

TRANSFORMING THE SYSTEM



SOLUTIONS & ACTIONS TO

Promote Justice in Pre-Trial Services & Practices

At all stages of the criminal process, decisions there should be 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 defendants into pleas even when they are innocent.¹ To protect the presumption of innocence, pretrial detention should be only used in exceptional cases; courts should afford counsel to defendants before their first appearance; and pre-booking diversion programs that do not result in a criminal record should be expanded.

1. Abolish Cash Bail

Courts routinely impose money bail without regard to a defendant's financial resources, the risk the defendant poses, or possible alternative conditions of release, keeping presumptively innocent people incarcerated, sometimes for years. Legislatures should abolish cash bail requirements.

2. Eliminate Unnecessary Pre-Trial Detention

Legislatures should pass legislation that prevents people from being unnecessarily detained, including mandating the use of warnings and citations rather than arrests in appropriate situations, and establishing time limits to allow the speedy processing of arrested individuals with real consequences for courts that fail to meet these limits.

3. Provide Defendants with Counsel

Legislatures should guarantee that defendants are provided with counsel prior to bail determinations. 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. Early access to counsel may be critical in avoiding pre-trial detention, refining the defense, and preventing downstream rights violations in the enforcement of sentences that include fines and fees.

4. Ban For-Profit Pre-Trial Agencies

Legislatures should ban for-profit pre-trial agencies. The for-profit bail bond industry has at times profited by exploiting pre-trial defendants and charging exorbitant bonds.²

5. Individualize Bail Determinations

The judiciary and judicial ethics committees and organizations should encourage individualized bail determinations based on actual ability to pay that ensure that individual defendants are not being incarcerated for poverty and are instead being assessed for actual risk. This should include providing judicial education on the appropriate role of bail and court-based risk-assessment programs where needed.

6. Release on Personal Recognizance

The judiciary and judicial ethics committees and organizations should encourage the use of release on personal recognizance or alternative conditions of release to manage pretrial risk.

7. Ban Coercive Detention

Prosecutors and prosecutor organizations should ensure that prosecutors are not employing pretrial detention as a coercive and potentially unethical trial strategy to pressure defendants to accept unfair plea deals through the threat of lengthy pretrial incarceration; and create metrics of success that do not rely on the number of prosecutions or rate of conviction.

8. Monitor Prosecutorial Practices

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 are disciplined for ethics violations.

9. Create Diversion Opportunities

Legislatures should pass legislation that creates non-arrest and pre-booking diversion programs as alternatives to incarceration and conviction. 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 arrest and criminalization would be the only other workable alternative.

10. Minimize the Harms of Cash Bail

Where cash bail is not eliminated, legislatures should pass legislation that minimizes the harms of cash bail by abolishing bail schedules, bail minimums, and bail bondsmen. Instead, legislatures should allow defendants to pay a cash deposit directly to the court.

¹ There are analogous detention issues in the immigration detention system.

² 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.