

# TRANSFORMING THE SYSTEM



## PROMOTE JUSTICE IN

# Pre-trial Services & Practices

The right to due process is a cornerstone of our commitment to freedom and fairness.<sup>171</sup> The U.S. Constitution provides the right to due process, habeas corpus, and equal protection under the law to all people in the United States.<sup>172</sup> Ensuring that everyone is guaranteed fair treatment and due process means that there is a presumption of innocence following arrest.<sup>173</sup> At all stages of the criminal process, there should be decisions that are fair and reasonable under the circumstances. However, our due process guarantees have often been tenuous in practice. Current pretrial practices have the effect of coercing low-income individuals accused of committing a crime into pleas even when they are innocent.<sup>174</sup> Furthermore, detention should generally be avoided for immigration-related matters.<sup>175</sup>

Low-income people are often imprisoned before trial because they are unable to provide a monetary bond. *One of the greatest predictors of the final outcome of a case is whether an individual was detained pretrial.* Detention increases the likelihood that the individual will enter a guilty plea, increases the length of the individual's sentence, and increases the severity of the charge that the person takes.<sup>176</sup>

To protect the right of everyone to fair treatment when facing deprivations of liberty, we must restore principles that recognize the presumption of innocence.<sup>177</sup> Pretrial practices should

171 Due process protections as required in the immigration context are discussed in greater length in the Immigration section (see section 14) of this report.

172 U.S. Constitution Amendment XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

173 *Coffin v. United States*, 156 U.S. 432 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.")

174 CHJ, *supra* note 85.

175 See Immigration section 14 for additional discussion on due process issues in the immigration context.

176 James C. Oleson et al., *Pretrial Detention Choices and Federal Sentencing*, 78 Fed. Probation 12 (2014). "[P]retrial detention was the strongest predictor of incarceration in the model, even after controlling for legal (e.g., offense seriousness and criminal history) and extralegal variables (e.g., race, gender, and age.)"

177 Shima Baradaran, *Restoring the presumption of innocence*, 72 Ohio St. L.J. 1, 1 (2011). "[Current] limitations on the presumption are fundamentally inconsistent with its constitutional roots. The results of the presumption's diminution are also troubling as the number of defendants held pretrial has steadily increased such that the majority of people in our nation's jails have not been convicted of any crime."

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encourage fairness, avoid incarceration where possible, and emphasize diversion to outside programs over incarceration.<sup>178</sup> Detention and money bail should only be imposed when an individualized assessment of the involved party require it.<sup>179</sup>

## Eliminating unnecessary pre-trial detention

A fair trial is premised on the guarantee of access to the courts and the right to a fair hearing. Studies show that pre-trial detention has a profound impact on whether an accused will be convicted of a crime.<sup>180</sup> This is especially the case for indigent accused persons.<sup>181</sup> Pre-trial detention has collateral consequences on those being detained before trial or even before a first appearance. Every year, of the nearly 12 million people booked into jails, mostly for misdemeanors, more than 60 percent are not convicted, and remain largely because they can't afford to post even small money bond amounts.<sup>182</sup> Even three days in jail can have serious collateral consequences, putting stress on "fundamentals like jobs, housing, and family connections."<sup>183</sup>

Prosecutors frequently use pretrial detention to coerce plea agreements from indigent individuals,<sup>184</sup> and research shows that accused persons who are detained pretrial are exponentially more likely to be convicted of a crime.<sup>185</sup> Eager to leave detention, incarcerated people are often reluctant to wait for trial to prove their innocence. They accept plea deals that permanently entangle them into the criminal system. The purpose of money bail is limited to assuring a person's presence at future court proceedings,<sup>186</sup> but it often serves to keep those without resources detained indefinitely, jeopardizing their jobs, families, and well-being. Courts

178 See generally CHJ, *supra* note 85.

179 Coke, *supra* note 401, at 15.

180 See, e.g., Oleson et al., *supra* note 176, at 78.

181 People who have only been accused of a crime spend months and sometimes years languishing in jails with horrible conditions, such as the infamous New York City jail at Rikers Island. Because of the abuses in that prison, there has been a major push to close it and reimagine a justice system in New York City that does not require that jail. See "Imagining a Rikers Island With No Jail," *The New York Times* (Feb. 24, 2016), [http://www.nytimes.com/2016/02/24/opinion/imagining-a-rikers-island-with-no-jail.html?\\_r=0](http://www.nytimes.com/2016/02/24/opinion/imagining-a-rikers-island-with-no-jail.html?_r=0).

182 Ram Subramanian et al., Vera Institute, *Incarceration's Front Door: The Misuse of Jails in America* (2015) 5.

183 *3 Days Count: Commonsense Pretrial*, Pretrial Justice Institute, <http://projects.pretrial.org/3dayscount/>.

184 Ryan, *supra* note 109, at 49, 56.

185 Oleson, *supra* note 176.

186 *Stack v. Boyle*, 342 U.S. 1, 4-6 (1951) ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."). See also 18 U.S.C. § 3142, Release or detention of a defendant pending trial ("The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court ... unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.").

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routinely impose money bail without regard to an individual's resources, or possible alternative conditions of release, keeping presumptively innocent people incarcerated, sometimes for years.<sup>187</sup>

To remedy this injustice, **local, state, and federal legislatures** should pass legislative measures that:

- ▶ Reform bail practices to encourage release;<sup>188</sup>
- ▶ Abolish the use of cash bail;<sup>189</sup>
- ▶ Encourage the use of warning and citations rather than arrests;<sup>190</sup>
- ▶ Provide court notifications to defendants prior to court dates through pretrial services;<sup>191</sup>
- ▶ Prohibit for-profit pretrial agencies;<sup>192</sup>
- ▶ Prohibit for-profit transportation for incarcerated individuals;<sup>193</sup>
- ▶ Prohibit the use of bail schedules and bail minimums;<sup>194</sup>
- ▶ Prohibit the use of compensated sureties where cash bail is still used; instead, allowing defendants to make a deposit directly to the courthouse;<sup>195</sup>
- ▶ Require individualized risk assessments<sup>196</sup> for bail determinations, which favor a bail determination based on a defendant's actual risk,<sup>197</sup> relying upon a data assessment that mitigates biases embedded in the risk assessment tools and that is open to public

187 Michael Schwartz & Michael Winerip, "Kalief Browder, Held at Rikers Island for 3 Years without Trial Commits Suicide," *The New York Times* (June 8, 2015), <http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>.

188 Coke, *supra* note 4, at 30.

189 Advocates have complained of the coercive use of cash bail. Ibid, at 9-10 ("The presumptive imposition of cash bail, particularly in misdemeanor cases, which unnecessarily incarcerates minority defendants and is used implicitly to coerce guilty pleas.").

190 Melissa Neal, Justice Policy Institute, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (September 11, 2012), <http://www.justicepolicy.org/research/4364>.

191 Ibid.

192 Justice Policy Institute, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice* (2012), [http://www.justicepolicy.org/uploads/justicepolicy/documents/\\_for\\_better\\_or\\_for\\_profit\\_.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf)

193 Eli Hager & Alysia Santo, The Marshall Project, *Inside the Deadly World of Private Prison Transport* (July 6, 2016) (describing the abusive transportation conditions of vans operated by for-profit companies which transport incarcerated individuals).

194 Pretrial Justice Institute, *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process* (2012), <http://www.pretrial.org/download/pji-reports/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf>.

195 See *generally* Com. v. Ray, 435 Mass. 249 (2001); Fred Contrada, "Bail Bondsmen are a Thing of the Past in Massachusetts," *MASS Live* (Mar. 25, 2014), [http://www.masslive.com/news/index.ssf/2014/03/bail\\_bondsmen\\_are\\_a\\_thing\\_of\\_t.html](http://www.masslive.com/news/index.ssf/2014/03/bail_bondsmen_are_a_thing_of_t.html).

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analysis and critique;

- ▶ Require that defendants be provided with counsel prior to bail determinations;<sup>198</sup>
- ▶ Expand pretrial services programs and adequately fund these programs;<sup>199</sup>
- ▶ Reform existing legislation, including the federal Bail Reform Act,<sup>200</sup> in compliance with these recommendations;
- ▶ Lower bail to an amount that factors the finances of the accused;<sup>201</sup>
- ▶ Incentivize restorative justice programs, including community prosecution programs and community courts that do not result in a criminal conviction, as alternatives to incarceration;<sup>202</sup>
- ▶ Establish time limits to allow the expeditious processing of arrested individuals with real consequences for courts that fail to meet these limits;<sup>203</sup>
- ▶ Establish special courts dedicated to addressing court backlogs;<sup>204</sup>
- ▶ Require that police interrogations are electronically recorded “during the time in which a reasonable person in the subject’s position would consider himself to be in custody and a law enforcement officer’s questioning is likely to elicit incriminating responses.”<sup>205</sup> If video recording is used, the camera should record both the interrogator and the person being interrogated;

196 Risk assessments should be favored to the extent they encourage the release of individuals who would otherwise be incarcerated. However, risk assessment tools may also exacerbate existing racial disparities in the criminal justice system by relying on data that is the result of racial biases that already exist in the criminal justice system. To address this issue, the data underlying risk assessment tools should be publicly available and transparent. The assessment tools should be culturally sensitive and provide for mechanisms to correct criteria that produce racially discriminatory outcomes.

197 Pretrial Justice Institute, *supra* note 194.

198 The Constitution Project, *Don’t I Need a Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing* (2015), <http://www.pretrial.org/download/infostop/Don%27t%20I%20Need%20a%20Lawyer%20-%20Constitution%20Project%202015.pdf>.

199 Eaglin & Solomon, *supra* note 39, at 27-29.

200 18 U.S.C. § 3142.

201 *Ibid.* at 15.

202 Ram Subramanian et al., Vera Institute of Justice, *Incarceration’s Front Door: The Misuse of Jails in America* (2015), <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

203 *Ibid.*

204 *Ibid.*

205 *False Confessions & Recording Of Custodial Interrogations*, The Innocence Project (August 12, 2015), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/false-confessions-recording-of-custodial-interrogations#sthash.HzqqPHF5.dpuf>.

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- ▶ Eliminate the use of monetary bail by ensuring that Congress passes the No Money Bail Act of 2016, H.R.4611;
- ▶ Encourage community supervision and alternative conditions of release where suitable.<sup>206</sup>

The **judiciary<sup>207</sup> and judicial ethics committees and organizations** should encourage bail determinations that ensure that individual defendants are not being incarcerated for poverty and are instead being assessed for actual risk.

## Judicial ethics committees and organizations should:

- ▶ Educate judges about the value of individualized risk assessments in determining flight risk, and encourage judges to use tools that mitigate against racial biases;<sup>208</sup>
- ▶ Educate judges on their role in contributing to the criminalization of poverty when improper bail determinations are made;<sup>209</sup>
- ▶ Establish court-based risk-assessment programs that rely upon data that is open to public critique and where needed;<sup>210</sup>
- ▶ Encourage the use of alternative conditions of release by providing bench cards that list suitable alternatives to manage risk.<sup>211</sup>

206 Ibid.

207 This recommendation aims to ensure that the judiciary is also held accountable for bail reform. Judge Jed S. Rakoff a federal trial judge in the South District of New York has spoken out about the importance of the judiciary in reducing mass incarceration: "More generally, judges é became accustomed to imposing prison terms as the norm. With the passage of time, there were fewer and fewer judges who had any experience with a gentler approach.... And where in all this stands the judiciary? In some ways, this should be our issue. Not just because sentencing has historically been the prerogative of judges but also because we are forced to impose these sentences that many of us feel are unjust and counterproductive." Gabe Friedman, "Judge Rakoff Criticizes Judiciary, Bar for Silence on Mass Incarceration," *Bloomberg News*, (April 13, 2015), <https://bol.bna.com/judge-rakoff-criticizes-judicial-bar-for-silence-in-mass-incarceration/>.

208 Pretrial Justice Institute, *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process* (2012), <http://www.pretrial.org/download/pji-reports/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf>.

209 Timothy Schnacke, "Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial" (2014), <http://www.pretrial.org/download/research/Money%20as%20a%20Criminal%20Justice%20Stakeholder.pdf>.

210 Pretrial Justice Institute, *supra* note 194.

211 See Amy L. Solomon, et al., "Putting Public Safety First: 13 Strategies for Successful Supervision and Reentry," *Public Policy Brief, No. 7*, The PEW Center on the States, (2008), <http://www.urban.org/research/publication/putting-public-safety-first-13-strategies-successful-supervision-and-reentry-policy-brief>; Marie VanNostrand, Kenneth Rose, and Kimberly Weibracht, "State of the science of pretrial release recommendations and supervision 2," Pretrial Justice Institute (2011), [http://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20of%20Pretrial%20Release%20Recommendations%20and%20Supervision%20\(2011\).pdf](http://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20of%20Pretrial%20Release%20Recommendations%20and%20Supervision%20(2011).pdf); E.J. Latessa, *What Works and What Doesn't in Reducing Recidivism: The Principles of Effective Intervention*, California Forward (2012), <https://cafwd.box.com/s/c9962d852ec4d0778d82>.

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**Prosecutors and prosecutor organizations** should ensure that prosecutors are not employing pretrial detention as a coercive and potentially unethical trial strategy.

**Community members, advocates, and activists** should partner with **legal aid organizations and other indigent defense organizations** to monitor prosecutorial practices and demand that prosecutors who frequently misuse bail to coerce guilty pleas be disciplined for ethics violations.<sup>212</sup>

## Encouraging early provision of defense counsel

Effective counsel is crucial to ensuring that there are fair outcomes, especially for misdemeanor cases, which are often indigent defendants' first point of entry into the criminal justice system, yet it is rare for indigent defendants to receive prompt counsel. Early access to counsel may be critical in avoiding pretrial detention, refining the defense, and preventing downstream rights violations in the enforcement of sentences that include fines and fees.<sup>213</sup>

To ensure that there is early<sup>214</sup> provision of indigent defense counsel, the local bar, judiciary, local law schools, and the federal government and local government should:

- ▶ Create a rapid response indigent defense system that accommodates the need for counsel, especially for misdemeanor cases.<sup>215</sup> Such response system may include the following: partnerships between law school clinics and local bar associations; legislation providing funds to support such programs; and judiciary-led initiatives to ensure that indigent defendants are represented soon after initial arrest.<sup>216</sup>

The **Administration** should remain active in the development of **Goal 16 of the United**

212 The Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson* (2016).

213 See Douglas Colbert, "Prosecution Without Representation," 59 Buff. L. Rev. 333 (2011); Eaglin & Solomon, *supra* note 39, at 38.

214 Eaglin & Solomon, *supra* note 39, at 39 ("increasing access to indigent defense at the early stages of a case—such as at arraignments and bail hearings—would reduce pressures to plead guilty").

215 *Ibid.* at 38 ("Of the approximate 10 million misdemeanor cases filed annually, almost 25 percent of defendants go before a judge without a lawyer. Theoretically, public defenders are guaranteed for all cases where a criminal defendant faces a term of incarceration. Nevertheless, indigent counsel is often denied due to court practices, overwhelming caseloads, or a lack of adequate government resources for public defense.")

216 Thomas Giovanni & Roopal Patel, Brennan Center for Justice, *Gideon at 50: Three Reforms to Revive the Right to Counsel* (2013), <http://www.brennancenter.org/publication/gideon-50-three-reforms-revive-right-counsel>.

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**Nation's Sustainable Development Goal**, which focuses on access to justice.<sup>217</sup>

The **Office for Access to Justice of the Department of Justice** and the **White House Legal Aid Interagency Roundtable** should identify key partnerships that could bridge gaps in indigent representation.

**Civil society** should be active in creating partnerships that bridge gaps in the provision of indigent defense.

217 Rule 16 of the Sustainable Development Goals aims to:

- Promote the rule of law at the national and international levels and ensure equal access to justice for all
- Develop effective, accountable and transparent institutions at all levels
- Ensure responsive, inclusive, participatory, and representative decision-making at all levels
- Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements
- Promote and enforce non-discriminatory laws and policies for sustainable development

United Nations, Goal 16: Promote Just, Peaceful and Inclusive Societies, <http://www.un.org/sustainabledevelopment/peace-justice/>.

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## Expanding diversion beyond first-time and less serious crimes



### Law Enforcement Assisted Diversion (LEAD)

Law Enforcement Assisted Diversion (LEAD) is a pre-booking diversion program developed with the community to address low-level drug and prostitution crimes in Seattle. The program allows law enforcement officers to direct people who have committed low-level offenses in drug or prostitution activity to community-based services instead of jail.<sup>218</sup> By diverting these individuals to services, LEAD interrupts the “cycle of arrest, prosecution, and incarceration” for people on the margins, improves the lives of individuals and improves public safety.<sup>219</sup>

When law enforcement officers pick up a person who would otherwise be charged with a low level offense, the officer gives the individual the option of cutting out the criminal-justice system entirely and bring them to case workers. These case workers can provide immediate help—a place to sleep, warm clothing, a hot meal—as well as longer-term services for job training, drug treatment, and stable housing. Case workers tailor their services to the individual and expect relapses as part of recovery.<sup>220</sup>

LEAD has been shown to be effective at reducing arrests, reducing recidivism, and reducing costs. Three years into the pilot, researchers undertook an 18-month study to evaluate its effects.<sup>221</sup> The people in LEAD were 60 percent less likely to be arrested within the first six months of the evaluation and 58 percent less likely than people in the control group to be arrested.<sup>222</sup> And it saves money. Researchers found that the LEAD group cost the city less than the criminal justice and legal system utilization and associated costs.<sup>223</sup>

218 *Law Enforcement Assisted Diversion*, LEAD, <http://leadkingcounty.org/lead-tools/> (accessed 7 July 2016) [hereinafter LEAD].

219 Sara Jean Green, “LEAD Program for Low-Level Drug Criminals Sees Success,” *Seattle Times* (April 9, 2015), <http://www.seattletimes.com/seattle-news/crime/lead-program-for-low-level-drug-criminals-sees-success/>.

220 Ibid.

221 Susan Collins et al., LEAD Program Evaluation, U. of Wash-Harborview Medical Center (June 24, 2015), <http://leadkingcounty.org/lead-evaluation/>.

222 Ibid.

223 Ibid.



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Criminal justice policy should focus on strengthening programs that are proven to be effective by expanding pre-booking diversion programs that prevent incarceration and do not result in a criminal record. Many diversion programs<sup>224</sup> have been proven to be effective at reducing crime, lowering recidivism, and promoting safe communities.<sup>225</sup> Several successful diversion programs are included in this document, including Crisis Intervention Teams, LEAD, specialty courts, and restorative justice processes. Diversion programs that have strong evaluation metrics in place and are proven to be effective should be expanded and replicated. There is a need to increase the number and diversity of diversion programs throughout the country, especially programs that do not result in a conviction record for defendants and lower both costs and crime. Nonetheless, there should be a focus on decriminalization for most offenses. Diversion programs are a suitable option when involving an individual in the justice system is inevitable or the only other alternative.

To ensure that diversion programs are considered as alternatives to criminalization, **the local, state, and federal legislatures** should pass legislation that:

- ▶ Creates diversion programs that do not result in convictions and are used as an alternative to incarceration.<sup>226</sup> However, these programs should not be used as a tool for the heightened policing of low-income communities. They should be viewed as an alternative where involvement in the criminal justice system would be the only other alternative.
- ▶ Pre-booking diversion programs should be available for all categories of cases including more serious cases.<sup>227</sup>
- ▶ Diversion programs should be provided with adequate funding and resource support.
- ▶ Diversion programs should adopt best practices, maintain comprehensive data on demographics and outcomes, and aim to reduce recidivism. These programs should provide proper social services; provide access to immigration attorneys where there

224 Diversion programs are alternative programs that often allow individuals to avoid criminal charges. These programs include various courts, such as mental health courts or human trafficking intervention courts, as well as restorative justice programs. These programs should not be used as alternate means for surveilling and policing marginalized communities.

225 See generally CHJ, *supra* note 85.

226 Eaglin & Solomon, *supra* note 38, at 30.

227 CHJ, *supra* note 85. ("Jurisdictions can develop or adopt strategies and interventions that focus on those individuals most likely to recidivate, and that consider factors other than just current charge and criminal history in determining an intervention plan.")

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might be immigration-related consequences; allow for independent oversight for the programs; and demonstrate a proven ability to reduce harm.<sup>228</sup>

For their part, **the local bar, law schools, judiciary, and federal government** should encourage partnerships that foster the creation of local diversion programs that meet individual community needs.



*For more information on issues of pretrial justice, check out:*

Tim Schnacte's comprehensive report, ***Fundamentals of Bail***, describing the bail framework and necessary reforms;

**Pretrial Justice Institute (PJI)**, which is dedicated to advancing safe, fair, and effective juvenile and adult pretrial justice practices; and

**Equal Justice Under Law**, which engages in litigation and advocacy to "reform the structures, norms, and incentives that create and perpetuate violations of fundamental rights," specifically focusing on the misuse of money bail to detain individuals pretrial.

228 Testimony of the Sex Workers Project, Urban Justice Center, the New York City Council Committee on Women's Issues and the Committee on Courts & Legal Services Hearing re: Oversight Hearing: Effectiveness of Human Trafficking Intervention Courts (Sept. 18, 2015).