Basic Principles for Money Bail Reform

Millions of people are detained in local jails each year; there are nearly 11 million admissions to local jails annually. On any given day, over 730,000 people are being held in local jails; of that population, nearly two-thirds—450,000 people—are presumptively innocent people awaiting trial. The gears of mass incarceration are grinding away in local jails, disproportionately impacting poor people and people of color.

After years of litigation, advocacy, and community pressure, jurisdictions across the country (cities, counties, states) have begun reforming pretrial release practices, and momentum is building for even more reform. These 8 Basic Principles for Money Bail Reform are drawn from lessons learned through reform and advocacy efforts. These principles are designed to assist organizers, advocates, attorneys, and funders advance pretrial justice reform initiatives that can serve the movement to end mass incarceration.

1 Judicial systems must have only an extremely limited use of pretrial detention.

Because of the harms of pretrial detention and the available empirical research about the ability to safely mitigate any purported risks, virtually all presumptively innocent people should be released from jail pretrial.

The standard must be clear—presumptively innocent arrestees must be released unless: (1) they are charged with one or more of a small set of the most serious offenses and (2) the government proves by clear and convincing evidence that there are no conditions or combination of conditions that can reasonably protect against specifically identified extreme risks to particular people or mitigate a serious risk of willful flight to avoid prosecution.

Any new statute cannot have presumptions in favor of detention and must provide clear language limiting the use of detention. The federal system essentially ended money bail, but it has intolerable and likely unconstitutional detention rates because it has many offense-related presumptions that result in detention. We must be cautious of using this as a model for release and detention in the states.

The system must minimize the time between arrest and release in all cases. Pretrial detention of even two days can increase the likelihood of a new arrest and future failure to appear, and can lead to family instability and the loss of jobs, housing, and medical care.

The system must provide an attorney at any court appearance in which the fundamental right to pretrial liberty is at stake and expedited appellate review of every detention decision to ensure a culture of aggressive advocacy.

Even when detention is based on failure to comply with conditions of release while on pretrial release, the court must conduct a hearing similar to that required for detention in the first instance and, at such hearing, must apply the same standard for pretrial detention concerning extreme risk of danger to particular people and willful flight to avoid prosecution.
2 Pretrial services and supervision functions must be evidence-based and community-oriented.

- Requiring pretrial services to follow legal and evidence-based practices will help keep unnecessary supervision at a minimum.

- Pretrial services agencies are more effective when they have a public health, social work, and evidence-based culture and employ practices that are supported by the academic literature.

- Supervision should be designed to contribute to flourishing communities to support public safety. This means reducing the overall resources expended on mechanisms of surveillance, imprisonment, and other forms of social control that are intrinsically associated with existing law enforcement agencies currently tasked with maintaining the system of mass incarceration.

3 Priority must be given to addressing needs rather than producing constraints or depriving liberty.

- The pretrial system must not be reformed into a new iteration of onerous restrictions on liberty through mass surveillance.

- Pretrial services should provide cost effective and evidence-based assistance like text and phone reminders and transportation to court as opposed to supervision-based interventions.

4 Risk assessment instruments, when they are used, must be open; transparent; actuarial; calibrated for and validated in that jurisdiction; and rigorous about what they tell us empirically and what aspects of the tool are political/values choices.

- Risk assessment tools should be empirically based and locally validated to be predictive of the most important considerations: willful failure to appear in court to avoid prosecution or a new arrest for serious or violent crimes.

- To the extent the tools identify only risks of general nonappearance or a wide variety of often less serious offenses, they should be used only to assist in determining what conditions of release and supervision are the least restrictive conditions necessary for the person to be successful prior to trial and not solely to determine detention eligibility.

- The location of pretrial services should be considered carefully, including whether they are created as an independent agency or located within an existing law enforcement bureaucracy like a sheriff’s department or an existing probation or parole department. The goal of pretrial services is to ensure court appearance while maximizing fundamental liberty and reducing future involvement with the system, therefore pretrial services should direct resources away from policing and jail systems and into community-based practices that provide cost-effective services to improve the lives of presumptively innocent arrestees and their families.

- The most successful examples have been separate and independent pretrial services agencies, as in Kentucky or Washington, D.C., that are able to develop their own culture of maximizing pretrial justice.

- Any restriction on liberty of a presumptively innocent person must be no greater than necessary to achieve an important interest. This principle will not only protect liberty and privacy and save money, but will reduce incarceration based on technical violations of unnecessary conditions. It is also consistent with the research on best supervision practices, which cautions against the overuse of conditions like drug testing, GPS monitoring, alcohol bracelets, restrictions on employment, home confinement, or other restrictions on liberty that are not specifically targeted to address and mitigate particular risks.

- Any tool must be clear about which assumptions and labels are political choices and which are empirically derived. Risk assessment tools may tell us something about whether an individual presents a risk of flight or risk of harm to a particular person, but no tool can tell us how much risk we are willing to tolerate. Those determinations are political and not empirically derived.

- Such tools must be calibrated to take into account that people of color are disproportionately arrested, prosecuted, and convicted. Racial disparities are driven by different factors in different parts of the country, so any tool must be locally validated to reflect the current and past practices of racial discrimination specific to that jurisdiction.
By their very nature, given current and past practice in policing, risk assessment instruments are prone to exacerbate racial disparities. Every effort must be made to minimize the extent to which such tools contribute to further racial disparity. Such tools must actively account for the extent to which existing metrics like prosecutions and convictions themselves reflect discrimination.

It must not re-entrench or mask discriminatory practices and disparities under the guise of “neutrality” or “data” —this includes disparities related to race, class, gender, sexual orientation, mental health, ability, immigration status, geography, etc.

A validated tool must continually be updated with new data from the jurisdiction in which the improved pretrial service system exists to consistently improve the tool.

End all practices that generate profit from pretrial release decisions and eradicate the notion that the system ought to be funded off the backs of the mostly impoverished people who are brought into it.

We cannot create a new “user funded” alternate system to replace the existing system.

Even when jurisdictions move away from money bail, many now charge defendants to use pretrial services (e.g. fees for every drug test, monthly supervision fees, fees for GPS monitoring, etc.). The bail industry is now shifting to offer GPS monitoring, drug treatment, or supervision and defendants must pay for the “use” of these services. We must be very careful not to create a system substantially similar to the old system that is merely reorganized.

In many places, a product of these “user fees” is that people are being jailed because they can’t afford these fees for those services and therefore don’t qualify for them. These fees, even when they don’t result in jailing, effectively shift people from pretrial detention to post-trial debt. We can’t have a replacement system where indigent people are saddled with the bills. There are too many downstream consequences (e.g. lost drivers licenses, employment, credit, etc.).

The economic focus must be on capturing savings from decreasing jail services, rather than generating income through unnecessary supervision of presumptively innocent people.

Jurisdictions must be required to keep standardized data about pretrial practices and outcomes and to make that data publicly available.

Data collection and reporting must include data related to race and ethnicity.

Data is needed to identify problem areas, make pretrial services more efficient and fair, and identify areas of improvement.

As many people as possible must be filtered out of the criminal legal system entirely.

This includes police making fewer stops and arrests, decriminalization of certain low-level offenses, and expanded eligibility for diversion to non-confinement alternatives.

Pretrial justice work must be combined with advocacy on policing and decriminalization of poverty generally.

Conditions of confinement must be improved to be humane, evidence based, and oriented around effective reentry.
Groups endorsing these 8 Principles (as of 2 June 2017)
Listed alphabetically – List in formation

- Brooklyn Community Bail Fund
- Civil Rights Corps
- Chicago Appleseed Fund for Justice
- Chicago Community Bond Fund
- Just City - Memphis
- Katal Center for Health, Equity, and Justice
- VOCAL-NY

List in formation –

Want to sign on? Please send a short note to:
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ABOUT THESE PRINCIPLES:
Alec Karakatsanis at the Civil Rights Corps (CRC) outlined the first draft of these principles. The Katal Center for Health, Equity, and Justice worked with CRC to solicit input, feedback, and recommendations for these principles from advocates, organizers, attorneys, researchers, and funders across the country. The eight principles outlined here are the result of this process. Questions about these principles should be directed to the CRC and Katal.

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