

Protecting Liberty and Safeguarding Communities: Pretrial Justice Priorities

Between 1970 and 2014, the U.S. jail population quadrupled; at any given time, there are now more than 730,000 people in jail in the U.S., two-thirds of whom are in pretrial detention.¹ On a national scale, this massive growth is the result of an increase in pretrial detention²: the incarceration of people who have not been convicted of anything while their criminal cases are still pending. It reflects a fundamental injustice within our systems: many of those sitting in jail should not be there; they are incarcerated simply because they cannot afford to pay bail. In our pretrial justice system, wealth determines your freedom and detention is the norm, rather than the exception. Not only do judges have broad discretion and few limits on the use of pretrial detention, but they lack the information and tools to make better decisions about pretrial release, release conditions, or detention.

465,000

The number of people in jail pretrial, many because they can't afford bail.

14 BN

Amount spent every year to jail people who haven't been convicted

35%

Amount more in bail African-American men pay compared to white men charged with the exact same crime

1 Fact Sheet: Subramanian, R.; Henrichson, C., & Kang-Brown, J. (2015). In Our Own Backyard: Confronting Growth and Disparities in American Jails. Vera Institute of Justice, 7, available at https://storage.googleapis.com/veraweb-assets/downloads/Publications/in-our-own-backyardconfronting-growth-and-disparities-in-americanjails/legacy_downloads/incarceration-trends-in-our-own-backyard-fullreport.pdf

2 Aiken, J. (2017). Era of Mass Expansion: Why State Officials Should Fight Jail Growth. Prison Policy Initiative, Table 1 available at https://www.prisonpolicy.org/reports/jailsovertime_table_1.html



We must eliminate unjust pretrial detention and create a justice system where jail is only used when absolutely necessary.

The Problems

Jails are crowded with people who shouldn't be there. A fundamental principle of our legal system is that people are innocent until proven guilty; that means judges should only use pretrial detention sparingly. But our system undermines the presumption of innocence by routinely jailing people before trial, often with little due process and no assessment of the individual's risk of committing new crime or flight. Jail is the default—which inevitably leads to over-incarceration.

Money bail discriminates against the poor. People charged with crimes are typically assigned money bail regardless of their ability to pay. The result: poor people who could be safely returned to the community are trapped in jail; wealthy people can pay to go free. Money bail also exacerbates racial disparities: research shows that black arrestees are subjected to higher bail amounts than whites for the same offenses.

Judges need more objective information. The law in almost every state requires that judges make release and detention decisions on the basis of a defendant's public safety risk or risk of flight. But judges often lack objective information to inform these decisions. Instead, they must rely on inconsistent information and make subjective choices, which research shows exacerbates racial disparities.

Our Approach

Make pretrial release the norm. The vast majority of defendants can be safely released with supports or conditions. We should permit pretrial detention only for the most serious charges—and only upon a finding of dangerousness or risk of flight that cannot be safely mitigated in the community.

Require pretrial detention decisions to be individualized. Pretrial detention decisions should be individualized and made with strict due process protections for defendants, such as adversarial hearings with discovery and right to counsel, required findings on the record, and requiring clear and convincing evidence of risk.

Restrict the use of money bail. Strictly limit the use of money bail: allow use only upon an assessment of ability to pay; and in those few cases, favor unsecured bonds over secured bonds. Restrict the practice of commercial bail bonding to protect defendants; eliminate fees that raise justice system revenue at the expense of the poor.

Empower judges to make objective decisions and release more people. Mandate release under the least restrictive conditions (allowing conditions only if they can help reasonably ensure public safety and court appearance). Improve judicial decision making by giving judges objective information, such as through a pretrial risk assessment. Ensure that any pretrial risk assessment adopted is transparent, validated, and does not exacerbate racial disparities. Ensure access to robust, well-resourced pretrial services.