

What If?

10 QUESTIONS FOR SPARKING LOCAL PRETRIAL CHANGE





“

We have avoided in recent years talking openly and honestly about race out of fear that it will alienate and polarize. In my own view, it's our refusal to deal openly and honestly with race that leads us to keep repeating these cycles of exclusion and division, and rebirthing a caste-like system that we claim we've left behind.”

— Michelle Alexander, author of "The New Jim Crow,"
in an interview with [truthout.org](https://www.truthout.org)

What if we accepted nothing short of equity?

Early in 2020, after significant reflection on our racial equity journey, we at the Pretrial Justice Institute reversed our long-held position in support of pretrial risk assessment instruments (RAIs), due to the inherent bias in these tools and the harm they perpetuate in communities of color. Following that announcement, many folks working in systems came back to us with what felt like the next logical question: **If not risk assessment, then what? What's the replacement?**

That question gave us pause, because “either/or” thinking—i.e., the belief that one tool must be replaced by another—helped to drive the proliferation of RAIs in the first place. As PJI and others sought to “reform” a system that preyed on the poor through the use of money bond, eliminating cash bail didn’t seem to be enough; it needed to be replaced with something “better.” ([Read our last paper to learn more.](#))

Many jurisdictions shifted from a money-based system to a risk-based one. But in doing so, our field avoided exploring some deeply-held assumptions that feed pretrial incarceration. For example, the assumption that courts need a reason to release someone rather than a reason to detain them. And that the system needs to do something (like collecting bonds or setting conditions) to get people back to court safely. By simply trading a bond schedule for an RAI without challenging these assumptions—and without asserting our values—we continue to perpetuate mass incarceration and structural racism.

So, where do we go from here? That depends on you. And us. And other justice practitioners, advocates, and community members who are not satisfied with having only two choices in a system that harms millions of people and families every day.

Creating a world without money bond or risk assessment is going to require great courage, commitment and imagination. It’s going to require culture-shifting and power-sharing. It’s going to require humanity. All of this is possible, though—the tools are available for communities who are willing to ask, “**What if?**” and pioneer a new approach.

Inside this publication, you’ll find ten questions for thinking expansively about pretrial justice, plus examples of promising practices from around the country and links to resources from thought leaders in the field. There’s also a Discussion Guide to support you and your colleagues in leading with your values, identifying barriers to equity in your system, and engaging in authentic collaboration with your community.

We strongly believe the bold, fresh ideas we need already exist locally, in people with lived experience and those who work at the intersections of justice. PJI is committed to working with all of you to center equity and disrupt the pathway to mass incarceration. Together, we can have a new discourse around pretrial justice. **Reflect with us...**



TENILLE PATTERSON
Executive Partner

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WHAT IF... we all committed to ending mass incarceration and advancing equity?

01

To envision pretrial justice without money bond or risk assessment, the first question you and your local partners must wrestle with is what culture you are trying to create, and what values you wish to embody. Even if onerous conditions, money bonds, or preventive detention are available by statute, your courts can maximize liberty by choosing to limit their use. When local partners are committed to a culture where the presumption of innocence is paramount—and you create a system that defaults to liberty—then there’s no need to label people as “risky” in order to assign limits on their freedom.

Similarly, when partners are committed to equity, you feel a sense of urgency to dismantle practices rooted in historical oppression and build systems that meet the needs of everyone in the community; systems that will look very different than what you have today.

To change local culture, the partners at your table will also need to change. The adoption of RAIs most often happens as an agreement amongst people with formal system authority, to the exclusion of community advocates and those with lived experience in the system. Setting a new table where community members also have power will shift the perspective on what safety and liberty mean, as well as offering creative solutions for how to achieve them. Because community voices are diverse, the new world will reflect local values, needs, and priorities. There’s not an “ideal” model that will work everywhere, and your solutions will be unique to your community.



THE TOOL BOX

Everyday Democracy's "Connecting Public Dialogue To Action And Change" is a comprehensive workbook (complete with ready-to-use meeting agendas), which can assist you in hosting large-scale community conversations that lead to tangible results for the common good. [Download it here.](#)



HISTORY LESSON

To dig deeper into the racialized history of the U.S. criminal legal system, read PJI staffer Wendy Shang's article in the spring 2021 issue of the ABA *Criminal Justice* magazine.



FIELD NOTES

In 2021, Oregon voters decriminalized the possession of several drugs for personal use. Measure 110, which was the result of a citizen's ballot initiative process supported by the Drug Policy Alliance, reclassifies possession of small amounts of drugs as a civil violation, and the fine can be waived by participating in a health assessment. A major selling point of Measure 110 was the potential for reducing racial disparities. While Black people make up less than 3% of Oregon's population, they are 2.5 times more likely to be convicted of a drug-possession offense than whites.

02

WHAT IF... activities related to health and basic human needs were no longer arrestable offenses?

Many people come into contact with the criminal legal system due to homelessness, substance use, or poverty. Revising the criminal code to decriminalize behaviors that reflect people's struggles to stay healthy and meet their basic needs—or making local decisions not to arrest and prosecute people for these behaviors—further reduces the number of people facing charges. At a community level, these decisions should go hand in hand with an expansion of community-based supports that address underlying issues and prevent a crisis from unfolding. This can also reduce the extraction of wealth from poor communities of color, who pay millions of dollars in money bonds, fines and fees as a result of nonviolent misdemeanor charges.

PODCAST



“One of the great fallacies of the misdemeanor universe is that getting a misdemeanor is no big deal... that it won't dog you for your life. That has come to be profoundly untrue. A misdemeanor conviction, although not as serious as a felony conviction, still imposes enormous burdens on the people who carry them.”

— "Punishment without Crime" author Alexandra Natapoff on [NPR's Fresh Air](#)

13 MILLION

Total misdemeanor cases filed in the U.S. each year. (That's 80% of American criminal dockets.)

49%

Percentage of unhoused people in the U.S. who report having spent five or more days in a city or county jail. Once arrested, they're almost always detained, says the National Homelessness Law Center. [Read more.](#)



03 WHAT IF... the question of safety was two-sided?

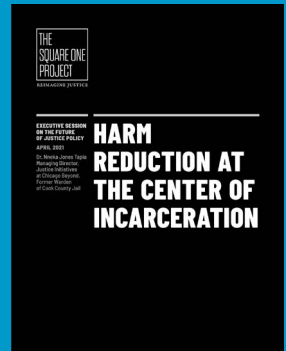
At the crux of the conversation about pretrial “risk” is the question of safety. Generally, considerations of safety are one-sided: if released, is there potential for an accused person to commit a crime that harms someone in the community? We rarely weigh the inverse: if someone is detained pretrial, what dangers do they face as a result of detention?

Of the 470,000 unconvicted people being held in jail on any given day, only a very small percentage may commit a violent crime if released, while virtually all face the risk of infectious disease and violence in jail, as well as the possibility of losing their job, housing, or children as a result of being detained. The risks to an incarcerated person have a ripple effect on their families and communities as well. RAIs are not effective at predicting risk of violent crime, and they don’t consider risk to an incarcerated person at all.

Instead, you could ask yourself: What can be done to maximize safety for members of the community, victims, and people facing charges? How can we support people’s physical and emotional well-being? If we were to create safe spaces from scratch, what would they look like?



Research by the [Prison Policy Initiative](#) and [Reuters](#) shows that local lockups are woefully unprepared for the recent increase in women going to jail — many of whom enter facilities during mental health crises, suffering from addiction, or while pregnant.



RECOMMENDED READING

“Even in a system that is inherently traumatic, we must shift the values of the institution so it is rooted in humanity and compassion,” says Dr. Nneka Jones Tapia, Managing Director of Justice Initiatives at Chicago Beyond, and former warden of Cook County Jail. Read more at the [Square One Project](#).



HEALTH EQUITY

“Pretrial incarceration wrecks havoc on what we know makes us healthy,” write Human Impact Partners in their 2020 “Liberating Our Health” publication, which investigates the disproportionate harms pretrial systems impose on certain communities—and centers public health as an alternate means of creating public safety.

“Bolstering health-affirming investments designed to benefit those who are historically and structurally marginalized—including those awaiting trial—can have cascading effects that end up benefiting all of society,” they say. [Read the report.](#)



FIELD NOTES

Alternative responder programs are popping up across the country, many inspired by [CAHOOTS](#) (Crisis Assistance Helping Out On The Streets), a mobile crisis center established in 1989 in Eugene, Oregon. In this model, a crisis worker and a medic respond to calls with or instead of police, offering voluntary treatment.

In Olympia, Washington, [Familiar Faces](#) (peer navigators who have lived experience with poverty, substance use and the legal system) provide ongoing support to individuals with complex needs who come into frequent contact with law enforcement.

In Maryland, [community mediation centers](#) use restorative justice practices to resolve disputes, rebuild relationships and find permanent solutions by providing an accessible forum with highly-trained volunteers for people in conflict.

04 WHAT IF... people in crisis had options other than 911?

A key element in the national conversation on defunding police has been the role that police play in responding to people in crisis, often those with acute mental or behavioral health issues. It is widely acknowledged that this is not a role intended for law enforcement, and their presence can escalate an already difficult situation. Investing in community-based civilian responder programs offers an alternative to connect people in crisis with professional support outside of the criminal legal system, reducing the risk of police violence, arrest, and detention.

“We’re trying to create a framework where people have someone to talk to, someone to respond, and someplace to go.

— David Lloyd of The Kennedy Forum

On the hopes (and challenges) of launching a national [988 number](#) for mental health crises and suicide prevention in all 50 states.

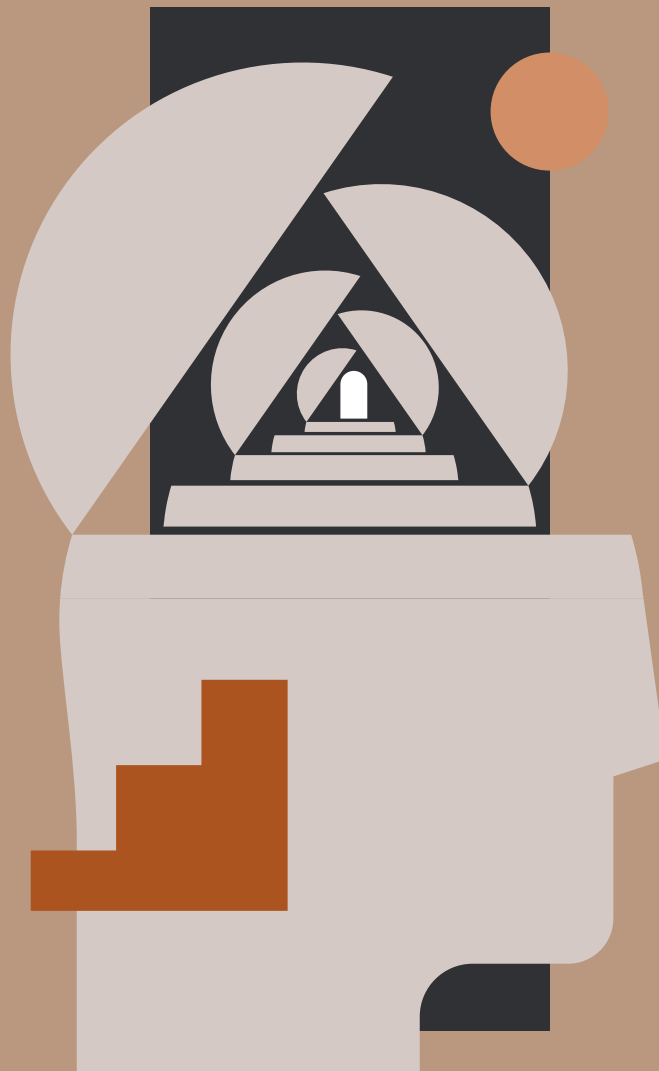
24,000 CALLS

CAHOOTS responded to 24,000 calls for crisis assistance in 2019. Only 150 of those calls required police backup. (That's less than 1%!)



FIELD NOTES

In New Jersey, law enforcement issues citations in approximately 68% of cases statewide. This has contributed to jail population reductions without a negative impact on public safety or court appearance. However, more work needs to be done on addressing disparities across decision points in the system.



WATCH YOUR LANGUAGE

Using behavioral science to redesign summonses and court reminders in New York City resulted in a 36% reduction in FTAs. The language below comes from the most effective text campaign, which encourages recipients to make a plan to get to court, while also noting the consequences of no-shows. [Read the report.](#)

Helpful reminder: go to court Mon Jun 03 9:30 A.M. We'll text to help you remember. Show up to avoid an arrest warrant. Reply STOP to end texts. www.mysummons.nyc

7 Days Before Court

You have court on Mon Jun 03 at 346 Broadway Manhattan. What time should you leave to get there by 9:30 A.M.? Any other arrangements to make? Write out your plan.

3 Days Before Court

Remember you have court tomorrow at 9:30 A.M. Tickets could be dismissed or end in a fine (60 days to pay). Missing court for ##### can lead to your arrest.

1 Day Before Court

05

WHAT IF... law enforcement officers used citations and summonses for most charges?

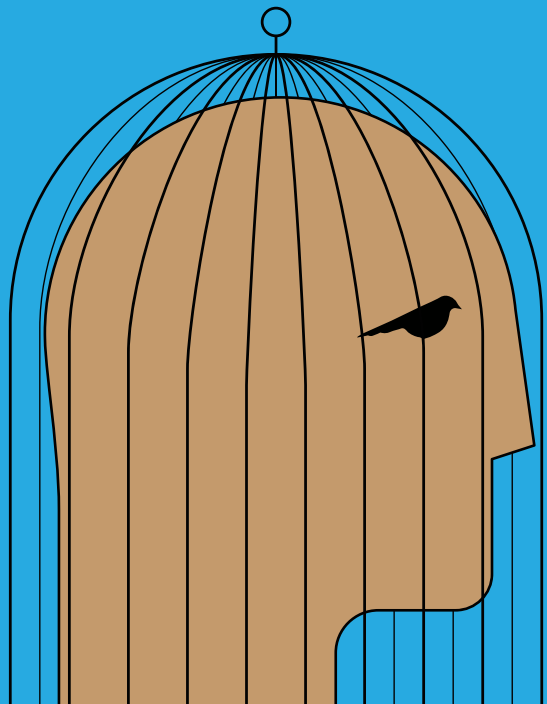


THE TOOL BOX

To explore policies on citation release around the country, visit the [NCSL Database on Pretrial Release.](#)

Even in situations where police believe a crime has been committed, it is often not necessary to take someone into custody. If police are able to verify the person's identity—and if that person has not committed a serious violent offense and does not pose an immediate risk to the safety of someone else—then they can be issued a citation or summons to return to court. This further reduces jail admissions and the need for money bond and risk assessment—and allows people to remain in the community, where they can go to work or school, care for themselves and their families, and participate meaningfully in their own defense.

But note: Citations and summonses need to include clear and straightforward instructions about when and where to appear in court and be accompanied by a court reminder.



WEIGHING THE COSTS

The cost of detaining legally innocent people who can't afford bond (or need time to come up with the money) is staggering. Here's how the numbers stacked up in New York City in [FY 2017](#).

06 WHAT IF... judicial officers released everyone who was not statutorily eligible for detention?

We all know the quote from Justice William Rehnquist—“liberty is the norm, and detention prior to trial or without trial is the carefully limited exception”—and that the Constitution and the Supreme Court provide for both a presumption of innocence and a presumption of liberty. We also know that most state laws are very specific about who is, or is not, eligible for preventive detention. But what if we actually lived this at the local level?

Bond schedules are ostensibly a tool to facilitate release through payment, but instead they result in detention for those who are unable to pay. RAIs are not designed to inform detention or release decisions, but they are often used to justify either high bond amounts or arguments of dangerousness that result in detention.

Upshot: If, instead, no one was detained who did not meet your state's constitutional and statutory threshold, then jails would begin to empty and another role of RAIs would become moot.



FIELD NOTES

In early 2017, a comprehensive bail reform package went into effect in New Jersey, which included a significant curtailment of money bond, along with a new constitutional amendment allowing for preventive detention.

Advocates were justifiably concerned that the amendment would ultimately increase pretrial detention rates. However, culture change in the courts, along with stringent requirements for pursuing preventive detention, resulted in plummeting detention rates.

Prosecutors are required to file a motion requesting preventive detention and demonstrating that the person facing charges meets the criteria for a hearing. A full adversarial hearing is then held, and a judge makes an individualized determination on the record.

\$28 MILLION

Lost wages for people unable to post bond in NYC jails

\$100 MILLION

Taxpayer cost to lock up people unable to post bond in NYC jails

119,030 DAYS

Cumulative time people spent in NYC jails before eventually posting bond



07



FIELD NOTES

“Detention only shall be imposed when it is determined that the defendant poses a specific, real and present threat to a person, or has a high likelihood of willful flight.” That’s the criteria for detention in the Illinois Pretrial Fairness Act, which takes effect in 2023, and eliminates the use of money bond along with strictly defining detention eligibility.

The law defines willful flight as “planning or attempting to intentionally evade prosecution by concealing oneself. Simple past non-appearance in court alone is not evidence of future intent to evade prosecution.”

WHAT IF... judicial officers only considered the risk of fleeing prosecution and committing a violent offense when deciding whether someone should be detained?

Part of the constitutional consideration mentioned in Question 6 is using the least restrictive conditions necessary to reasonably assure that someone returns to court without committing a new crime. Does the person have the means, or have there been prior attempts, to flee prosecution, rather than just miss a court appearance? Is there a specific threat to the safety of a known victim or witness? Has the person committed a violent offense while on pretrial release?

A risk assessment score cannot answer these questions; they are not designed to predict these rare events. (For more on this, see PJI’s [previous paper](#).) Nor can a prosecutor who was just handed a case five minutes before a hearing.

If prosecutors and judges have fewer bail hearings, they will have more time to prepare for and hear bail arguments. If people facing charges are always represented by counsel with manageable caseloads, then defense attorneys will be able to add more context to the bail decision. If victims are given a voice at meaningful hearings, then specific safety threats can be revealed. A person should only be detained if a judge can document,

on the record, a specific and constitutional justification that the person is likely to flee prosecution or commit a violent crime. Everyone who does not meet that narrow criteria should be released. The judge’s documentation on the record can also be used to track detention decisions and bring any racial bias to light.

“Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day, the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

—Justice Thurgood Marshall
United States v. Salerno

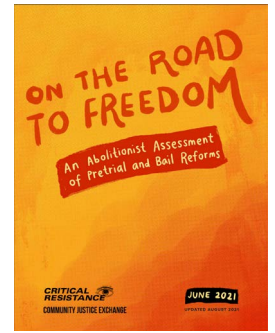


08

WHAT IF... judicial officers only set conditions of release that were directly related to an individual's circumstances?

If most people are released at a bail or detention hearing, then the question becomes, what are the appropriate conditions of release? This is another area where we need to be cautious about “replacement.” To assuage concerns about pretrial release, detention and release on monetary bond have often been replaced by pretrial supervision or other conditions. This is the role that risk assessment instruments are supposed to play—matching people with a certain risk profile to the conditions that are most likely to assure return to court with no new arrests. However, the connection between conditions of release and RAI score is a political decision, not a scientific one; there is no body of research saying that specific conditions are effective with specific people. Therefore, we are depriving people of liberty without assurance that we are assigning the “least restrictive conditions necessary.”

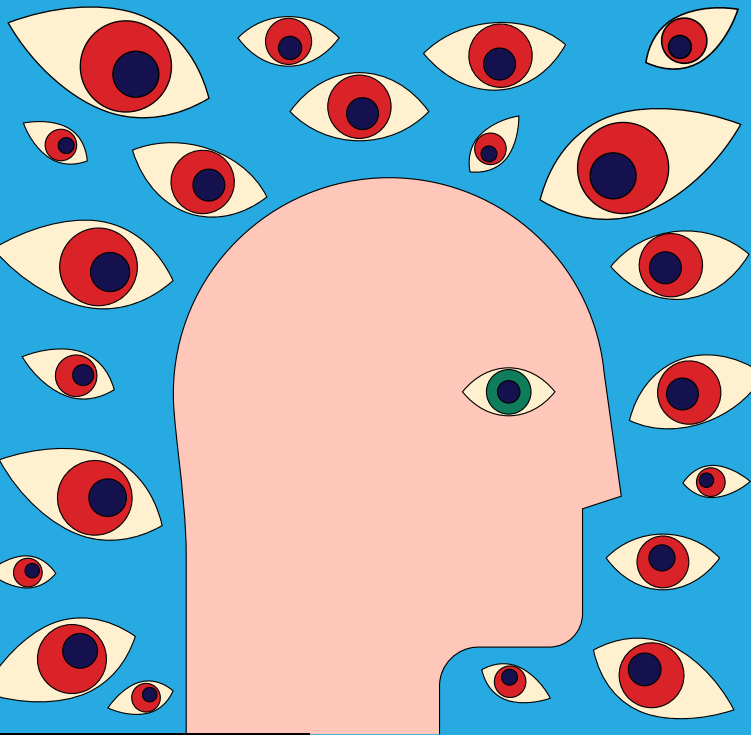
What if, instead: Local courts returned to the constitutional requirement of least restrictive conditions, and judicial officers only put conditions in place that are relevant to a specific person? This may include an order of protection for someone facing domestic violence charges, or a requirement for a person with international resources to surrender their passport. These conditions could be revisited based on a person's behavior on pretrial release, but would avoid blanket conditioning and the associated likelihood of technical violations and returns to court. Many more people would be released outright on their own recognizance, and research tells us that most of them will successfully return to court.



ANTI-MASS SUPERVISION

In their 2021 review of current pretrial and bail reforms, Critical Resistance and the Community Justice Exchange rejected efforts to create “new and conditional barriers to release and/or increased punitive supervision that are themselves forms of pretrial detention and surveillance.”

“These types of ‘substitution’ reforms do not create more freedom and can lead to increased re-arrest because they create new possibilities for violations punishable by incarceration or increased restrictions,” write the authors. In addition, use of these conditions “often introduces or increases monetary penalties and expenses for the individual.” [Read the report.](#)

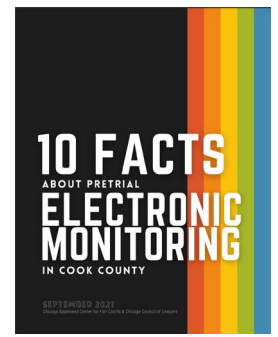


09

WHAT IF... conditions were only available if proven to be effective in increasing a person's likelihood of returning to court safely?

In setting individualized conditions of release, what if the only conditions available to your judges were those that had been proven effective to increase a person's likelihood of returning to court safely? For decades the pretrial field, including PJI, has promoted supervision and other conditions of release as alternatives to incarceration. (Indeed, promoting supervision was part of the reason we were founded as an organization.) Yet despite years spent supervising millions of people, there is still little data on the efficacy of many supervision practices. Most people are successful while on supervision; then again, most people are successful on pretrial release, regardless of type of release or release conditions. And there are insufficient studies showing what elements of supervision contributed to their success, and whether those same people would have also been successful if released without conditions.

On the other hand: People impacted by the system have been increasingly vocal about the negative effects of unproven conditions like drug testing and electronic monitoring on individuals and their families. If, instead, courts only assigned proven conditions, then there would likely be many more court orders that simply said "return to court" and "remain law abiding." Again, no assessment necessary.



DIGITAL JAILS

In Cook County, Illinois, 23% of the population is Black, but over 74% of people on EM are Black. [Read more](#) from The Chicago Council of Lawyers and Chicago Applesseed Center for Fair Courts.



A BITTER PILL?

Pretrial drug testing is not associated with higher rates of court appearance or lower rates of arrest. Yet drug testing remains a widespread condition of pretrial release, even when the charge is not related to drug use. According to PJI's [Scan of Pretrial Practices](#), 77% of counties with pretrial services reported that they administered drug tests. Only 35% had data on how many people were placed on drug or alcohol monitoring.



THE TOOL BOX

For a one-stop resource, check out UNC Criminal Justice Innovation Lab's [2021 report](#) summarizing research on pretrial supervision practices.



10

WHAT IF... community supports were available to help ensure return to court?

It is true that some people struggle to make court appearances, and some are re-arrested on non-violent charges while pending trial. Often, these pretrial “failures” are related to other challenges people facing charges are experiencing, such as lack of transportation, childcare needs, homelessness, and poverty. As a result, they often do need support, but that support can come from outside the criminal legal system, and it does not need to be set as a formal condition.

Community-based volunteers and organizations can offer a variety of supports and wraparound services—anything from a housing placement to a referral for treatment, or even just a ride back to court. Community organizations may conduct a needs assessment to match people with services, but these assessments do not assign a “risk” level, and they are not used to assign formal conditions of release. They simply offer help when it is needed, for the benefit of impacted people—making it easier to meet their pretrial obligations.

“ **The pretrial system can either be a profound disruption or a positive intervention point for connecting people with supportive services such as housing assistance, job training, and substance abuse treatment. The institutional design of how supportive services are identified and coordinated can help prevent community release from drifting toward coercive practices that expand the power and reach of the carceral system.**

— "After Cash Bail: A Framework for Reimagining Pretrial Justice" by [The Bail Project](#)



FIELD NOTES

This is happening in Santa Clara County, California, where Silicon Valley De-Bug organizes families and community members to support people facing charges—a model they call Participatory Defense. De-Bug's advocates collaborate to support individuals throughout the pretrial phase of their case, and they collectively see their actions as part of a broader movement for systemic change.

BONUS VIDEO: Watch PJI's [First Friday Forum](#) featuring Raj Jayadev of SV De-Bug and April Frazier Camara of the Black Public Defenders Association, who discuss the role defense attorneys can play in meeting accused people's needs, and how support can be provided in the community, by the community.



NEED A LIFT?

In Hennepin County, Minnesota, a committee of local stakeholders established the Adult Detention Initiative aimed at reducing FTAs and bench warrants. In addition to sending email reminders, they created Court Ride, a program that provides eligible people with free transportation to and from court and court-related appointments.

Putting it all together..

This reimagined system honors the presumption of innocence and releases most people. Liberty is the default, and detention is only possible for very narrow reasons related to the seriousness of a charge, a known risk of flight, or a known risk of violent behavior. Decisions about detention are interrogated through an adversarial hearing. Conditions of release are only applied if they are specifically relevant to the person facing charges, and if they are proven effective. People who are released receive support in the community to get back to court—and to stay safe and healthy.

This approach is a seismic shift. It will not be an easy sell for those who are hesitant about change, those who see people who are arrested as inherently risky, or those deeply invested in the current pretrial infrastructure. It is aspirational, likely incomplete, and as yet unproven in its entirety.

What it represents is the kind of **pathway formed when constitutional principles and the pursuit of equity converge**—as part of a larger movement to end mass incarceration and supervision, starting with the front-end of the system.

 **How does this “new world” compare to your values and vision for the future?**

Discussion Guide

Breaking the binary of money-based or risk-based pretrial processes is revolutionary for our field, but at the same time it's nothing new—the building blocks are out there, and it's just a matter of having the collective courage to implement them in service of your values. Below are some conversation starters we hope will help you engage others in your workplace and community.

Who should be at the table?

When you think about making changes to your pretrial process, who will be impacted by those changes? Who knows what's working now, and what is not? Who has an opinion on what it takes to get people safely back to court? This is likely a mix of people with positional authority, like judges and sheriffs, and community members, including those who have been impacted by the pretrial process. An important first step is to explore who is missing from your table, then build the relationships necessary to bring people together for authentic conversations.

What values guide your pretrial decision making?

Have you ever had a conversation with your local pretrial partners about what values drive local pretrial decisions, and how those values are defined? If safety is paramount, then safety for whom? If liberty is a value, is that freedom from incarceration or freedom from restrictive conditions? If you value community, how do you define it, and how does that differ for others around the table? Shared values can provide common ground for finding solutions—and openly discussing differences is essential to pursuing equity.

Who is coming into contact with pretrial decision makers, and why?

Who is affected by your pretrial decisions? Data on who's coming into contact with decision makers, and the ultimate outcomes for those people, provides context for discussions of policy and equity. Ideally, your portrait of people in the system will come from

across agencies and include demographics, along with a willingness among partners to dig deeper to understand how intersections like race, income, and geography impact outcomes.

What options are available at each decision point?

When people come in contact with law enforcement, what choices do officers have about how to respond? When judges make bail decisions, what conditions and supports are available, and which are used? Mapping the decision points in your current system, the options available at each, the choices being made by decision makers, and the outcomes of those choices provides a picture of whether your current practices reflect your values, and where changes need to be made.

What will it take to build true equity into your pretrial process?

This is a big question that can be layered on all of the questions posed above. When you're setting your table for collaborative decision making, consider the make-up of your community, and how to raise the voices of people who don't traditionally hold power. When deciding on your values, consider what it means to explicitly hold equity as a value, and how it would live in your pretrial process. When you're exploring the decisions being made throughout the process, determine where racial bias is present. These initial steps, along with education and conversation on how racism manifests in individuals and systems, will prepare you for co-creating equitable solutions.

About PJI

We believe that racial justice is essential to advancing pretrial liberty and ending mass incarceration.

The Pretrial Justice Institute (PJI) began over 40 years ago as the sole U.S. organization dedicated exclusively to pretrial system reform. While our expertise is grounded in working with the system “insiders” (judges, prosecutors, defense attorneys, and others), we know that powerful, sustained solutions must include the people most deeply harmed by the criminal legal system—usually Black, Latinx, and Indigenous communities.

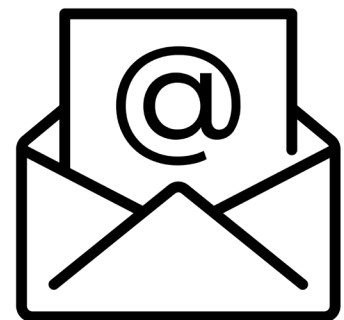
Today, PJI serves as a bridge between system actors, who historically hold the power in the legal system, and community members, who have a vision for justice and well-being, **to co-create places where all people feel safe, respected and able to thrive.**

To achieve this goal, we must work together to identify common values and pursue systems that move away from punitive, harmful policies and practices—focusing, instead, on resources that help people heal and live better.

Let's keep in touch...

GOT IDEAS? Our goal is to make “What If” a living publication with even more bold ideas, resources and questions for the pretrial community. Already doing great work on these issues? We want to hear from you!

NEED SUPPORT? Or, if you're feeling inspired by these ideas but not sure where to get started (or you could use some assistance to keep going), we'd love to hear from you, too.



Send us a quick email at leaders@pretrial.org.

