

# WHAT PRETRIAL SYSTEMS LOOK LIKE WITHOUT MONEY BAIL

Whenever someone is arrested in the United States, a court must decide whether that person should be released before trial and, if so, under what conditions, if any. Until very recently, one of the most commonly used conditions has been money bail—requiring the arrested person to pay money prior to release as a “guarantee” that he or she will show up in court as expected.

The use of money bail is both widespread and persistent—despite the fact that it cannot legally be used to protect public safety, does no better at getting people to court than other release options such as recognizance,<sup>1</sup> and does not actually motivate people to appear in court.<sup>2</sup> However, the growing recognition that money bail is unfair to poor and working class people and generates unwanted consequences [see Unwanted Consequences of Money Bail, right] is spurring many communities to consider favoring non-financial conditions of release over money bail.

Because money bail, however flawed, has the virtue of being familiar, this Issue Brief answers the question, What does a pretrial justice system without money bail look like?

## Unwanted Consequences of Money Bail

- 63% of people held in local jails are unconvicted<sup>a</sup>
- Unconvicted inmates accounted for 95% of jail growth from 2000 to 2014<sup>b</sup>
- Nearly half of Americans can't afford a \$400 emergency<sup>c</sup>
- Bail amounts have increased sharply; median bail in California is \$50,000<sup>d</sup>
- Research shows significant portions of pretrial jail populations are held on small bail amounts<sup>e</sup>
- Unnecessary detention leads to increased guilty pleas, incarceration, and crime<sup>f</sup>

a. Minton, Todd D., and Zhen Zeng. Jail Inmates in 2015. Report. Bureau of Justice Statistics, U.S. Dept. of Justice. NCJ 250394. 2016;

b. Minton, Todd D., and Zhen Zeng. Jail Inmates at Midyear 2014. Report. Bureau of Justice Statistics, U.S. Dept. of Justice. NCJ 248629. 2015;

c. Report on the Economic Well-Being of U.S. Households in 2015. Report. Board of Governors of the Federal Reserve System. 2016. Pg.1;

d. Neal, Melissa. Bail Fail: Why the U.S. should end the practice of using money for bail. Report. Justice Policy Institute. 2012. pg. 10; Tafoya, Sonya. Pretrial Detention and Jail Capacity in California. Report. Public Policy Institute of California. 2015. pg. 4;

e. For example: VanNostrand, Marie. New Jersey Jail Population Analysis. Report. Luminosity, Inc. 2013. pg. 13;

f. Heaton, Paul S. and Mayson, Sandra G. and Stevenson, Megan T., The Downstream Consequences of Misdemeanor Pretrial Detention (2017). Stanford Law Review, Vol. 69, Pg. 711, 2017.

### Remove Money from the Decision Point

In a pretrial system that favors non-financial conditions, an unconvicted person's right to carry on with his or her life and mount a legal defense from home would NOT depend upon his or her ability to pay money to the court or to a corporate surety agent (a.k.a. a bail bondsman). Instead, the setting of any release conditions would be informed by a reliable, objective assessment of the likelihood he or she will appear in court or not be arrested for a new offense during the pretrial period—the only two considerations allowed by law in most jurisdictions.

### Pretrial Assessment

Every release decision in every court in America is preceded by an assessment of each arrested person's likelihood of success if released. Before seeing any arrested individual released or deciding what conditions to place on that release, most court officials will make some kind of calculation about whether that person will show up in court and stay out of trouble if allowed to go home before trial. This assessment is done differently in different places—and often, very quickly: most court officers will consider the severity of the charges and whatever relevant information they have on the case. But they will also call upon their experience, their intuition, and in some cases, perhaps even a hunch. While this approach may work at times, it is vulnerable to inconsistent application and racial and ethnic biases.

Best practices would have courts conduct an objective, actuarial pretrial assessment using a validated assessment tool whose findings would inform—but not replace—the court's pretrial decision making process.<sup>3</sup>

Actuarial pretrial assessment tools help jurisdictions measure the likelihood that a

person will appear in court and not get arrested for a new charge if released before trial. Most often in the form of a questionnaire or database, pretrial assessment tools gather information about the accused person and—drawing on the behavior of similar individuals who were released before trial—generate a score that suggests how he or she is likely to behave during the pretrial period. Depending on the score, a person may present a higher, medium, or lower chance of pretrial success. That score can then be used to inform the court's discretion to release or detain an arrested person.

### Assessment Categories

To identify the most effective release conditions for each person, it is helpful to understand his or her likelihood of success and to identify any extra supports that may be needed to improve that individual's chance of success.

- Likely to succeed: Individuals in this group need only to be reminded of their court date and can be released without any other conditions or supervision. Statistics show that in most places this group accounts for approximately **half of all people ordered released**, and they generally have over a 90% likelihood of showing up for court and staying out of trouble while released.<sup>4</sup>
- Need a little support: People in this group benefit from some monitoring in the community and, perhaps, referrals to voluntary services. In addition to court reminders, the monitoring could include calling or visiting the supervising agency once a week. In most places this group accounts for about **35% of people ordered released**, and they have about a 75% chance of showing up for court and staying out of trouble while released. Targeted and limited supervision improves their chances of success.

- Need a lot of support: This group benefits from active supervision in the community in order to be successful. This might include mandatory in-person visits to the supervising agency and, in rare cases, electronic monitoring or home detention—in addition to careful management of their court orders and court date reminders. In most places, this group accounts for only about **15% of people ordered released**. It is important to note that despite their position at the higher end of the assessment spectrum, approximately **half of the people in this category will successfully appear at all court dates and stay out of trouble during the pretrial period**. Targeted supervision can increase their chances of success.

**Detention Without Bail**

While most people can be released pending adjudication of their charges, the law in many states recognizes that some individuals pose such a significant threat that they may be detained. These laws carefully define the eligibility criteria, typically limiting detention eligibility only to those charged with the most serious offenses. Due process requires that before ordering a person detained without bond, the court must hold a hearing and make a finding that no combination of support and supervision can reasonably assure that a person will not flee the jurisdiction or present a credible threat to public safety. In places that use a due process hearing, **only about 10% of the arrested population** is likely to be preventively detained before trial, leaving about 90% of arrested individuals releasable. The process the court follows to preventively detain someone who, by law, is presumed innocent until proven otherwise must be legal, transparent, and include a right to appeal.

When courts set high money bail amounts for individuals they perceive to present a low likelihood of success if released, the result is often de facto preventive detention for those who cannot afford to pay. It should be noted, however, that intentionally using high bail to detain—a practice to which few judicial officers will admit—is illegal. Moreover, it doesn’t work. Research shows that nearly half of people assessed as “high risk” are able to purchase pretrial release using money bail.<sup>5</sup>

People who are ordered detained through an explicit system of due process are typically afforded more opportunities to challenge their detention through appeals than those who are assigned high bail amounts. Detention order appeals are typically more robust and timely than bail review hearings.

**The Release/Supervision Matrix**

In jurisdictions that use money bail, the management of arrested people before trial is elemental: people who cannot afford money bail are detained in jail; those who can afford money bail go home (although it is not unheard of for a judge to mandate some sort of supervision upon learning that a higher-risk defendant has made the necessary money bail payment.) Jurisdictions that favor non-financial pretrial release decisions may find it helpful to employ a matrix or table that provides suggested levels of supervision and support depending on the pretrial assessment results and, if desired, the nature of the criminal charge. These matrices, like the example shown in Figure 1, (page 4) provide a useful guideline for courts and can help ensure they do not over- or under-condition released individuals.

Both the law and research into best practices favor a light touch to pretrial supervision.

Figure 1: Matrix of Pretrial Release Conditions

| Most Serious Charge <sup>1</sup> |   |  |  |  |
|----------------------------------|---|--|--|--|
| Pretrial Category <sup>2</sup>   | Most Misdemeanors                           | Non-Violent                                    | Felony Domestic Violence and DUI               | Violent Felony   |
| Lower                            | Recognizance Release with Court Reminder    | Recognizance Release with Court Reminder       | Recognizance Release with Basic Supervision    | Recognizance Release with Enhanced Supervision, <i>if Released</i> |
| Medium                           | Recognizance Release with Court Reminder    | Recognizance Release with Basic Supervision    | Recognizance Release with Enhanced Supervision | Recognizance Release with Enhanced Supervision, <i>if Released</i> |
| Higher                           | Recognizance Release with Basic Supervision | Recognizance Release with Enhanced Supervision | Recognizance Release with Enhanced Supervision | Recognizance Release with Enhanced Supervision, <i>if Released</i> |

1. Most serious charge as determined by an experienced prosecutor.

2. Pretrial Assessment Category as determined by the defendant's score on an actuarial pretrial assessment tool.

Available research shows, for example, that the most effective intervention for reducing failure to appear is a reminder of when and where a person is due in court.<sup>6</sup> A simple telephone call or text message—like those employed by doctors' offices and hairdressers—can dramatically increase attendance. Conversely, research shows that over-supervising people produces contrary results.<sup>7</sup>

Because randomized controlled experiments in criminal justice are rare, more inquiry is needed to learn more about which interventions work best for different groups or individuals.

**How to Respond to Noncompliance**

Violations of pretrial release conditions can be handled in a number of ways, from issuing verbal warnings to imposing additional conditions or returning an individual to detention. Clear guidelines about how to respond to various forms of noncompliance help ensure that courts respond to violations fairly and consistently. Modifications to existing conditions of a person's release should be done with the goal of better ensuring that the individual will return to court and not get arrested for a new charge during the pretrial period. Similarly,

it is important to respond to compliance by eliminating or ratcheting conditions down after a defendant has demonstrated compliance during the pretrial period.

Juvenile justice systems provide a good example of individualized conditions and responses. The development of graduated responses grids has been an integral component for keeping young people out of detention during their pre-adjudication phase and is a practice that can be replicated by criminal justice systems.<sup>8</sup>

**Concluding Thoughts**

Money bail has been proven to be unfair to people with lower incomes and ineffective at protecting public safety. Using a validated pretrial assessment to produce an objective measure of each individual's probability of failing to appear in court or being arrested for a new offense while on pretrial release, combined with tailored conditions for each released person—including, often, no conditions at all—offers a compelling alternative that can deliver safer, fairer, and more effective outcomes. The combination of using validated pretrial assessment promises to be a significant improvement in pretrial justice overall.

1. Jones, Michael R. *Unsecured Bonds, The As Effective and Most Efficient Pretrial Release Option*. Report. Pretrial Justice Institute. 2013.
2. *Have you asked them? Talking to defendants about money bond and pretrial release*. Report. Pretrial Justice Institute. 2017.
3. For more information on why we believe pretrial assessment is an integral part of pretrial justice improvement, see [www.pretrial.org/solutions/risk-assessment/](http://www.pretrial.org/solutions/risk-assessment/).
4. *The Colorado Pretrial Assessment Tool (CPAT)*. Report. JFA Institute. 2012. pg. 19.
5. *Developing a National Model for Pretrial Risk Assessment*. Report. Laura and John Arnold Foundation. 2013. pg. 1.
6. Schnacke, Timothy R., Michael R. Jones, and Dorian M. Wilderman. "Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program." *Court Review: The Journal of the American Judges Association* 48 (2012).
7. For more on the Risk-Need-Responsivity Principle, see <http://bit.ly/2vk2jp1>.
8. For more info, see *Graduated Responses Toolkit: New Resources and Insights to Help Youth Succeed on Probation*, available at [www.JDAIconnect.org](http://www.JDAIconnect.org).