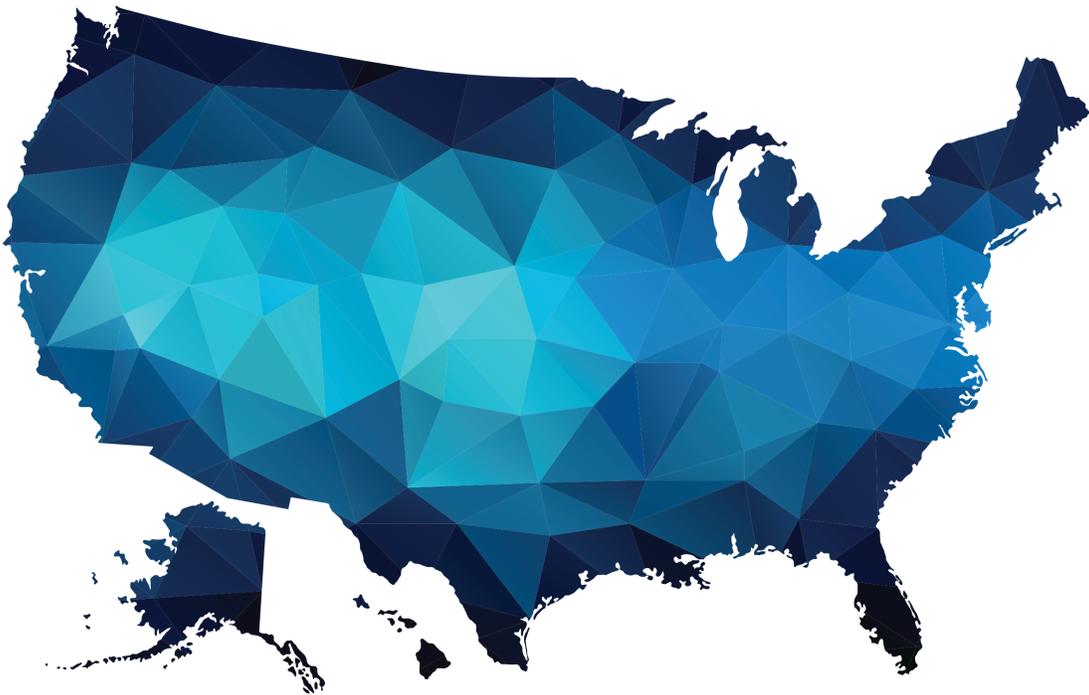


# THE STATE OF PRETRIAL JUSTICE IN AMERICA

NOVEMBER 2017



# A Message from Cherise Fanno Burdeen



**I** have been working to advance pretrial justice for ten years—a few decades shy of what many, like my Pretrial Justice Institute colleagues John Clark and Tim Murray, have put in. However, even readers who are relatively new to this work know that we are at a special moment.

Half a century after the Manhattan Bail project first showed that money bail is unnecessary to assure court appearance, there is unprecedented, growing demand for change; far-reaching litigation is compelling jurisdictions to abruptly alter their practices; and local, state, and national lawmakers are honing plans for comprehensive reform.

Before we all begin counting our proverbial chickens, however, it would be prudent to step back and ground our expectations in some facts. *The State of Pretrial Justice in America* is our attempt to capture, using basic indicators, current pretrial practice in all fifty states, as well as in the aggregate. It is a baseline against which we can gauge progress.

Like you, I am eager to see a new national standard of pretrial justice that does not discriminate based on wealth or race; or undermine individual and community safety; or squander public resources; or contribute to the problem of mass incarceration, but actively contributes to its elimination instead. But getting there, even from where we are now, won't be easy. Even if the money bond culture in every state were to change tomorrow, there would still be the vexing challenges of implementing legal and evidence-based practices, ensuring process and outcome transparency, and sustaining advancements when political winds change.

*The State of Pretrial Justice in America* is offered as a reflection of both how far we've come and also how far we still have to go. My hope is that everyone—the public, the media, and stakeholders alike—will be able to use it to help move us closer to a system that is fairer and safer for us all.

*Cherise Fanno Burdeen*

—Cherise Fanno Burdeen  
CEO, Pretrial Justice Institute

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### The State of Pretrial Justice

The past five years have witnessed a remarkable growth in support for reforming our nation’s pretrial justice system (the portion of criminal justice practice that begins with a person’s first contact with law enforcement and ends once any resulting charges are resolved, usually through a plea, a trial, or dismissal). This

unprecedented interest emerges from a growing awareness that existing pretrial operations lead to unnecessary detention of poor and working class people—disproportionately people of color—while those with money are able to go free with little or no supervision, regardless of any danger they may present.<sup>1</sup> Current pretrial justice practice is, in short, unfair, unsafe, a waste of public resources, and a significant contributor to the nation’s widely recognized problem of mass incarceration.<sup>2</sup>

### Washington, DC

In Washington, DC, 92% of people who are arrested are released pretrial and no one is detained because of an inability to pay. These results are largely due to the District of Columbia Pretrial Services Agency (PSA), one of the pioneering institutions of its kind in the field. Begun as the D.C. Bail Project in 1963 with a grant from the Ford Foundation, this agency operates 24 hours a day, promoting court appearance and public safety through the use of public safety assessments and graduated supervision levels. Eighty-nine percent (89%) of arrested people released before trial were not arrested for new charges while their cases were being adjudicated; ninety-eight percent (98%) were not rearrested on a crime of violence while in the community pending trial.



Many who have looked at PSA have noticed that the program has a significant budget and questioned whether such a program can be replicated elsewhere. However, PSA operates under conditions that would not necessarily apply to most jurisdictions. As an independent federal agency, PSA has certain fixed and stand-alone costs, such as administrative support functions, finance, and information technology, that could, in a state, be housed within another agency. PSA’s budget also includes a robust drug specimen collection program and drug testing laboratory, which also are not a part of a typical pretrial services agency’s budget. States will find that many of these features are already operational within their state.

There is, of course, no single pretrial justice system in the United States. The structure of criminal justice in this country allows for significant variation from state to state, and even from county to county. This decentralization has its benefits. But it presents challenges to those who would seek systemic improvements.

The Pretrial Justice Institute (PJI) developed this report card to minimize those challenges. Its foundational premise is that American pretrial practice—in any state or jurisdiction—should be able to maximize liberty among people who are entitled to the presumption of innocence, while also protecting public safety and ensuring effective court operations.<sup>3</sup> This is, after all, an aspiration traced to our founding fathers and beyond, which former Chief Justice of the United States William Rehnquist eloquently summarized when he wrote, “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>4</sup>

**“Too many people in the pretrial phase are locked up for days, weeks, and even months, when, according to both law and research, they should be released”**

The analysis presented here finds, however, that the state of pretrial justice in America falls far short of Chief Justice Rehnquist’s vision. Too many people in the pretrial phase are locked up for days, weeks, and even months, when, according to both law and research, they should be released.

New Jersey, which implemented comprehensive reforms earlier this year that have already led to improved outcomes, is the only state to have received an A grade in our analysis. The remaining grade distribution, as illustrated in the table on page 11, includes nine Bs, ten Cs, 12 Ds, and 17 Fs. One state, Delaware, received an Incomplete (I) grade because one of the three indicators—rate of pretrial detention—was unavailable.

The silver lining is that these results would have been far worse had this report card been produced in 2007 rather than 2017. Viewed this way, the current grade distribution may be seen as encouraging. We are in the midst of what has been called the “third generation” of bail reform, spurred by a demand for practices that are shown to be effective and fair.<sup>5</sup> At PJI, we are hopeful that the public, the media, elected officials, and system stakeholders in every state across the nation will use this report to educate, advocate, litigate, and legislate a new national standard of pretrial justice.

## Background

The first wave of bail reform came about in the 1950s and 60s, when the U.S. Supreme Court held that conditions of release must be individualized,<sup>6</sup> and the Vera Foundation demonstrated that individuals released on recognizance—that is, without money bond—achieve high rates of appearance in court. This spurred the use of release on recognizance, nonfinancial conditions, and pretrial supervision. The second generation focused on the idea of public safety, when the Supreme Court upheld the use of preventive detention with due process protections in 1987.<sup>7</sup> As a result, the court acknowledged that there is not a right to bail in all cases, and the original purpose of setting bail—court appearance—was expanded to include considerations of public safety. These two goals are the only purposes that conditions of release may address, under the Constitution.

Despite these changes, the use of financial bond has been the dominant condition of release from

## New Jersey

In 2014, under the urging of Governor Chris Christie, New Jersey passed legislation that dramatically changed pretrial justice in the state. First, it mandated the creation of pretrial services agencies statewide to conduct pretrial assessments and make release recommendations to the court. The new system requires courts to use money bail only as a last resort, when they can articulate why other release conditions are insufficient to assure court appearance and public safety. Second, voters approved a constitutional amendment allowing for pretrial detention of individuals the court chooses to not release before trial. Before the amendment, almost everyone who was arrested in the state was afforded an opportunity for release.



The state spent two years following adoption of the new laws preparing for implementation, which occurred in January 2017. The new system has, so far, been phenomenal. The number of people held in New Jersey jails awaiting trial dropped by 15% in the first six months. Courts had begun detaining fewer individuals prior to the new laws coming into effect and the number of unconvicted people held in jail dropped by more than a third (34.1%) between mid-2015 and mid-2017. At the same time, public safety was improved. Both violent crime and overall crime rates dropped statewide in the first nine months of 2017, compared to the same period in 2016.<sup>1</sup>

One hundred percent of New Jersey’s population now resides in a county that employs validated evidence-based pretrial assessment, and secured money bail has been functionally eliminated. Since the law went into effect, fewer than thirty individuals have been required to pay money prior to release.

For an insider’s perspective on New Jersey’s recent changes, see *Improving Pretrial Justice in New Jersey*.

1. *New Jersey State Police, Uniform Crime Report, January-September 2017, generated October 13, 2017.* [http://www.njsp.org/ucr/pdf/current/20171013\\_crimetrend.pdf](http://www.njsp.org/ucr/pdf/current/20171013_crimetrend.pdf)

the late 1990s until today. During that period, 95% of the growth in jail populations has been due to the increase in the unconvicted population.<sup>8</sup> The third generation of change has come about due to the continued pervasive practice of detaining individuals before trial who should be released. Today, nearly two-thirds of people in jails have a pretrial status; many are charged with low-level, nonviolent offenses and are detained because of their inability to pay the set bail amount.

This most recent wave of reform emphasizes legal and evidence-based practices. In place of “gut instinct” and incomplete information, system stakeholders are finding ways to make better and more-informed decisions using evidence-based pretrial assessment. Properly designed and validated, evidence-based pretrial assessment provides statistical proof that the vast majority of arrested people can be released on recognizance. It also reveals which men and women might benefit from limited conditions and support to increase their likelihood of pretrial success, as well as the small number who may not be suitable for pretrial release (legal standards require a number of procedural steps to determine who may be detained before trial, including early defense representation and opportunity for immediate appeal). In some jurisdictions, lawsuits are also forcing change by challenging practices that fail to look at individual circumstances and base detention on access to money. In several states, state chief justices have led the way in changing pretrial release practices, usually through the form of commissions, judicial training, and court rule changes.

Today it is the rare state that is not considering or has not recently implemented some adjustment to its pretrial justice system. The challenge is that these activities must result in real change, whether spurred by legislation



## Alaska

### STATE TO WATCH

After 10 years of dramatic growth in the jail and prison populations, including an 81% increase in the number of people held pretrial, Governor Bill Walker signed SB 91, introducing a series of criminal justice improvements, including evidence-based pretrial practices, that are designed to improve public safety and reduce incarceration. Law enforcement officers now have expanded discretion to issue citations in lieu of arrest, and a newly created pretrial services program will conduct evidenced-based assessments and make recommendations to the court. Part of the challenge for Alaska will be implementing effective pretrial services in its many remote rural areas.

Although the state law contained a presumption in favor of release on recognizance, studies found that courts departed from this presumption in the vast majority of cases, and that secured money bond was a significant contributor to the length of pretrial stays. The new law seeks to correct this with mandatory release on recognizance requirements for certain cases.



## Arizona

### STATE TO WATCH

The Arizona Supreme Court took the lead in changing pretrial practices when it established a task force to examine fines, fees, and pretrial release practices in 2016. The work of the task force has resulted in, among other changes, new court rules that prohibit pretrial incarceration based solely on an individual's inability to pay, require that when money bond is deemed a necessary condition of release that it is “the least onerous” type of money bond, and also permit the use of preventive detention. The legislature is introducing bills to address other recommendations from the task force, including: allowing community restitution in lieu of payment; reclassifying certain misdemeanor offenses as civil offenses; and establishing a statewide pretrial services program. The efforts in Arizona are bolstered by Pima County's work as a Safety and Justice Challenge site to reduce the average daily jail population, and the statewide rollout of a pretrial assessment tool through the Laura and John Arnold Foundation.

**“Establishing this baseline will enable each state to set goals and demonstrate progress.”**

or lawsuits. Experience has shown that it is not enough to have a good law on the books; a successful transformation of a pretrial system requires information gathering, education, and stakeholder buy-in. The ability to track and modify practices is also critical, as the overuse of detention and excessive conditioning of release can confound the best efforts of any system.

This report provides a snapshot in time from which we can begin to measure change. Establishing this baseline will enable each state to set goals and demonstrate progress.

## Methodology

There are any number of ways to gauge pretrial justice in America. This report focuses on the biggest flaws affecting most of the nation’s pretrial systems and the areas where improvement can have the greatest positive impact. An explanation of each of the measures appears below, along with information on how the measure was sourced. These are followed by a brief discussion of the measures’ limitations and an explanation of how the collected information was converted into grades.

## The Measures

Local pretrial practice can vary from jurisdiction to jurisdiction. Yet every local pretrial system operates within a structure—based on elements that include a state’s constitution, statutes, case law, and tradition—that is unique to the state where it is located. For this reason, this analysis focuses on states as the basic unit and collected three fundamental measures for each:

1. Rate of unconvicted people in local jails,
2. Percentage of people living in a jurisdiction that uses evidence-based pretrial assessment to inform pretrial decisions, and
3. Percent of a state’s population living in a jurisdiction that has functionally eliminated secured money bail.

### ***Rate of unconvicted people in local jails.***

Nearly two-thirds (63%) of the people in U.S. jails are unconvicted individuals. In 1990, that figure was just slightly more than half (51%).<sup>9</sup>

This indicator focuses, however, on the pretrial detention rate within the overall population. The rate used is the number of unconvicted people in jails per 10,000 adult residents.



## California

STATE TO WATCH

The three major branches of the nation’s most populous state are moving forward on modernizing pretrial practices. State Senator Bob Hertzberg and Assemblyman Rob Bonta introduced companion bills to establish the use of pretrial assessments and pretrial services, and a work group studying the impact of the bail system on people unable to afford bond. In October 2017 the Pretrial Detention Reform Workgroup, appointed by Chief Justice Tani Cantil-Sakauye, recommended replacing the current monetary bail system with a robust system of pretrial assessment and supervision. In the meantime, several localities have moved forward with initiatives of their own, including the implementation of assessment tools, the increased presence of defense attorneys, and the diversion of people with behavioral health issues out of the criminal justice system. In 2016, the Santa Clara Board of Supervisors voted to implement evidence-based pretrial practices, citing studies that the money bail system was keeping low-income people unnecessarily locked up.

Data for this measure was collected primarily through the Bureau of Justice Statistics (BJS) Census of Jails series—using the most recent year available, 2013.<sup>10</sup> A handful of states did not submit data to BJS, but we were able to locate similar numbers from other sources.<sup>11</sup> The only exception is the state of Delaware. Because we could not find comparable data for this state, it received an “Incomplete” (I) rather than a letter grade.

***Percent of state’s population living in a jurisdiction using evidence-based pretrial assessment.*** In most of America, only two considerations may legally influence the pretrial release decision: whether the accused person, if released, is likely to appear in court as expected, and whether he or she would present an unmanageable threat to public safety during the pretrial period if released. An evidence-based pretrial assessment measures these two considerations for each person who comes before the court using a “tool” (usually a questionnaire, form, or database) that collects relevant information and generates an objective score based on a statistical analysis of the performance of previously arrested people with similar profiles.

The use of evidence-based pretrial assessment is an important advance over systems that allow irrelevant, or even biased factors to influence court decisions. Ideally, evidence-based pretrial assessment should be locally validated—meaning that the tool has been tested to confirm that it has predictive ability within the jurisdiction where it is being used.

Data for this measure were compiled using a combination of institutional knowledge and contacts with national pretrial

## STATE TO WATCH



## Indiana

Progress in Indiana is supported in part by the state’s participation in the National Institute of Corrections’ (NIC) Evidence-Based Decision Making Initiative (EBDM). In 2016, the Indiana Supreme Court adopted Indiana Criminal Rule 26 encouraging the use of pretrial risk assessments and the non-financial release of arrestees who do not present a substantial risk of flight or danger to themselves or others. NIC is working with 11 Indiana counties that are piloting evidence-based pretrial practices in accordance with CR 26. The pilot counties are using the Indiana Risk Assessment System Pretrial Assessment Tool (IRAS-PAT) to inform release and supervision conditions and provide—or are working to provide—defense counsel at initial hearings. The EBDM state policy team is overseeing a process and outcome evaluation of the pretrial pilot project that will include a validation study of the IRAS-PAT.

## STATE TO WATCH



## Maryland

In the fall of 2016, two documents helped shape the dialogue around pretrial detention and release in Maryland. The first was an advisory letter from state Attorney General Brian Frosh indicating that the practice of locking up individuals as a consequence of their inability to pay was likely to be found unconstitutional. The second, a report from the Maryland Office of the Public Defender, quantified concerns around the money-based bail system, showing that tens of thousands of Marylanders were improperly incarcerated because of money bail and that for-profit bail bonds drained millions of dollars from the state’s poorest communities.

As a result, Maryland changed its court rules to create a presumption in favor of release on recognizance, require the “least onerous” conditions of release, and require an individualized inquiry into a person’s specific circumstances, including ability to meet financial conditions of release. The challenge now is to provide support for a new release model, in the form of evidence-based pretrial assessments that provide better information on which people can be released under what conditions, and pretrial services.

assessment leaders and local stakeholders. Only those states and counties using validated evidence-based pretrial assessment tools were given credit on this measurement.

For more information about pretrial assessment tools, see *Questions About Pretrial Assessment*.

**Percent of state’s population living in a jurisdiction that has functionally eliminated secured money bail.** In many ways, the final measure—functional elimination of secured money bail—is the simplest and also the most crucial to achieving truly safe, fair, and effective pretrial justice. It is the simplest because, to date, only one state, New Jersey, has achieved this goal. (Washington, DC, which has operated a model pretrial system without money bail for more than twenty years, was not included in this analysis.<sup>12</sup>)

As long as pretrial systems use money as a condition of pretrial release, poor and working class people will remain behind bars while those who are wealthy go home, regardless of their likelihood of pretrial success. This is a fundamental injustice.

Data for this measure were compiled using a combination of institutional knowledge and contacts with national pretrial assessment leaders and local stakeholders.

**Data Limitations**

The measures presented here reflect work that has been completed, not work in progress. This is an important distinction, since many states are actively engaged in improvement efforts whose results have yet to be reflected in the measures used in this report. New

**“As long as pretrial systems use money as a condition of pretrial release, poor and working class people will remain behind bars while those who are wealthy go home...”**

**STATE TO WATCH**



**New Mexico**

In 2016, voters in New Mexico overwhelmingly approved a constitutional amendment to prevent the pretrial detention of people based on an inability to pay, while also allowing preventive detention of people charged with certain serious crimes. The measure had bipartisan support, and backing from Chief Justice Charles Daniels. Before the measure took effect, New Mexico had one of the highest pretrial detention rates in the nation— 341 per 100,000 residents.

To guide criminal courts on this measure, the New Mexico Supreme Court issued new court rules, developed with the input of judges, prosecutors, defense attorneys, bail bondsmen, legislators, and detention officials, which took effect July 1 of this year. A group of bail bond agents and state legislators have brought suit against the rules; in August, a federal judge denied a request to stop judges from using the new court rules.

Mexico, for example, is on a path to implement validated pretrial assessment tools in every court in the state, but that has yet to happen and so is not reflected in New Mexico’s grade. An important accompaniment to this report are the profiled States to Watch, which discuss several of these cases in more detail.

Also, data in this report represent our best effort to collect information that is current and accurate. Readers are invited to provide more recent or comprehensive data that may have been overlooked and to submit corrections that can help make future analysis more accurate and meaningful by contacting us at [stateofpretrial@pretrial.org](mailto:stateofpretrial@pretrial.org).

# 3DAYS COUNT™

## Commonsense Pretrial

# AN UPDATE ON 3DAYS COUNT SITES

*Our nation's justice system allows for significant variation in policy and practice at the local level. Yet every county's pretrial system operates within a structure established by the state. 3DaysCount™ was created to support state-level changes that facilitate safer, fairer, and more effective local pretrial practice. This overview highlights steps our partners in 3DaysCount have been pursuing within this framework, helping to set a new national standard of pretrial justice.*

### Guam

In June 2016, the U.S. territory of Guam became the inaugural 3DaysCount site. Led by the Chief Justice of the Supreme Court—with system-wide participation that included the attorney general, the public defender, and legislators—Guam's 3DaysCount team developed three specific goals: ensure defense counsel at the earliest hearing that could result in pretrial detention, provide universal evidence-based pretrial assessment, and match pretrial conditions to each individual's assessment results. One year in, defense counsel is now present at first appearance and a pretrial assessment is conducted for every arrested person. Recognizing a pattern of over-supervision, the territory is currently refining its pretrial supervision services and conditions, continuing to educate judges, and revising policies to comport with best practices. Guam has also set out to improve its pretrial data collection and to use the data to understand and shape pretrial policies.



### Illinois

Illinois joined 3DaysCount with support from the state Supreme Court, the Administrative Office of the Illinois Courts (AOIC), and state representative Carol Ammons. Together, the team identified three overall 3DaysCount goals: restrict pretrial detention, after due process, to people who pose an unmanageable risk to public safety or of failing to appear in court; provide judges with additional safe, fair, and cost-effective options as alternatives to pretrial detention; and increase public safety.



In April 2017, the Illinois supreme court issued a Statewide Policy Statement for Pretrial Services. As Chief Justice Lloyd A. Karmeier noted, the statement is a guide for all trial courts and emphasizes that "Illinois pretrial principles and practices are founded upon the presumed innocence of the accused." In July, the court approved the creation of the Illinois State Commission on Pretrial Practices; participants will include representatives from all three branches of government, law enforcement, public defenders, and representatives of victims, among others.

These developments occurred within a larger context that included passage of statewide legislation that, among other things, establishes a clear presumption for release on the least restrictive non-financial conditions needed to provide reasonable assurance of public safety and court appearance and allows the Supreme Court to implement a pretrial assessment in judicial districts throughout the state. Also, in Cook County (Chicago), the site of ongoing litigation surrounding bail practices, the chief judge promulgated changes to the court rules that would limit bond amounts to each individual's ability to pay, replacing all bond judges and renaming the Central Bond Court as the Pre-Trial Division in the process.

## Connecticut



Governor Dannel Malloy's office signed on to the 3DaysCount campaign in February 2017. Within just a few months, the Connecticut legislature passed, and the governor signed, a bill establishing a clear presumption for non-financial release in most misdemeanor cases. Moreover, people who are in jail on financial bonds they cannot post for 14 days must be brought before the court for a bond review and the court "shall remove the financial conditions of release unless the court makes specific findings for why the financial conditions are needed."

This law promises to be a first step for pretrial reform in the state. In October, the Connecticut Sentencing Commission sent a delegation to New Jersey to study its transformation of the bail system. It also sponsored a day-long summit of about 150 judges, prosecutors, defenders, law enforcement, pretrial services, and other key justice system stakeholders to hear from other states that have been active in bail reform.

## Washington

Washington state committed to 3DaysCount in June 2017 through its Pretrial Reform Task Force. The Task Force, which has the support of judges from all levels of the state court system, has created professionally staffed subcommittees with broad stakeholder representation to study and make recommendations on three major areas: pretrial services, pretrial assessment, and data collection.



The 3DaysCount-related work in Washington builds upon local efforts in King, Spokane, and Yakima counties. Yakima County is a Smart Pretrial Demonstration site, Spokane recently developed its own pretrial assessment tool, and King County (Seattle) is home to Law Enforcement Assisted Diversion (LEAD), a program that helps prevent unnecessary arrests. All of these counties are represented on the Task Force.

*For more information about 3DaysCount, visit [pretrial.org/3DaysCount](http://pretrial.org/3DaysCount).*

## Overall Scores and Grading

The measures described above were converted into a point system that has been translated into a standard A-to-F grading system for clarity and ease of use. States were awarded points for each of the measures described in the first three columns below. A bonus point was added for any state that had both 100% of its jurisdictions using evidence-based

Pretrial Detention Rate		Use of Validated Pretrial Assessment		Functional Elimination of Money Bail		Bonus Point (for combination 100% pretrial assessment and elimination of money bail)		Overall Score & Grade
<10 = 2 pts	●	76% to 100% = 4 pts	●	100% = 1 pt	●	Yes = 1	●	7 pts = A
10 to 20 = 1 pt	◐	51% to 75% = 3 pts	◐	0% = 0 pts	○	No = 0	○	5-6 pts = B
21 & up = 0 pts	○	26% to 50% = 2 pts	◐					3-4 pts = C
		1% to 25% = 1 pt	◑					2 pts = D
		0% = 0 pts	○					0-1 pts = F

## Results By State

	Pretrial Detention Rate	Use of Validated Pretrial Assessment	Elimination of Money Bail	Bonus Point	Grade
Alabama	◐	○	○	○	F
Alaska	○	○	○	○	F
Arizona	◐	●	○	○	B
Arkansas	◐	○	○	○	F
California	◐	◑	○	○	D
Colorado	◐	●	○	○	B
Connecticut	◐	●	○	○	B
Delaware	-	○	○	○	I
Florida	◐	◑	○	○	D
Georgia	◐	○	○	○	F
Hawaii*	●	●	○	○	B
Idaho	◐	○	○	○	F
Illinois	◐	◐	○	○	C
Indiana	◐	○	○	○	F
Iowa	●	○	○	○	D
Kansas	◐	◑	○	○	D
Kentucky	◐	●	○	○	B

\*Results, scores, and grade have been changed to reflect more accurate data.

	Pretrial Detention Rate	Use of Validated Pretrial Assessment	Elimination of Money Bail	Bonus Point	Grade
Louisiana	○	⦿	○	○	F
Maine	●	○	○	○	D
Maryland	◐	◐	○	○	C
Massachusetts	●	○	○	○	D
Michigan	●	◐	○	○	C
Minnesota	●	⦿	○	○	C
Mississippi	◐	○	○	○	F
Missouri	◐	○	○	○	F
Montana	◐	○	○	○	F
Nebraska	◐	○	○	○	F
Nevada	◐	●	○	○	B
New Hampshire	●	○	○	○	D
New Jersey	◐	●	●	●	A
New Mexico	○	◐	○	○	D
New York	●	◐	○	○	C
North Carolina	◐	⦿	○	○	D
North Dakota	◐	○	○	○	F
Ohio	●	◐	○	○	C
Oklahoma	◐	○	○	○	F
Oregon	●	⦿	○	○	C
Pennsylvania	◐	⦿	○	○	D
Rhode Island	●	●	○	○	B
South Carolina	◐	○	○	○	F
South Dakota	◐	◐	○	○	C
Tennessee	◐	○	○	○	F
Texas	◐	⦿	○	○	D
Utah	●	●	○	○	B
Vermont	●	○	○	○	D
Virginia	◐	●	○	○	B
Washington	●	⦿	○	○	C
West Virginia	◐	○	○	○	F
Wisconsin	◐	◐	○	○	C
Wyoming	◐	○	○	○	F

Pretrial Detention Rate: < 10 = ● ; 10 to 20 = ◐ ; 21+ = ○  
 Pretrial Assessment: 76-100% = ● ; 51-75% = ◐ ; 26-50% = ◐ ; 1-25% = ○ ; 0% = ○  
 Eliminated Money Bail: 100% = ● ; 0% = ○  
 Bonus Point: Yes = ● ; No = ○

For detailed results, see Appendix.



pretrial assessment and had functionally eliminated the use of money bail (column 4). The points were then added to generate letter grades listed in the far right column.

### Summary of Findings

The good news is that this analysis shows 25% of people living in the United States now reside in a jurisdiction that uses a validated evidence-based pretrial assessment. Only four years ago, this figure was calculated as closer to 10 percent.<sup>13</sup> However, fewer than 3% of people living in this country live in a jurisdiction that has functionally eliminated money bail. Moreover, averaging the individual scores of all fifty states generates a national score of only 2.65—which earns the United States as a whole a D. This speaks volumes about the need for further improvement.

As noted earlier, only one state, New Jersey, received an A. This is because, in addition to having relatively low rates of detention and implementing validated pretrial assessments statewide, it has functionally eliminated money bond. New Jersey's efforts are discussed in more detail on page 4. Nine states (Arizona, Colorado, Connecticut, Hawaii, Kentucky, Nevada, Rhode Island, Utah, and Virginia) received Bs. Ten states earned Cs (Illinois, Maryland, Michigan, Minnesota, New York, Ohio, Oregon, South Dakota, Washington, and Wisconsin). In addition, there were 12 Ds and 17 Fs.

It is important to note that these scores are based upon current practice and do not reflect reforms initiated but not yet fully implemented. Several states have



### New York

STATE TO WATCH

The momentum to change pretrial detention practices in New York could perhaps be best encapsulated in the recently announced long-term plan to close Riker's Island. The infamous facility holds 80% of the city's inmates, most of whom have a pretrial status. Former Chief Justice Jonathan Lippman chaired the commission that developed the plan, and it has the support of Gov. Andrew Cuomo and New York City Mayor Bill de Blasio. Cuomo has also made changes to pretrial practices part of his Criminal Justice Reform Act, which would include the use of assessment tools and alternatives to detention. New York City is also home to several innovative pretrial programs, including community bail funds and holistic defender programs, and a Justice Reinvestment Initiative from the Bureau of Justice Assistance seeks to improve pretrial systems through data and process analyses across the state. The challenge for the state will be in finding common ground between New York City and upstate jurisdictions.



### Ohio

STATE TO WATCH

In Ohio, one of the states hit hardest by the opioid epidemic, jail overcrowding has brought the need for changes to pretrial release practices to the forefront. The County Commissioners' Association of Ohio and the Buckeye State Sheriffs' Association have called for a move away from bail schedules, a practice that keeps people needlessly locked up due to finances. An ad hoc committee formed by the Ohio Criminal Sentencing Commission has also recommended, among other changes, a move toward evidence-based release practices, data collection and analysis of all facets of the bail and pretrial system, and the right to counsel at initial appearance.

County-based initiatives support these moves. In Lucas County, implementation of the Laura and John Arnold Foundation Public Safety Assessment tool has resulted in an 18% reduction in the number of people incarcerated. Cuyahoga County, with support from the George Gund Foundation, is conducting data analysis of its jail populations to see if people are spending unnecessary time in jail. Ohio is also participating in the Stepping Up initiative, which seeks to reduce the number of people with mental illnesses involved in the criminal justice system.

grades that do not reflect important initiatives that PJI expects, in time, will yield significant improvements. These include states such as Alaska and New Mexico, both of which are profiled as States To Watch.

In six states besides New Jersey—Arizona, Connecticut, Hawaii, Kentucky, Rhode Island, and Utah—all residents live in a county that uses a validated, evidenced-based pretrial assessment to inform decisions about pretrial release and detention; all of these states received a B. In three other states—Colorado, Nevada, and Virginia—85-89% of residents live in a county using such a tool. Several other states are exploring or are in the planning stage of statewide implementation of pretrial assessments. Again, several of these states are profiled as States to Watch.

Additionally, several jurisdictions are taking active measures to deflect individuals, particularly those with behavioral health issues, away from the justice system and into programs that can more adequately meet their needs. LEAD (Law Enforcement-Assisted Diversion) is a pre-booking diversion program that moves individuals charged with low-level drug and prostitution offenses into a case management treatment model. Stepping Up is a national initiative to reduce the number of people with mental health issues in jails. While the results of this work should be reflected in the detention rate score, it is also worth explicitly acknowledging such efforts.

**Beyond The Measures**

High detention rates, limited implementation of evidence-based

**STATE TO WATCH**



**Texas**

Harris County (Houston) is at the center of one of the nation’s largest legal challenges to money bail. A federal judge has already granted a preliminary injunction to plaintiffs, who represent people charged with misdemeanors locked up because they could not post cash bail, and has ordered that all people charged with misdemeanors be released within 24 hours on personal bond if they have not already bonded out.

Despite its reputation for “lock’em up” criminal justice, Texas is home to bi-partisan efforts to emphasize prudent and legally-backed bail practices. Groups on both sides of the political spectrum—such as the conservative Right on Crime initiative and liberal Texas Criminal Justice Coalition—have found common ground on issues such as bail reform as a means to reducing jail populations and spending public resources prudently. While a bipartisan bill supported by the Texas Judicial Council to reform bail practices ultimately failed to pass this session, Texas has enjoyed success from its other smart-on-crime measures. Texas has its lowest crime rate since 1968, saved \$2 billion in new prison construction costs, and closed three prisons.

**STATE TO WATCH**



**Utah**

Following reports from the Utah Judicial Council and the Office of the Legislative Auditor General showing that judges lacked sufficient information to make fair pretrial decisions, the state is now rolling out the Laura and John Arnold Foundation’s Public Safety Assessment tool to make more information available to judges. The new program is expected to go live in November 2017, and will be followed by a Harvard University study to see how the program is working. After a 2015 study of Salt Lake County, the state’s most populous jurisdiction, there are also plans to improve the diversion of people with behavioral health issues from the criminal justice system through the Stepping Up initiative, and also improve data collection practices.

Chief Justice Matthew Durrant has been an advocate of recognizing the evolving abilities of the courts, stating, “One overarching change that we have made in our court system over the past twenty years is that rather than simply being guided by...tradition, anecdote, or ‘gut instinct,’ we are guided by research, data, and evidence about what works.”<sup>1</sup>

1. Chief Justice Matthew Durrant, 2017 State of the Judiciary (Utah), January 23, 2017.

pretrial assessments, and continued use of money bail are not just numbers. These figures represent hundreds of thousands of people across the country being detained even though they do not present a risk to court operations or public safety. Research has also shown that keeping such individuals locked up for as few as three days can have dangerously destabilizing effects.<sup>14</sup> They risk losing their homes, their jobs, and their families. Moreover, unnecessary pretrial detention raises questions of whether public resources are being used effectively.

These numbers also represent an erosion of the values of our legal system. Pretrial detention compromises the presumption of innocence, inhibits the ability of people to develop a legal defense, and coerces men and women to plead guilty so they can get out of jail faster, even when they may have a defensible case. It also exacerbates the problem of mass incarceration. For example, people who are detained receive longer jail and prison sentences than similarly-situated people who were released before trial.<sup>15</sup>

Holding such a large percentage of individuals on bonds they cannot post has become so commonplace that it is hard to appreciate that many are being detained in violation of the Constitution.<sup>16</sup> As noted earlier, detention is supposed to be the “carefully limited exception” to the custom of pretrial release, occurring only with due process protections. Conditions of release are to be tailored to the individual circumstances of each person, and designed to meet the goals of court appearance and public safety.<sup>17</sup> What these numbers show is that for far too many people in too many courts in this country, the promise and protections of the justice system have not yet materialized.

**“What these numbers show is that for far too many people in too many courts in this country, the promise and protections of the justice system have not yet materialized.”**

## How to Use These Results

The scoring and grades presented in this report are intended to be the start of a conversation, not the end. They are meant to encourage states to ask, “Given where we are, how can we do better?”

It is important to emphasize that neither states with high grades nor those with low grades should view these results as a reason to stop improving or to not even try. Even states that earned top grades have room to improve; those that earned a C, D, or F can find encouragement and guidance from states that have already begun these critical efforts.

States may wish to turn to PJI’s quarterly publication, *Where Pretrial Improvements are Happening*, for insights on how and where to begin (or continue) this work.

This document provides up-to-date information on activities categorized by changes in practice, judiciary-led change, executive branch brand-led change, community and grassroots-led change, legislative change, and change through litigation. The work described runs the gamut from small counties seeking solutions to crowded jails to multi-state philanthropic initiatives aimed at creating lasting, systemic improvements.

State leaders are also encouraged to consider adding their state to 3DaysCount, a nationwide effort to set a new national standard for pretrial justice by working at the state level to reduce unnecessary arrests that destabilize families and communities; replace discriminatory money bail with practical, assessment-based decision-making; and restrict detention (after due process) to the small number of people who are not ordered released by the court. See *An Update on 3DaysCount Sites* on page 9 for highlights of steps currently being taken by states already associated with 3DaysCount.

## References

1. *Questions About Pretrial Assessment*. Report. Pretrial Justice Institute. October 3, 2017. [www.university.pretrial.org/viewdocument/questions-about-pretrial-assessment](http://www.university.pretrial.org/viewdocument/questions-about-pretrial-assessment).
2. See, for example, a curated list of pretrial detention research at [www.prisonpolicy.org/research/pretrial\\_detention/](http://www.prisonpolicy.org/research/pretrial_detention/).
3. Timothy Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, National Institute of Corrections, 2014.
4. *U.S. v. Salerno*, 481 U.S. 739 (1987).
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6. *Stack v. Boyle*, 342 U.S. 1 (1951).
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8. Office of Justice Programs. Bureau of Justice Statistics. *Jail Inmates at Midyear 2014*. By Todd D. Minton and Zhen Zeng. NCJ 248629. 2015.
9. *Jail Inmates at Midyear 2014*. Minton and Zeng.
10. Office of Justice Programs. Bureau of Justice Statistics. *Census of Jails 2013*. Data set available at [www.bjs.gov/index.cfm?ty=dcdetail&iid=254](http://www.bjs.gov/index.cfm?ty=dcdetail&iid=254).
11. Non-BJS sources include—Alaska: 2015 Alaska Criminal Justice Commission Justice Reinvestment Report; Connecticut: June 2013 Criminal Justice Policy & Planning Division Monthly Indicators Report from the Connecticut Statistical Analysis Center; Hawaii: State of Hawaii Department of Public Safety 2013 Annual Report; Rhode Island: Rhode Island Department of Corrections Planning and Research 2013 Fiscal Year Annual Population Report; Vermont: Average Monthly Detained Counts for July 2013.
12. Washington, DC has characteristics similar to other major cities, not states that are more diverse in density and population. For that reason, including its data with that of states can be misleading.
13. *Developing a National Model for Pretrial Risk Assessment*. Report. The Laura and John Arnold Foundation. 2013. 2.
14. *Pretrial Criminal Justice Research*. Report. The Laura and John Arnold Foundation. 2013.
15. *Pretrial Criminal Justice Research*, 2013.
16. U.S. Department of Justice. Office of Public Affairs. “Department of Justice Files Statement of Interest in Clanton, Alabama, Bond Case.” News release, February 13, 2013. Accessed October 17, 2017. <https://www.justice.gov/opa/pr/departments-justice-files-statement-interest-clanton-alabama-bond-case>.
17. *Stack v. Boyle* (November 5, 1951).

### **PJI Publications referenced in this report:**

*Improving Pretrial Justice in New Jersey*

*Questions About Pretrial Assessment*

*Where Pretrial Improvements are Happening*

To access these and other useful resources, visit the University of Pretrial at [www.pretrial.org/up/](http://www.pretrial.org/up/)

# Appendix

	Pretrial Detention Rate		Use of Validated Pretrial Assessment		Elimination of Money Bail		Bonus Point		Overall	
	Rate per 10,000 residents	Score	% Living in county using assessment	Score	% Living in county that has eliminated money bail	Score	Assessment used, no money	Score	Score	Grade
Alabama	19.4	1	0	0	0	0	No	0	1	F
Alaska	20.1	0	0	0	0	0	No	0	0	F
Arizona	16.7	1	100	4	0	0	No	0	5	B
Arkansas	13.1	1	0	0	0	0	No	0	1	F
California	11.7	1	2.9	1	0	0	No	0	2	D
Colorado	10.5	1	87.4	4	0	0	No	0	5	B
Connecticut	10.2	1	100	4	0	0	No	0	5	B
Delaware	n/a	n/a	0	0	0	0	No	0	0	I
Florida	17.6	1	8.9	1	0	0	No	0	2	D
Georgia	19.5	1	0	0	0	0	No	0	1	F
Hawaii*	6.8	2	100	4	0	0	No	0	6	B
Idaho	11.5	1	0	0	0	0	No	0	1	F
Illinois	10.8	1	46.2	2	0	0	No	0	3	C
Indiana	15.7	1	0	0	0	0	No	0	1	F
Iowa	9.9	2	0	0	0	0	No	0	2	D
Kansas	14.1	1	20.1	1	0	0	No	0	2	D
Kentucky	16.1	1	100	4	0	0	No	0	5	B
Louisiana	29.9	0	8.4	1	0	0	No	0	1	F
Maine	5.1	2	0	0	0	0	No	0	2	D
Maryland	12.8	1	27.6	2	0	0	No	0	3	C
Massachusetts	7.7	2	0	0	0	0	No	0	2	D
Michigan	6.8	2	27.2	2	0	0	No	0	4	C
Minnesota	7	2	22.3	1	0	0	No	0	3	C
Mississippi	17.7	1	0	0	0	0	No	0	1	F
Missouri	14.6	1	0	0	0	0	No	0	1	F
Montana	12.8	1	0	0	0	0	No	0	1	F
Nebraska	13.1	1	0	0	0	0	No	0	1	F
Nevada	17.9	1	89.1	4	0	0	No	0	5	B
New Hampshire	8.4	2	0	0	0	0	No	0	2	D
New Jersey	14	1	100	4	100	1	Yes	1	7	A
New Mexico	21.8	0	32.5	2	0	0	No	0	2	D
New York	9.1	2	43.2	2	0	0	No	0	4	C
North Carolina	15.5	1	10.4	1	0	0	No	0	2	D
North Dakota	11.5	1	0	0	0	0	No	0	1	F
Ohio	9.1	2	29.3	2	0	0	No	0	4	C
Oklahoma	13.4	1	0	0	0	0	No	0	1	F
Oregon	8	2	19.5	1	0	0	No	0	3	C
Pennsylvania	15.9	1	9.6	1	0	0	No	0	2	D
Rhode Island	7.4	2	100	4	0	0	No	0	6	B
South Carolina	17.5	1	0	0	0	0	No	0	1	F
South Dakota	13.2	1	34.3	2	0	0	No	0	3	C
Tennessee	16.4	1	0	0	0	0	No	0	1	F
Texas	18	1	16.5	1	0	0	No	0	2	D
Utah	9.3	2	100	4	0	0	No	0	6	B
Vermont	7	2	0	0	0	0	No	0	2	D
Virginia	13.8	1	85.3	4	0	0	No	0	5	B
Washington	9.1	2	3.4	1	0	0	No	0	3	C
West Virginia	11.7	1	0	0	0	0	No	0	1	F
Wisconsin	10.1	1	25.7	2	0	0	No	0	3	C
Wyoming	16.1	1	0	0	0	0	No	0	1	F

\*Results, scores, and grade have been changed to reflect more accurate data.