



**SAFETY+JUSTICE**  
CHALLENGE



# Strategies for Pretrial Justice Reform

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# Decision Points

I. Arrest

II. Charging

III. Pretrial release/detention



The MacArthur Foundation has identified seven core decision points where change strategies need to be developed for the Safety and Justice Challenge. This presentation focuses on the first three of those points

At each of the decision points listed here, there are steps that jurisdictions have taken to triage individuals encountered by the justice system to provide them with the most appropriate, effective, and cost-efficient placement, consistent with public safety, due process and the management of justice system resources, including, especially, the use of the most costly system resource – a jail bed. We hope that this discussion will help you prioritize the decision points you will be focusing on for your plan.

## Did your data show...

- |   |                     |                    |
|---|---------------------|--------------------|
| <input type="checkbox"/> Arrests for low-risk individuals and/or low-level offenses?                  | <a href="#">YES</a> | <a href="#">NO</a> |
| <input type="checkbox"/> Arrests tied to acute mental health or substance abuse needs?                | <a href="#">YES</a> | <a href="#">NO</a> |
| <input type="checkbox"/> Many arrestees being released at booking?                                    | <a href="#">YES</a> | <a href="#">NO</a> |
| <input type="checkbox"/> Many arrestees being released on their own recognizance at first appearance? | <a href="#">YES</a> | <a href="#">NO</a> |
| <input type="checkbox"/> Significant racial and ethnic disparities at point of arrest?                | <a href="#">YES</a> | <a href="#">NO</a> |



This information, which may have been part of your data collection or system mapping, represents some “red flags” that you may want to explore your arresting practices as drivers of jail. For each of these areas, did your data raise a red flag?

Show of hands for each area: Yes, No, or Unsure

## Citation

- ABA says use for minor offenses
- Laws on use of citations



The ABA says that law enforcement should issue citations in lieu of arrest for persons charged with non-violent misdemeanors if the individual's identity is established to the officer's satisfaction, a risk assessment shows person is likely to appear in court and be safe, and the individual signs the citation. When a law enforcement officer fails to issue a citation for an individual meeting these criteria, making a custodial arrest instead, the officer should indicate the reasons in writing (ABA Standard 10-2.2)

The following four states, all represented by Safety and Justice Challenge sites, provide examples of how state laws define the use of citations.

California: Persons charged with misdemeanors, with the exception of several offenses, such as domestic violence, are to be released on citation by the officer or his/her supervisor, unless the person demands to be taken immediately before a magistrate. CA PC Sec. 853.6

Maryland: Maryland law requires the use of citations for any misdemeanor that does not carry a penalty of imprisonment, for most misdemeanors that carry a maximum penalty of 90 days, and for misdemeanor possession of marijuana. Cr. Pr. Law Sec. 4-101.

## Risk Assessment & Citations

- The Proxy Tool:
  - Current age
  - Age at first arrest
  - # of prior adult arrests
- Arnold Foundation/IACP



The Proxy tool has been tested to be effective in identifying risks to re-offend. It is meant to be a quick and easy way to identify the low risk individuals who can be effectively dealt with using minimal system resources. It has just the three factors, listed on the slide.

The police department in Eau Claire, Wisconsin uses the proxy tool to help officers identify good candidates for citation release. They get the answers to the three questions through a criminal history check done in the field. Except for defendants charged with domestic violence, assaults, any many felonies, those who show as low risk are given citations unless:

- (1) The accused does not have proper ID
- (2) The accused appears to represent a danger to himself or another, or a threat to property
- (3) The accused cannot show sufficient evidence of ties to the community
- (4) The accused has previously failed to appear in court or failed to respond to a citation
- (5) Arrest or detention is necessary to carry out legitimate investigative action in accordance with law enforcement policies.

The Laura and John Arnold Foundation is currently working with the International Association of Chiefs of Police to gather information on how police departments

## CASE STUDY – WASHINGTON, D.C.

### Citations

- Designation of release authority
- Targets misdemeanors
- Pretrial Services Agency assists
- Arresting officer or supervisor decides



In the District of Columbia, unlike in many jurisdictions, there is no explicit statutory authority for the police to issue citations. However, the Chief Judge of the DC Superior Court does have the statutory authority to designate police officials to act as clerks of the court for the purpose of issuing citations. With that authority granted, the Metropolitan Police Department has issued a General Order outlining the procedures for issuing citations. Those procedures limit citations to misdemeanors, excluding domestic violence.

The District of Columbia Pretrial Services Agency interviews the defendant, verifies the address, conducts a criminal history check, and makes a recommendation regarding the issuance of a citation. The officer or station clerk makes the final decision.

## Law Enforcement Diversion

- King County, WA
  - LEAD program
- Montgomery County, MD
  - Deflection program
- CIT



Being on the front lines of the criminal justice system, law enforcement officers are perfectly positioned to play an important triage role. Just because they encounter an individual who could be charged with a criminal offense does not necessarily mean that they should do so. At least two police departments have developed strategies to provide law enforcement with options other than bringing an individual into the criminal justice system, and multiple jurisdictions have developed alternatives for dealing with persons with mental illness.

Law Enforcement Assisted Diversion (LEAD) is program that targets low level drug and prostitution crimes in certain neighborhoods in King County, Washington. Instead of arresting those individuals charged with such crimes, the program allows law enforcement officers to re-direct them to community services, such as housing, healthcare, job training, treatment, and mental health support. The goals of LEAD are to reduce the harm caused by these defendants to both themselves and to the community, and to preserve system resources for more serious cases. It provides participant with immediate case management services.

Montgomery County, MD is set to begin a “deflection” program, which would deflect from the criminal justice system eligible individuals with chargeable offenses who have substance use disorders, where the substance abuse problem may have led to the incident. Police officers will use a drug screen (an 11-question tool) developed by

## Law Enforcement Practices

- Policies on low level offenses
- Emphasis on community policing



Law enforcement can make policy decisions regarding the enforcement of laws relating to low level offenses. Police departments that follow “stop and frisk” practices, made famous in New York City, make numerous arrests for low level offenses. Other departments are under pressure to make arrests for low level offenses as a way to raise money for the jurisdiction through the imposition of fines. But taking different approaches to low level offenses, such as through emphasizing building community relations, leads to fewer arrests. Many police departments put great effort into working with members of the community as full partners. This effort can be undermined, as many departments are finding out, through an emphasis on low level offenses.



## Benefits of Arrest Alternatives

- Fewer jail bookings & lower jail populations
- More efficient use of law enforcement resources
- Less disruption in the lives of those encountered by law enforcement
- Greater opportunities for those with serious issues to address them
- Healthier communities



## Did your data show...

- ☐ Delays between arrest and filing of charges? YES NO
- ☐ Frequent down-charging after initial appearance, which impacted eligibility for release from jail? YES NO
- ☐ Cases being accepted for prosecution, but then charges being dismissed? YES NO
- ☐ Significant racial and ethnic disparities at the charging decision point? YES NO



## II. CHARGING

- Common practice
  - Prosecutor screens cases after initial bail-setting hearing
- Alternative practice
  - Prosecutor screens cases before initial bail-setting hearing



## Purpose of Early Charging

- Identify and weed out, before they enter the court system, those cases not likely to result in conviction
- Assure the charge considered at the bail hearing is the charge for which defendant will be prosecuted
- Identify those defendants who might be suitable for pretrial diversion or specialty court placement



This early screening should be done by an experienced prosecutor, one who has the ability to identify, at the very earliest point in the life of a case, where the case would likely end up anyway. That way, a case that may have lingered in the system for 6 or 9 months, perhaps with the defendant in jail for all or a good part of that time, is disposed of immediately.

Having a prosecutor review a case before the initial appearance also provides an opportunity, at the earliest point in the court process, to identify those defendants who might be good candidates for placement in a pretrial diversion program or in a specialty court.

Data show that 23% of felony cases coming into the system nationwide are ultimately dismissed and 8% are ultimately placed in diversion programs. With the average length of stay in jail of 12 days for those defendants who are released during the pretrial period, and 121 days for those who are not, the earlier that the decisions to dismiss or divert can be made, the greater the savings in the use of jail bed space.

## Benefits of Early Charging

- Reduced jail population
- Reduced court caseload
- Reduced caseload of prosecutors and defense
- Greater attention to serious cases



## CASE STUDY – WASHINGTON, D.C. Early Charging Decision

- Senior prosecutor screens all cases before initial bail hearing
- 20% of all arrests screened out




In DC, senior prosecutors from the U.S. Attorneys Office (for felony and misdemeanor cases) and from the Attorney General's Office (for traffic and ordinance violations) screen all cases before the initial bail hearing. Doing so allows them to screen out about 20% of the cases before they ever make it to court. This is an average of one out of every five arrestees every day.

## Did your data show...

- ☐ Low- and moderate-risk individuals in the jail, as determined by a risk assessment? [YES](#) [NO](#)
- ☐ Individuals remaining in jail on low bond amounts? [YES](#) [NO](#)
- ☐ Detention of high-need individuals with low-level offenses? [YES](#) [NO](#)
- ☐ High rates of incarceration for pretrial misconduct and failure to appear? [YES](#) [NO](#)
- ☐ Significant racial and ethnic disparities at point of arrest? [YES](#) [NO](#)



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## Goals of Pretrial Risk Assessment

		Risk Level	
		Lower/Medium	Higher
Location	Community	Yes <u>Low</u> : ROR or unsecured bond <u>Medium</u> : Release w/non-financial conditions	No
	Jail	No	Yes <u>High</u> : Detention w/o bond, following due process



What we ultimately hope to achieve with risk assessment is to identify those defendants who can be safely released and make sure that they are released right away, and those few defendants who pose such substantial risks that they need to be detained.

The ABA Standards, as well as many state statutes and the federal bail law, state that there is a presumption for release on personal recognizance or unsecured bond, and that presumption must be overcome before the court can impose conditions of release. When the court does impose conditions, they are required to be the least restrictive needed to provide reasonable assurance of public safety and court appearance. About half the states have laws (constitutions and/or statutes) that allow the court to detain without bond certain categories of defendants. Many of these laws are poorly written, in that they are exclusively charge-based, and don't provide the procedural protections that are in place in laws (the federal and DC detention statutes) that have been challenged and upheld by the highest courts in those jurisdictions. The ABA Standards, as well as the federal and DC statutes, state that, before ordering a defendant detained without bond, the court must find, by clear and convincing evidence, that there are no conditions or combination of conditions that can reasonably assure public safety and court appearance. About half the states have a right to bail clause in their constitutions. In those states, the constitutions would need to be amended to allow for detention. This is a major



## Guidance on Decision Making

Risk Level	Less Serious Misdemeanor	More Serious Misdemeanor	Less Serious or Non-Violent Felony	More Serious or Violent Felony
Lower	ROR with Court Date Reminder	ROR with Court Date Reminder	ROR with Court Date Reminder	Enhanced Supervision (if released) or detention
Medium	Basic Supervision	Basic Supervision	Basic Supervision	Enhanced Supervision (if released) or detention
Higher	Basic Supervision	Enhanced Supervision	Enhanced Supervision	Enhanced Supervision (if released) or detention



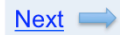
The matrix on this slide is an example, or template, that a jurisdiction's stakeholders can use when developing their own. It shows the matrix features that many other jurisdictions have successfully used. At a minimum for any given jurisdiction, a multi-agency stakeholder team consisting of judges, prosecutors, defense attorneys, directors of staff who perform the pretrial services functions of risk assessment and supervision, sheriff's office/jail executives, law enforcement executives, and other relevant justice system decision-makers should convene to develop its own matrix. The matrix integrates the defendant's level of pretrial risk to public safety and of failing to appear (rows) with the defendant's current charges (columns). The presumptive type of pretrial release from jail and the conditions of release, or presumptions for pretrial detention, are shown in the cells of the matrix.

A pretrial release and detention guidelines matrix/praxis enables a jurisdiction to integrate all of the following:

- An actuarial pretrial risk assessment tool
- The law (state constitution, statute, and case law; federal case law)
- National pretrial standards (e.g., ABA pretrial standards)
- Research on outcomes associated with different types of pretrial release and the effects of pretrial detention and supervision on defendants' behavior
- The quantity and quality of the jurisdiction's pretrial services and jail resources
- Local values, policy preferences, and political concerns

## Pretrial Diversion

- Risk/needs responsiveness
- Many limited to first time offenders or low level offenses
- Prosecution put on hold while defendant participates in program
- Upon completion of program, charges dropped



Since one of the main goals of pretrial diversion is to reduce the likelihood of recidivism, diversion programs at first must assess the risk of recidivism so that they can be assure to address it. One tool that is used in many jurisdictions to assess likelihood of recidivism is the Proxy Tool, as described earlier. While needs assessments should not factor into pretrial release decisions, they are very important in diversion settings. Diversion is designed to address any needs that may have contributed to the individual being arrested in the first place, so it is important to identify those needs. There are several validated needs assessments tools available, such as those in the Level of Service Inventory (LSI) family.

Eligibility for entrance into a diversion program can be stated in statute, or can be a matter of policy by the local prosecutor. While in many diversion program, eligibility is limited to first time offenders or those charged with low level offenses, there are several that aim higher – with repeat offenders or non-violent felony cases. Even in those jurisdictions that limit eligibility to lower level offenses, given that at least two-thirds of all criminal charges are for misdemeanors, there is significant opportunity for the expansive use of diversion.

Those who agree to the terms of diversion, which should be done only after consultation with an attorney, have their cases put on hold while they participate in treatment or some other intervention program. If they successfully complete

# Pretrial Diversion

- **Benefits of Diversion**

- Address underlying issues that lead to recidivism
- Avoid collateral consequences of criminal conviction

- **Case Study: Washington, DC**

- Deferred Prosecution
- Deferred Sentencing



## Pretrial Supervision

- Moderate & higher risk defendants
- Conditions
  - Check ins
  - Substance abuse testing/treatment
  - Stay away
  - Curfew
  - Electronic monitoring
- Court date reminders



As discussed earlier, jurisdictions should be using empirically derived pretrial risk assessment tools to identify the risk levels of individual defendants. It does little good, however, to identify those who do pose some risks without having the means to manage those risks. The way to manage those risks is through pretrial supervision.

Research has made clear that supervising low risk defendants does nothing to improve their already very high rates of success on pretrial release. The only thing that happens is that many violate their conditions of release – conditions that were unnecessary to begin with – and then are jailed for the violation. Recent research from the Arnold Foundation has also shown that moderate and higher risk defendants do have better outcomes when supervised.

The conditions can include having the defendant check in with the system on a regular basis, either in person or through some other means, undergo substance abuse testing and, if needed, treatment, stay away from a particular individual or a particular location, observe a curfew, or be monitored electronically.

Studies in several different jurisdictions have found that a very effective way to reduce the incidence of failure to appear is to simply remind defendants about their upcoming court dates.

## Benefits of Supervision

- Allows for safe release of moderate and higher risk defendants
- Substantially less expensive than jail



## CASE STUDY – WASHINGTON, D.C.

- Pretrial Supervision
  - General
  - High Risk
  - Special Populations
- Results
  - 80% released
  - 91% arrest free
  - 90% appeared



The D.C. Pretrial Services Agency coordinates two Pretrial Diversion opportunities. For both of these, the Agency performs the initial screening of the defendant's eligibility for placement, and then monitors performance in the program. The first Pretrial Diversion opportunity is the Deferred Prosecution Agreement. In this one, if the defendant successfully completes program requirements, usually community service, the charges are dropped. For the second one, the Deferred Sentencing Agreement, the defendant agrees to plead guilty, but if the defendant complete the program requirements, the guilty plea is withdrawn and charges are dismissed.

As to Pretrial Supervision, about half of defendants are released to the agency's General Supervision program. These are typically defendants who are assessed as moderate risk. The higher risk defendants are placed in the agency's High Risk Supervision program, which involves an increased level of supervision through frequent contact, regular drug testing, and location monitoring. A Specialized Supervision Unit is geared for defendants with serious mental health or developmental issues.

## DISCUSSION

What factors (eg., resources, law, culture) influence the extent to which these practices are available in your jurisdictions?

In what ways can these factors be addressed?





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