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Strengthening Pretrial Justice:

A Guide to the Effective Use of Indicators

Red Regional para la Justicia Previa al Juicio América Latina

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INTRODUCTION

In recent years, many Latin America countries undertook extensive reforms of their criminal justice systems, shifting from an inquisitorial or mixed system of justice to an adversarial one. A key aim of the reforms is the strengthening of due process rights and the presumption of innocence.

The presumption of innocence has at least three important and complementary implications. First, the onus to demonstrate guilt rests with the accuser – the state in the form of the police and prosecution – so that accused persons are deemed innocent until proven guilty in a court of law. Second, arrestees and accused persons have the right not to be presented to the media as "criminals." Third, the use of pretrial detention should be an exceptional measure: any deprivation of liberty before a finding of guilt must be objectively justified and should be of the shortest possible duration.

When courts impose pretrial restrictions or "cautionary measures" to ensure accused persons stand trial, do not interfere with the administration of justice, and do not endanger public safety, these should be the least restrictive possible for the accused. Such restrictions, including pretrial detention, should never be – even implicitly – a form of punishment.

Numerous studies produced by members of the Latin American Network for Pretrial Justice[1] – a consortium of civil society organizations engaged in research, advocacy, and the provision of technical assistance to improve and rationalize Latin America's pretrial detention regimes – demonstrate that pretrial detention is grossly overused throughout the region.[2]

Evaluating the implementation and impact of Latin America's criminal justice reforms can take many forms. Given the overarching aspirations of the reforms, it is crucial to measure their impact on the presumption of innocence. To this end, the Latin American Network for Pretrial Justice developed a conceptual framework with which to design measures of the use and impact of pretrial detention. Properly applied, such measures can provide usable information to policymakers and criminal justice officials interested in minimizing the excessive and arbitrary use of pretrial detention, as well as the concern that accused persons who pose a credible risk of interfering with the criminal justice process or to public safety, are released pretrial.

This Guide on the effective use of pretrial justice indicators builds on the aforementioned framework and provides detailed descriptions of indicators and measurements which influence the manner in which pretrial detention is used in a jurisdiction. Every indicator in this Guide is described in easy-to-understand language, including how it may best be used in practice.

The trajectory of criminal justice reform varies by country, strongly influenced by factors such as crime levels and the resources available to the criminal justice system and its institutions. Consequently, every indicator described in this Guide should be contextualized and, if

1 *Red Regional para la Justicia Previa al Juicio América Latina,* http://redjusticiaprevia.com/.

2 *Prisión Preventiva en América Latina. Catálogo de publicaciones. 2014. Red Regional para la Justicia Previa al Juicio Amér*ica Latina. See: http://redjusticiaprevia.com/producto/prision-preventiva-en-america-latina-catalogo-de-publicaciones-2014/.

necessary, adapted to meet the needs of the local jurisdiction in which it is used. The Guide is not a handbook which needs to be followed precisely in all cases, but rather, as the name implies, a guide to inform the development and implementation of appropriate pretrial measurements and indicators at the national or local level.

There are a number of reasons why policymakers and criminal justice operators should find the ongoing measurement of their system's pretrial justice performance advantageous. Good measurement allows for a sophisticated understanding of whether the criminal justice reforms are achieving their objectives in respect of pretrial processes and the presumption of innocence. If this is not the case, suitable interventions can be designed to improve the direction of the reforms. Any public policy has a much greater chance of success if designed with up-to-date and accurate information at hand.

In its seminal 2013 report on the use of pretrial detention in the Americas, the Inter-American Commission on Human Rights called on Member States to establish indicators that set measurable benchmarks related to the reasonable use of pretrial detention. Moreover, the commission called on states to produce and periodically publish statistical information about pretrial detainees, and use such information to implement public policies aimed at guaranteeing the application of international standards pertaining to the use of detention.[3]

The indicators in this Guide help elucidate the performance of criminal justice institutions affecting pretrial justice processes and how these, in turn, affect the functioning of the justice system as a whole. The indicators are therefore a tool for building constructive inter-agency dialogue to improve the overall performance of the criminal justice system. Moreover, pretrial justice indicators, properly analyzed and disseminated, empower citizens in their understanding of the justice system's performance. This, in turn, should heighten public confidence and trust in the state and its criminal justice agencies.

3 *Report on the use of pretrial detention in the Americas.* 2013. Inter-American Commission on Human Rights, pp. **131-132**./producto/prision-preventiva-en-america-latina-catalogo-de-publicaciones-2014/.

SECTION 1:
THE IMPORTANCE OF MEASURING PRETRIAL JUSTICE

Of all aspects of pretrial justice, the one with the most severe consequences for society and individuals is pretrial detention—the practice of detaining accused persons pending trial or the finalization of their trial. Detention has a severe and lasting adverse impact. The loss of freedom jeopardizes an individual's family, health, home, job, and community ties. The decision to detain a person accused but not convicted of a crime, whether an arresting officer, prosecutor, or judicial officer makes the decision, is therefore a grave one.

The nominal intention of pretrial detention is to ensure an accused person appears at trial. By a wide margin, even excluding the cost of constructing adequate detention facilities, it is the most expensive means of accomplishing this goal. Not all pretrial detention is irrational or unlawful, however. Persons who present a genuine risk of flight or of endangering witnesses or the community should be detained before trial, in the absence of reasonable alternatives. Applied properly and sparingly, pretrial detention plays an important role in a criminal justice system that balances public security and defendants' rights.

As detention centers grow crowded and conditions deteriorate, costs to society mount. These centers become dangerous breeding grounds of future criminality and corruption, and also put detainees at risk for a range of health problems. Those who spend substantial time in pretrial detention may be acquitted at trial, yet recent studies show that longer periods of pretrial detention increase the risk that detainees will offend after their release, or re-offend, and the effect does not depend on conviction. In many jurisdictions pretrial detainees are not confined separately from sentenced convicts. Consequently, defendants—typically young men charged with relatively minor offenses—live together with serious and hardened convicted criminals. Such mixing heightens the risk of abuse—especially where juveniles are also mixed with adults, or women with men—and has a criminogenic effect.

Many people currently detained in the world should be released. Most pretrial detainees pose no threat to society. Many of those held in detention will have their charges withdrawn due to a lack of incriminating evidence, while others will be acquitted at trial. Still others will be found guilty of minor, non-violent offenses for which imprisonment is inappropriate or for which the maximum custodial sentence is less than the time they spent in pretrial detention.

Even short periods in detention can have lingering consequences. Days of absence can threaten jobs, and put families in financial difficulties for months or years. Multiplied by thousands of detainees, the costs can become a drag on tax revenue, and a brake on development.

The excessive use of pretrial detention undermines public security by substantially contributing to prison overcrowding. In Latin America, there are some 550,000 pretrial detainees, while prisons are overcrowded by 390,000 prisoners. Reducing the number of pretrial detainees by half would significantly ameliorate the region's prison-crowding problem. Prison crowding complicates efforts to rehabilitate incarcerated offenders, resulting in higher recidivism rates.

Informed policymakers are aware that longer periods of pretrial detention lead to lost earnings, broken homes, and damaged communities, aggravating some of the underlying causes of crime in fragile communities. They understand the need to eliminate the avoidable costs the excessive and arbitrary use of pretrial detention generates—such as prison violence, recidivism,

and the spread of communicable disease. Yet policymakers are responsible for ensuring laws and policies are in place to prevent accused persons who pose credible risks of interfering with the criminal justice process (such as failing to stand trial) or endangering public security from doing so. They also must preserve judicial independence and promote efficiency of the prosecution and police. In short, they need to achieve a balance among a number of factors to ensure the system is performing optimally.

But how do decision-makers obtain a more informed picture of how the pretrial justice system is performing with respect to a key set of functions? And how can governmental actors use these measures as a basis for managing the system's performance in an efficient way while respecting important principles such as judicial independence, due process, and prosecutorial discretion? To implement good practices, a crucial first step is to gain a better understanding of the nature of the problem underpinning the less-than-optimal use of both pretrial detention and pretrial release.

This guide proposes a methodical approach whereby empirically based indicators are developed, refined, and deployed to identify exemplary and problematic practices. This will empower policymakers and justice system managers to promote the former and improve the latter—and measure changes in performance over time and between places.

SECTION 2: PRINCIPLES OF INDICATOR DESIGN [4]

To improve pretrial detention practices requires knowledge and understanding of how and why the criminal justice system is not operating in the way it should. Promoting this understanding requires indicators such as tracking a particular measure or measures over time that can help illustrate whether the system is making progress or encountering challenges. When policymakers, managers, and frontline personnel are conscious of these measures and use them to inform their practices, indicators serve the critical function of motivating and shaping performance toward a desired set of outcomes. To be effective, indicators must therefore measure things that are relevant to the concerns of criminal justice policymakers.

A common indicator provides an example to illustrate the limitations and possibilities of indicators. The proxy indicator most widely used to measure changes in the use or volume of pretrial detention is *the proportion of all prisoners who are pretrial detainees*. Changes in this measure are always ambiguous. An increase in the proportion of prisoners who are pretrial detainees could indicate a real increase in the number of pretrial detainees, a decrease in the number of sentenced prisoners, or both. Indicators are frequently proxies of the outcomes or concepts they measure. To varying degrees, indicators are simplified to make it possible to measure them easily, frequently, and at low cost. Their value lies in the fact that they are expected to correlate with the desired outcome, but the correlation is rarely perfect. A smaller proportion of pretrial detainees typically correlates with judicious use of pretrial detention, but it need not always.

When designing indicators, it is helpful to bear the following in mind:

- Given the risk of ambiguity, **an indicator should rarely be used on its own**. Rather, **a group or basket** of indicators relating to the same policy objective will provide a more valid, reliable, and rounded view of policy progress. This guide proposes a basket of five categories of indicators, each of which contains one or more ancillary indicators to measure pretrial detention and its effects.
- **Indicators should reflect changes in relatively short time periods**: a month, a quarter of a year, or a year. **Indicators thus need to be sensitive enough to register the kinds of changes** that could reasonably occur in those periods of time, even if, as is often the case, they will be tracked for much longer periods.**Disaggregating data within individual indicators**—by, for example, income, gender, ethnicity, region, or level of urbanization—**enhances their informational value and allows for a better understanding** of the impact of criminal justice policy and practice on specific groups.
- **Avoid creating perverse incentives.** Indicators can be powerful tools to motivate behavior, especially when actors understand that decision-makers are monitoring progress through them. **Constructing and interpreting these measures requires care**. For example, system operators using the percentage of detainees awaiting trial as a measure of progress might be motivated to find shortcuts that make convictions faster and easier to obtain. While the number of sentenced prisoners would increase, it would neither promote justice nor alleviate overcrowding. Indicators should correlate with a desired outcome in meaningful ways.

4 Much of the material in this section is drawn from: *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector,* Vera Institute of Justice, New York, NY, November 2003, http://www.vera.org/pubs/measuring-progress-toward-safety-and-justice-global-guide-design-performance-indicators-across (accessed on 20 February 2015).

SECTION 3:
REVIEW AND APPRAISAL OF THE INDICATORS

This guide proposes a basket of five categories of indicators—based on a variety of international and regional norms and standards on the use of pretrial detention—with which to measure and track the performance of the justice system at the pretrial stage:

- **Risk to liberty**—the likelihood of someone being arrested or detained.
- **Duration** of pretrial detention.
- **Frequency** (and exceptionality) of the use of pretrial detention.
- **Defendants' compliance** with the conditions of pretrial release.
- **Legitimacy**—or smooth functioning— of the criminal justice system.

Taken together, the basket of categories of indicators is comprehensive and covers many of the underlying drivers of the negative consequences of pretrial detention, such as the duration of detention or the excessive use thereof. It is carefully calibrated to provide usable information to policymakers interested in minimizing the excessive and arbitrary use of pretrial detention and the possibility that accused persons who pose a credible risk of interfering with the criminal justice process or to public safety are released pretrial. Proper use will ensure a fair, efficient, and effective pretrial justice system.

Most categories of indicators are comprised of a number of ancillary indicators, which are described separately in Table 1. A discussion of each indicator's strengths and weaknesses, its ancillary uses, and, where relevant, how data for the indicator can be disaggregated and measured appears in the following section.

CATEGORY	INDICATOR
Risk to liberty	Number of people arrested by the police per 100,000 of a jurisdiction's population Number of defendants subjected to pretrial detention
Duration of pretrial detention	Average duration of pretrial detention Number or proportion of defendants in pretrial detention in excess of a defined period
Frequency (and exceptionality) of the use of pretrial detention	Number or rate of pretrial detention requests by the prosecution Number of pretrial detentions ordered by judicial officers
Defendants' compliance with the conditions of pretrial release	Number or proportion of defendants complying with judicial officers' pretrial measures
Legitimacy of the criminal justice system	Number or proportion of acquitted pretrial detainees Number or proportion of pretrial detainees who receive a non-custodial sentence

Table 1: Basket of indicators, by category and individual indicator

A. RISK TO LIBERTY

Risk to liberty, indicator 1: Number of people arrested by the police per 100,000 of a jurisdiction's population

> *The indicator illuminates how the police's arrest levels change over time, and provides policymakers with an overall sense of the volume of cases entering the criminal justice system with its attendant human and financial resource implications.*

This indicator measures the volume of people the police arrest in relation to the number of people residing in the jurisdiction covered by the police. For example, if in a town of 100,000 people the police arrest 3,000 people a year, the police arrest 3,000 per 100,000 of the population, or 3 percent of the population, a year.[5]

Strengths:

The number of people arrested by the police per 100,000 of a jurisdiction's population reveals the incidence or prevalence of arrest over time. Arrest numbers alone would obscure this. For example, if the police arrested 2,500 people in 1990 when the population was 80,000, and the police arrested 3,000 people in 2010 when the population was 100,000, the number of arrests increased by 20 percent. Converting the 1990 arrests to a rate per 100,000 of the population, we obtain 3,125 arrests per 100,000.[6] This allows for a straightforward comparison of 3,125 arrests per 100,000 in 1990 decreasing to 3,000 arrests per 100,000 in 2010. Expressing the number of arrests as a rate per 100,000 reveals the likelihood of being arrested the average person faced in both years—namely, 3.13 percent in 1990 and 3.0 percent in 2010.[7]

The indicator also permits comparisons *between jurisdictions of different population sizes.* For example, in city X, with a population of 500,000, the police arrest 12,000 people in a year. In city Y, with a population of 100,000, the police arrest 3,000 in the same year. The arrest rate is lower in city X at 2,400 per 100,000 versus 3,000 per 100,000 in city Y.[8] Likewise, the likelihood of being arrested the average person faced was 2.4 percent in X versus 3.0 percent in Y.[9]

Weaknesses:

The indicator relies on *an accurate count of the jurisdiction's total population*. Typically, population data come from censuses, which take place only every ten years or so. Population data may consequently be dated and exclude certain categories of people such as undocumented migrants, temporary workers, refugees, visitors, and tourists (none of whom the census counts). This is not a serious weakness in areas where population numbers are fairly stable and change in a reasonably predictable manner from one year to the next, and where groups not captured by the census represent a fairly small portion of the population.

The indicator also obscures risk factors within a population. In many jurisdictions, arrestees dis-

5 To calculate the number of persons arrested as a proportion of the total population, divide the number of arrests by the total population, and multiply the result by 100. For example, (3,000 / 100,000) x (100) = 3 percent of the population was arrested.

6 The formula to calculate the rate of arrests per 100,000 inhabitants is to divide 100,000 by the total population, and multiply the result by the total number of arrests. For example, (100,000 / 80,000) (2,500) = 3,125 arrests per 100,000.

7 1990: 3,125 (detentions per 100,000 inhabitants) / 1,000 = 3.13 percent of the population arrested. For 2010: 3,000 (detentions per 100,000 inhabitants) / 1,000 = 3.0 percent of the population arrested.

8 City X: (12,000 arrests) / (500,000 total population / 100,000) = 2,400 arrests per 100,000 inhabitants. City Y: (3,000 arrests) / (100,000 total population / 100,000) = 3,000.

9 City X: (12,000 arrests / 500,000 total population) x (100 percentage) = 2.4 percent. City Y: (3,000 arrests / 100,000 total population) x (100 percentage)= 3.0 percent.

proportionately belong to particular groups such as marginalized minorities, young people, the homeless, and people who earn a living through illegal activities such as sex work or drug trade. In addition, a many crimes are often committed by a small number of (repeat) offenders. Consequently, without disaggregated data about who is being arrested, the indicator may not provide an accurate measure of the risk of arrest for the average person.

When comparing arrest rates across jurisdictions, the number of arrests *does not take into account a variety of factors that could influence the police's propensity to arrest.* For example, levels of crime (higher levels of crime should lead to more arrests), changes in police numbers (arrests are likely to increase with more police on the streets), the density of police officers and residents in a locale (the same number of police and residents squeezed into a small, densely populated area is likely to result in more police-civilian interactions and, hence, arrests, compared to a large, sparsely populated area). These factors likely have little relevance to changing arrest rates in the same place over time but could be relevant when comparing arrest rates across jurisdictions.

Ancillary uses:
The key purpose of measuring the number of people arrested by the police per 100,000 of a jurisdiction's population is to indicate the probability or risk of a person, residing in a defined area, being arrested. As arrest is usually the entry point into the criminal justice system, the arrest rate provides a useful base from which to calculate a variety of ratios for better understanding the functioning of the criminal justice system. For example, the ratio of the number of arrests to the number of persons formally remanded to pretrial detention by a court could be useful to illuminate the relationship between arrest and detention. And the ratio between number of arrests and number of convictions suggests whether arrest rates are unreasonably high. *The time and date of arrest are also an important measure of pretrial justice,* as most jurisdictions mandate that an arrestee has to appear before a court within 24–72 hours of arrest.

Disaggregated data:
To enhance the usefulness of measuring arrest rates, it is helpful to know who is being arrested and for what. That is, *arrestees' demographic information* (age, gender, employment status, and, possibly, ethnicity) and *the reasons for the arrest.* Ideally, states should collect information on the charges in each case. With such information we can calculate what proportion of arrestees are eligible for release by police on "police bail" (in jurisdictions where this is possible), what proportion of persons have been arrested for offenses for which the courts may not grant bail, or what proportion of persons have been arrested for minor versus more serious offenses.

How to measure:
Virtually all police agencies collect arrest data, including some demographic information on the persons arrested and the reasons for their arrest. When measuring the duration of pretrial detention it is preferable to begin with the date of arrest, as not all suspects are brought before a court within 24–72 hours, especially in developing countries where distances between police stations and courts can be vast.

RISK TO LIBERTY, INDICATOR 1

Number of people arrested by the police per 100,000 of a jurisdiction's population

Use: Helps us understand how police arrest levels change over time, and provides policymakers with an overall sense of the volume of cases entering the criminal justice system with its attendant human and financial resource implications.

Strengths:

1. Can accurately monitor changes in the incidence or prevalence of arrest over time.
2. When the number of arrests is expressed as a rate per 100,000 it is easy to discern the likelihood of being arrested the average person faces.
3. Can compare the incidence or prevalence of arrest between jurisdictions of different population sizes.

Weaknesses:

1. Relies on an accurate count of the total population.
2. Obscures differential rates of risk across types of population.
3. Does not take into account a variety of factors that could influence the police's propensity to arrest.

Ancillary uses:

1. Provides data relevant to calculations of a variety of ratios for better understanding the functioning of the criminal justice system.
2. The time and date of arrest are an important measure, as most jurisdictions mandate that an arrestee appear before a court within 24–72 hours of arrest.

Disaggregated data:

- Demographic information (age, gender, employment status, and, possibly, ethnicity).
- The reasons for the arrest. Ideally, information on the prospective charge(s).
- The proportion of persons arrested for offenses for which the courts may not grant bail.
- The proportion of persons arrested for minor offenses only.

Risk to liberty, indicator 2: Number of defendants subjected to pretrial detention

The indicator provides policymakers with a sense of whether arrest is being used excessively as a mechanism to bring defendants to court, and of the volume of pretrial detainees entering the system and its resource implications (e.g., detention space, subsistence for detainees, demand for legal aid lawyers, court time for trials). Also, when compared with the number of arrestees, it illuminates the relationship between arrest and pretrial detention.

Typically persons formally remanded to pretrial detention by a court over a specified period of time are accused persons who have been arrested by the police and who are then taken before a judicial officer whereupon the court decides whether the accused should be released awaiting trial or remanded to pretrial detention. Many jurisdictions require approval of pretrial detention within 24–72 hours of arrest.

Strengths:

This indicator *reveals the volume of accused persons remanded to pretrial detention over a specified period*. As such, it provides an *overview of the extent to which pretrial detention is used in a jurisdiction*. For example, if 5,000 people are remanded to pretrial detention in one year, and 10,000 people the following year, it would appear that—everything else remaining equal—the use of pretrial detention has doubled. In other words, the risk of being remanded to pretrial detention the average person or the average accused person faces can be said to have doubled. Of course, everything else does not normally remain equal, with the result that the real value of this indicator becomes apparent only once it is expressed as a ratio or proportion to other data of interest to the analyst. For example:

- *Expressing the number of accused persons remanded to pretrial detention as a proportion of all persons appearing in court for a bail hearing.* For example, if one year, 20,000 accused persons appear in court for a bail hearing and 5,000 are remanded to pretrial detention, we can say that of all bail hearings, 25 percent resulted in pretrial detention. If in the following year, 50,000 accused persons appear in court for a bail hearing and 10,000 are remanded to pretrial detention, we can say that of all bail hearings, 20 percent resulted in pretrial detention. *The average accused person's* risk of being remanded to pretrial detention therefore decreased.
- *Expressing the number of accused persons remanded to pretrial detention as a proportion of all persons arrested by the police.* Not everyone arrested by the police is charged and appears in court for a bail hearing. This is because the police or prosecution may decide not to proceed with a matter because, for example, the offense for which the person has been arrested is trivial (e.g., public drunkenness), the complainant asks that the charge against the accused be withdrawn, or the accused is released on "police bail" or on a "summons" (a written notice to appear). For example, the police may arrest 40,000 people, of whom 20,000 appear in court and 5,000 are remanded to pretrial detention. We can then say that 12.5 percent of all arrestees are remanded to pretrial detention.[10] The following year, the police arrest 100,000 people, of whom 50,000 appear in court and 10,000 are remanded to pretrial detention—in other words, 10 percent of all arrestees are remanded to pretrial detention. On the face of it, therefore, arrestees in the first year faced a higher risk of being remanded to pretrial detention.

Weaknesses:

In some jurisdictions, *judicial officers do not have the discretion to release accused persons charged with certain offenses awaiting trial.* That is, pretrial detention is mandatory for persons charged with one or more offenses as classified by law as being non-bailable. *In such jurisdictions the indicator may falsely exaggerate the zeal with which courts remand accused persons to pretrial detention.* It is consequently important to disaggregate the number of persons actively remanded to pretrial detention by a decision of the courts, versus those who are remanded to pretrial detention at the behest of the applicable law(s).

Ancillary uses:

The indicator—the number of defendants subject to pretrial detention—is a *useful base indicator to calculate a number of other indicators* described in the remainder of this document.

For example, to measure the frequency or exceptionality of the use of pretrial detention, it is helpful to know how many—or what proportion—of prosecutors' requests for pretrial detention courts

10 (5,000 pretrial detention / 40,000 total arrests) x (100 percentage) = 12.5 percent.

accede to (see section C). Calculating this ratio requires having the number of persons remanded to pretrial detention as the denominator.

The data on which the indicator is based—the number of accused persons appearing in court for a remand determination—*may serve as a proxy for the workload remand proceedings place on the courts*. Depending on the jurisdiction, remand proceedings involve the presentation of written and/or oral evidence and arguments in court (including, on occasion, witnesses testifying under oath). Judges have to weigh up the evidence and arguments presented to them, including, where applicable, written recommendations made by a pretrial services scheme. The higher the number of such matters before the courts, the more time and effort courts will tend to devote to them and the less time and effort the criminal courts will be able to devote to one of their core functions, the holding of trials.

Disaggregated data:
As with arrest data, it is helpful to know *who is remanded to pretrial detention and for what.* That is, remandees' *demographic information* (age, gender, employment status, and, possibly, ethnicity) and the *reasons for the pretrial detention decision* (e.g., the seriousness of the offense, flight risk).

In jurisdictions that use sureties and/or money bail, the data should be able to count the *number of accused persons who were granted pretrial release upon the availability of a surety and/or deposit of a sum of money but who ended up in pretrial detention due to an inability to locate the needed surety or come up with the required sum of money.* A high number of persons falling into this category might indicate that judicial officers are failing to individualize conditions of bail so that individuals can comply. Moreover, a high number of accused who are unable to come up with relatively low amounts of money bail would indicate that many accused end up in pretrial detention solely because of their lack of means.

Ideally, *information on the charge(s) leveled against the accused persons* should be collected. With such information we can calculate what correlations, if any, exist between the charges leveled against accused persons and the likelihood of their being remanded to pretrial detention. According to international standards and the laws of most countries, the seriousness of an offense cannot be a primary criterion for denying accused persons pretrial release.[11] Having data that relate types of offenses to pretrial detention rates will identify violations of this principle. Such data also reveal the *number of cases where accused persons charged with minor offenses* (which will not lead to a custodial sentence upon conviction) are remanded to pretrial detention.

How to measure:
The most reliable source for data on the number of pretrial rulings is likely to be the courts that made them. Generally the court files will also contain key demographic data on the individuals who appeared in front of the court—their age, gender, and the charge(s) they faced.

11 With the exception of laws that mandate non-bailable offenses, which mean that the alleged offense is the sole criterion that determines pretrial detention.

Volume versus rate

The number of defendants subject to pretrial detention is the *volume* of pretrial detention. As indicated under the discussion of the indicator's strengths, the usefulness of the indicator increases if it is expressed as a ratio or proportion to other data of interest—that is, as a rate.

In many circumstances it is useful to express the same indicator in both ways—its absolute number (volume) and its rate in relation to other data or indicators. For example, in a small island country the courts may remand 500 people to pretrial detention in year X. This number—the volume of remandees in a year—may be useful to get a sense of whether the resources allocated to the island's detention center were sufficient. Or, if it is possible to estimate the average length of a remand hearing, the courts can calculate how much time they spent on such hearings over the course of a year. Alternatively, calculating the number of defendants remanded to pretrial detention as a rate of, for example, the number of judges responsible for remand hearings, it is possible to calculate whether the average remand judge's workload is changing over time. If in year Y, 700 people are remanded to pretrial detention, but in both years X and Y the number of remand judges remained the same at five, then the average remand judge dealt with some 100 remand cases in year X and some 140 in year Y.

RISK TO LIBERTY, INDICATOR 2

Number of defendants subjected to pretrial detention

Use: Helps us understand the relationship between arrest and pretrial detention. It provides policymakers with a sense of whether arrest may be used excessively as a mechanism to bring defendants to court, and of the volume of pretrial detainees entering the system and its resource implications.

Strengths:

1. Reveals the volume of accused persons remanded to pretrial detention over a specific period.
2. Provides an overview of the extent to which pretrial detention is used in a jurisdiction.

Weaknesses:

1. In some jurisdictions, pretrial detention is mandatory for persons charged with certain offences. In such places the indicator may overstate the zeal with which courts remand accused persons to pretrial detention.

Ancillary uses:

1. Is a useful base indicator to calculate a number of other indicators.
2. Is a proxy for the workload remand proceedings place on the courts.

Disaggregated data:

- Number of persons remanded to pretrial detention by a decision of the courts, versus those who are automatically placed in pretrial detention because of the law.
- Demographic information (age, gender, employment status, and ethnicity).
- The reasons for courts' pretrial detention decisions (seriousness of the offense, flight risk, etc.).
- Number of accused persons who were granted pretrial release upon the availability of a surety and/or deposit of a sum of money but who ended up in pretrial detention due to an inability to locate the needed surety or come up with the required sum of money.
- Charge(s) leveled against the accused person.

B. DURATION OF PRETRIAL DETENTION

Duration, indicator 1: Average duration of pretrial detention

> *The indicator reflects the efficiency of the criminal justice system in processing cases at the pretrial stage of the justice process, and the burden detention places on detainees and their families, which may include foregone income and lack of parental supervision for minor children as well as lost freedom. Properly analyzed, the indicator allows policymakers to identify bottlenecks and weaknesses in the pretrial justice process and develop remedial interventions.*

This indicator measures the average duration of pretrial detention, typically for all pretrial detainees as a group over a specified period of time.

Strengths:
Calculating the *duration of pretrial detention is a powerful way of representing the negative impact of detention on the average detainee.* Pretrial detention obviously negatively affects the individuals detained as represented by the second "risk to liberty" indica tor: number of defendants subjected to pretrial detention. *However, the impact of the detention is aggravated the longer the period of detention lasts.* Longer periods of pretrial detention impose higher risk of losing contact with family and friends, job loss and future unemployment or loss of livelihood, damaged careers, communicable disease, and exposure to violence and corruption, as well as other risks. The duration of pretrial detention can therefore serve as a general proxy for the negative demands pretrial detention imposes on detainees and their families.

Comparing the average duration of pretrial detention to custodial sentences provides additional insight. In jurisdictions where the length of pretrial detention comprises a significant proportion of the average accused person's total incarceration time (i.e., the period covering pretrial detention and post-conviction imprisonment), *pretrial detention likely serves as a de facto form of punishment.*

Weaknesses:
Outliers easily influence mathematical averages. That is, a relatively small number of extreme cases (persons who are in pretrial detention for either exceptionally short or long periods of time) can significantly affect the average. Given this, it is useful to also calculate the "median" duration of pretrial detention. Outliers do not affect the median. *The median is not affected by outliers in the data.*

Strictly speaking, *it is possible to measure the average duration of pretrial detention only retrospectively.* This creates a challenge for analysts. Persons whose pretrial detention is ongoing should not appear in the data, but data must be current to be useful. In environments where pretrial detention may last for years, it may be necessary to augment the measure with the average duration of ongoing periods of detention.

Mean versus median

The mean, or average, is sensitive to extreme scores when population samples are small. For example, if nine detainees were in pretrial detention for 10 days each, and one detainee for 100 days, the average duration of detention for all ten detainees is 19 days. As this suggest, the tenth person, who was detained for 100 days, strongly influences the mean.

The median is the middle score in a list of scores. It is the point at which half the scores are above and half the scores are below. A median can be computed by listing all num-

bers in ascending order and then locating the number in the center of that distribution. Medians are less sensitive to extreme scores and are probably a better indicator generally of where the middle of the group analyzed is, especially for smaller sample sizes.

Ancillary uses:

We can use the indicator to *calculate the financial costs of pretrial detention to the state* based on knowledge of what it costs to detain a person for a unit of time. It is also useful, in combination with estimates of detainees' income at the time of arrest, in *calculating lost earnings to individuals* due to pretrial detention; however, as noted previously, a few days' detention can easily result in job loss and larger impacts than the lost income during detention.

In a similar manner, based on the duration of pretrial detention, it is possible to calculate the rough cost of detention to the average individual detainee and his family and household. For example, once one has ascertained what proportion of detainees were earning an income at the time of their arrest, and what the average earnings were, it is possible to calculate the average income detainees and their families forego.

Disaggregated data:

It can be useful to know whether certain categories of detainees are at greater risk of relatively lengthy periods of pretrial detention. For example, *whether juveniles spend longer or shorter periods of time in detention than adults.* Juveniles should spend a relatively short duration in pretrial detention, and access to data disaggregated between juvenile and adult detainees would reveal whether states uphold this principle.

It would also be helpful to know *whether the average or median duration of pretrial detention differs between accused persons who do not have access to a lawyer,* those who have access to a state-funded lawyer, and those who have access to a private lawyer. The results of such an analysis could reveal the relative advantages of the various forms of (non) representation and the impact thereof on detention duration.

Duration data disaggregated by selected demographic criteria such as income, ethnicity, and religious affiliation may also reveal measurable differences in the average duration of detention between groups, which could indicate the presence of discriminatory laws or practices. Disaggregation by the *reasons for the pretrial detention decision*, and by whether pretrial detention occurs because of *denial of bail* or because of *inability to pay*, potentially provides useful information. The relationship between *charges leveled* and period of detention may show that persons charged with particularly serious and complicated crimes that take a long time to investigate and bring to trial (e.g., complex organized crime or terrorism cases) serve no longer in pretrial detention than those charged with more minor crimes. Such a system probably imposes pretrial detention in a manner that is difficult to justify from a cost perspective, and that likely violates international norms and standards.

Disaggregated data by geographic region can help identify areas or jurisdictions where the duration of pretrial detention is particularly long or short compared to the national average. This may identify practices and procedures that affect detention periods, which can inform national reform initiatives.

It may be useful to *disaggregate duration data by stages in the criminal justice process.* For example, the average or median duration between the initial remand to pretrial detention and the beginning of trial, between the beginning and the end of trial, and between the end of trial and the imposition of a sentence may reveal causes of delays. If, for example, a seemingly disproportionate period of the duration of pretrial detention falls between-

the beginning and end of trial it may indicate particular delays during the trial process. This, in turn, may spur an investigation to pinpoint the actual causes of the delay, such as multiple adjournments because of crowded court rolls, the unavailability of lawyers or witnesses, absent judicial officers, etc.

How to measure:

In most jurisdictions court files would be the most comprehensive and accurate source of data for this indicator. Police files or dockets may also be a useful source of data, and might provide demographic information on accused persons not always available in court records.

In the absence of the resources to track data, *exit surveys* at courts, pretrial detention centers, and prisons to ask all released persons about the length of their pretrial detention would provide data but with the limitation that they rely on memory.

DURATION OF PRETRIAL DETENTION, INDICATOR 1

Average duration of pretrial detention

Use: The indicator helps us understand how efficient the criminal justice system is in processing cases at the pretrial stage of the justice process, and the burden detention places on detainees and their families with respect to such measures as lost freedom, foregone income, and lack of parental supervision for minor children.

Strengths:

1. A powerful way of representing the negative impact of detention on the average detainee.
2. When compared to the average duration of custodial sentences, data on the duration of pretrial detention can show where the latter is disproportionately long.

Weaknesses:

1. Mathematical averages are easily influenced by outliers. The median is not affected by outliers in data.
2. Strictly speaking, it is possible to measure the average duration of pretrial detention only retrospectively.

Ancillary uses:

1. The indicator permits us to calculate the financial cost of pretrial detention to the state.
2. Permits us to calculate raw lost income and therefore get a preliminary sense of the cost of detention to the average detainee.

Disaggregated data:

- Whether certain categories of pretrial detainees spend longer periods of time in detention compared to the average or mean duration for all detainees. For example, by juvenile or adult status.
- By access to a lawyer and by access to a state-appointed lawyer versus a privately funded lawyer.
- By age, gender, employment status, and ethnicity.
- By the reasons for the pretrial detention decision (seriousness of the offense, flight risk, etc.).
- By those denied bail versus those granted bail but unable to pay it.
- By charge(s) leveled.
- By geographic area.
- By stage in the trial process.

Duration, indicator 2:
Number or proportion of defendants in pretrial detention in excess of a defined period

> *The indicator helps us understand the extent to which pretrial detention is of excessively long duration, and, where relevant, the degree to which detention periods exceed the legally permissible duration. Properly analyzed, the indicator illuminates whether unduly long periods of pretrial detention are concentrated in specific regions, are related to particular crimes, or disproportionately affect poor defendants.*

In jurisdictions that have a statutory time limit for the maximum period of pretrial detention, such an indicator can reveal any violations of law. Alternatively, where no legal maximum time limit exists, the indicator would reveal the number or proportion of persons in pretrial detention in excess of a period deemed excessive or unduly burdensome (e.g., six months, one year, two years).

Strengths:
Number or proportion of defendants in pretrial detention in excess of a defined period is a clear and easy-to-quantify indicator and doesn't require restriction to detainees whose pretrial period has concluded. It permits percentage calculations of detainees currently serving in excess of a period of, for example, six months. At a glance it provides a sense of the extent to which pretrial detainees are subjected to excessively long periods of pretrial detention.

In jurisdictions where there is a statutorily limited maximum period of pretrial detention, the indicator reveals the state's compliance with its own laws or obligations. By allowing policymakers to calculate the percentage of pretrial detainees held in excess of an understood maximum period, it gives a clear, quantifiable picture of a problem and allows governments to scale interventions accordingly, including the simple release of individuals held in excess of statutory maximum, and measure progress over time.

Weaknesses:
In jurisdictions without statutorily defined maximum periods of detention or maximum periods counted in years, the indicator has little power to spur change. It also reveals nothing about the reason for the long duration of pretrial detention. An arrestee who changes his lawyer numerous times and keeps on asking for adjournments may be the primary cause of a long detention period. The failure of witnesses to appear at trial may extend detention without being a fault of the state. While such cases may be relatively rare, the indicator is unable to quantify their number.

Ancillary uses:
Provided the data are adequately disaggregated, it may be possible to pinpoint factors that correlate with long pretrial detention periods. This, in turn, would allow for targeted interventions that seek to reduce the duration of particularly lengthy periods of pretrial detention.

Disaggregated data:
Disaggregation of this indicator should follow the guidelines for the disaggregation of the average duration indicator discussed previously. This includes juvenile or adult status; persons who do not have access to a lawyer, those with access to a state-appointed lawyer, and those with a privately funded lawyer; by age, gender, employment status, and ethnicity; by the reasons for the pretrial detention decision (seriousness of the offense, flight risk, or inability to pay bail); by charges leveled; and by geographic area.

Disaggregated data by geographic region can help identify areas or jurisdictions where the proportion of pretrial detainees who are detained in excess of the legally permissible maximum is significantly below the national average. This may allow for the identification of

"good" practices and procedures that can inform national reform initiatives.

How to measure:
Where the objective is to measure the number or proportion of pretrial detainees who had been in detention in excess of a number of defined periods (e.g., one year and two years), the analyst needs to be aware that all detainees who have been detained in excess of two years will logically also have been detained in excess of one year. Care needs to be taken not to count the former twice (i.e., as persons who have been detained for both more than one year and more than two years).

DURATION OF PRETRIAL DETENTION, INDICATOR 2

Number or proportion of defendants in pretrial detention in excess of a defined period

Use: The indicator helps us understand the extent to which pretrial detention is of excessively long duration and, where relevant, the degree to which detention periods exceed the legally permissible duration.

***Strengths*:**

1. A clear and easy-to-quantify indicator.
2. In jurisdictions where there is a statutorily limited maximum period of pretrial detention, the indicator reveals the state's compliance with its own laws or obligations.
3. The indicator requires the data collector to identify individual detainees who have been in detention longer than the statutory maximum period permitted.

***Weaknesses*:**

1. Has restricted applicability in jurisdictions without statutorily defined maximum periods of detention or with periods that are very generous.
2. The indicator says nothing about the reason for the long duration of pretrial detention.

Ancillary uses:

1. It may be possible to pinpoint factors that seem to correlate with pretrial detention periods that extend beyond a certain period of time.

Disaggregated data:

- By juvenile or adult status.
- By access to a lawyer and by access to a state-appointed lawyer versus a privately funded lawyer.
- By age, gender, employment status, and ethnicity.
- By the reasons for the pretrial detention decision (seriousness of the offense, flight risk, etc.).
- By those denied bail versus those granted bail but unable to pay it.
- By charge(s) leveled.
- By geographic area.
- By stage in the trial process.

C. FREQUENCY (AND EXCEPTIONALITY) OF THE USE OF PRETRIAL DETENTION

The frequency of pretrial detention can be empirically and objectively measured. Two indi cators are suggested—namely, the frequency with which prosecutors request pretrial detention, and the frequency with which judicial officers comply with the prosecutions' request. On the face of it, "frequency" and "exceptionality" of the use of pretrial detention are inversely related. The more frequently prosecutors seek pretrial detention and judicial officers comply, the less exceptional it is.

Such an inverse relationship, while useful as a general guide, needs to be treated with caution. To illustrate, in a jurisdiction where the vast majority of interpersonal crimes are resolved through traditional or informal justice mechanisms, prosecutors may only prosecute cases that are particularly serious and/or involve defendants who are not members of local community structures. In such a situation it could be reasonable for prosecutors to ask for pretrial detention in most cases (given the seriousness of the charge and the accused person's lack of community ties), and for judicial officers to grant such requests. In short, the frequency of requests for, and granting of, pretrial detention may be high, but this may not imply that pretrial detention is used as an unexceptional measure. Thus, the exceptionality of the use of pretrial detention is a somewhat subjective and context-specific indicator. The type of charges leveled in those cases where the prosecution requests pretrial detention illuminates the issue.

Frequency (and exceptionality) of use, indicator 1: Number or rate of pretrial detention requests by the prosecution

> *The indicator helps us determine whether the prosecution treats pretrial detention as an exceptional measure to be used as a last resort to ensure defendants stand trial and do not interfere with the administration of justice. For policymakers the indicator suggests whether the prosecution service may drive the overuse of pretrial detention, and suggests areas for reform.*

This indicator measures the percentage or ratio of cases in which prosecution requests pretrial detention during a bail or remand hearing in front of a judicial officer.

Strengths:

On its own the indicator can help reveal prosecutorial approaches to pretrial detention. When compared with the number of cases in which accused persons have few ties to the local community or that involve violent crimes, it provides a picture of whether prosecution treats pretrial detention as an exceptional measure of last resort to ensure that an accused stands trial, does not interfere with the investigation, and does not pose a credible risk to public safety. In most jurisdictions, it may be possible to assign a maximum percentage of prosecutorial requests for pretrial detention.

This indicator is also illuminating when compared to the following indicator, the number of pretrial detentions ordered by judicial officers. Where the prosecution requests pretrial detention in excess of X percent of cases, this may raise concerns that the prosecution's policy toward pretrial detention lacks nuance or sophistication, unable to discriminate between cases where pretrial detention is arguably justified and those cases where it is not.

Weaknesses:

On its own the indicator suggests a misapplication of requests for denial of bail only when it is particularly high. A request for pretrial detention in 70–90 percent of all cases would, prima facie,

indicate that the prosecution is being excessive and not suitably selective in its request for pretrial detention. However, the prosecution requests should be interpreted in the context of the judiciary's response to such requests and the extent to which accused persons who are released pretrial fail to comply with the conditions of their release.

Ancillary uses:
The indicator can be used to ascertain to what extent prosecutors are abiding by their own policies and regulations when it comes to pretrial detention. Some prosecution services have internal policies providing guidance (or instructions) to prosecutors about what criteria to use when opposing pretrial release. For example, prosecution services may seek to abide by the generally accepted international norm that pretrial detention should be an exceptional measure used only when there is a demonstrable risk that the accused will abscond, interfere with the investigation, or pose a serious risk to public safety.

If it can be shown—by disaggregating the data informing the indicator (see the following)—that prosecutors virtually always request pretrial detention for accused persons charged with certain offenses such as drug-related offenses or robbery, a case may be made that the prosecution's approach to requesting pretrial detention is arbitrary, overly focusing on the charge rather than issues germane to pretrial detention.

In jurisdictions with pretrial services schemes, the indicator has more relevance. Pretrial services are typically independent, state-funded agencies responsible for gathering and analyzing defendant information for use in determining risk, making recommendations to the court concerning conditions of release, and supervising defendants who are released from secure custody during the pretrial phase. Pretrial services seek to recommend the least restrictive conditions that promote public safety and return to court. Whether pretrial services recommendations influence this rate would give insight into the efficacy of such schemes.

Disaggregated data:
Data disaggregated by a variety of demographic factors relevant to the local context, such as accused persons' ethnicity, race, socioeconomic background, etc., could be useful to tease out discriminatory patterns that may influence prosecutors' practices.

As discussed previously, data disaggregated by the type of offense(s) with which accused are charged may reveal that prosecutors are particularly inflexible when it comes to opposing pretrial release for persons charged with serious crimes. Similarly, the data might show that even for relatively minor offenses—for which the length of pretrial detention is typically shorter than any custodial sentence imposed upon conviction, for example—prosecutors oppose pretrial release in a significant proportion of cases. Such findings can lead to investigations into prosecutors' motives for opposing pretrial release, which, in turn, may encourage reform to bring about prosecutorial practices that are both rational and respectful of national laws and international norms.

Disaggregating the data to reveal the role of a lawyer—state-funded or private—in influencing the prosecution's propensity to ask for pretrial detention could also provide useful information. In jurisdictions with pretrial services schemes, the influence of agency recommendation is also worth measuring.

How to measure:
Data for this indicator should be available in both the prosecution's files and court records, with the latter probably being more accessible. Both should also contain information as to the prosecution's formal or official motive for requesting pretrial detention.

In some jurisdictions, legislation requires pretrial detention for persons accused of certain crimes.

Such cases should be excluded from calculations of the proportion of cases for which prosecutors request pretrial detention.

FREQUENCY (AND EXCEPTIONALITY) OF THE USE OF PRETRIAL DETENTION, INDICATOR 1

Number or rate of pretrial detentions requests by the prosecution

Use: Helps us determine whether the prosecution treats pretrial detention as an exceptional measure used as a last resort to ensure defendants stand trial and do not interfere with the administration of justice.

Strengths:

1. Reveals prosecutorial approaches to pretrial detention.

Weaknesses:

1. On its own the indicator suggests a misapplication of requests for denial of bail only when it is particularly high.

Ancillary uses:

1. Ascertain to what extent prosecutors are abiding by their own policies and regulations when it comes to pretrial detention.
2. In jurisdictions with pretrial services schemes it helps to ascertain the impact of the scheme.
3. Could be useful to tease out any discriminatory patterns in prosecutors' practices.

Disaggregated data:

- Demographic information (age, gender, employment status, and ethnicity).
- Charge(s) leveled against the accused person.
- The presence of a lawyer for the accused, and whether the lawyer is private or state-funded.
- In jurisdictions with pretrial services schemes, by the recommendation of the scheme.

Frequency (and exceptionality) of use, indicator 2: Number of pretrial detentions ordered by judicial officers

Measured against the number of pretrial detentions requested by prosecutors, the indicator helps us understand the influence of prosecutors in such cases and may serve as a proxy for measuring de facto judicial independence with respect to pretrial detention decision making. For policymakers, the indicator may suggest whether clearer laws and guidelines are necessary to assist judicial officers in their pretrial detention decision making.

This indicator measures the extent to which judicial officers order pretrial detention when the law provides them this discretion.

Strengths:

This indicator can uncover judicial practices that diverge from the general norm that pretrial detention should be an exceptional measure of last resort to ensure that an accused stands trial, does not interfere with the investigation, and does not pose a credible risk to public safety. Disaggregated data (see the following) further illuminates the issue. However, where judicial officers order pretrial detention in a seemingly large number of cases, a prima facie case may be made that judicial practice is not in compliance with international norms (and, often, national laws) and fails to treat every individual pretrial decision on its individual merits.

When compared to the number of pretrial detention requests by the prosecution, this can reveal whether judicial officers seem overly eager to comply with the prosecutions' requests, which may suggest compromised judicial independence vis-à-vis the pretrial process.

Weaknesses:
A full sense of whether judicial officers may be ordering pretrial detention in an excessive or arbitrary manner may require further contextual information and the application of other indicators discussed in this document. In situations where, for example, the prosecution requests pretrial detention very sparingly, the number of cases in which judicial officers order pretrial detention may be very similar to the number in which prosecutors do, without indicating a problem.

The indicator also does not reveal the number of cases in which judicial officers set bail too high for an accused person to pay.

Ancillary uses:
The indicator can be used to ascertain to what extent judicial officers are abiding by the intent and letter of the law as it applies to pretrial detention, relevant practice directives as compiled by senior judges to guide pretrial detention decisions, and international norms and standards.

Disaggregating the data, as described in the following section, can further illuminate whether the judiciary's approach to ordering pretrial detention is arbitrary.

By correlating judicial officers' decisions with the requests or recommendations of other role players in the criminal justice process (prosecution, defense, pretrial services) it is possible to develop a hypothesis of which institution is particularly influential in swaying judicial officers' decisions. Investigating such hypotheses further by reading court records, interviewing judicial officers to inquire about their reasons and views of other actors' requests can guide reformers in targeting their interventions. Thus, if judicial officers order pretrial detention excessively or arbitrarily largely in fidelity to prosecutors' requests, any intervention that seeks to rationalize the use of pretrial detention should primarily target the actions of prosecutors rather than judicial officers.

Disaggregated data:
Disaggregating the data according to the charges leveled will reveal whether judicial officers are complying with norms that state that the alleged offense should not determine pretrial detention. This may show which offenses with which accused persons are charged comprise the bulk of pretrial detention cases. Persons accused of having committed such offenses may warrant particular scrutiny to tease out why judicial officers seem to think that they pose a particular risk deserving the disproportionate application of pretrial detention. Cross-tabulating such data with that of other indicators discussed in this document (such as pretrial release compliance rates) will allow the development of an empirical basis to confirm—or refute—judicial officers' apparent concern that persons charged with certain offenses pose a higher pretrial release risk.

As with many other indicators discussed in this document, data disaggregated by a variety of demographic factors relevant to the local context, such as accused persons' ethnicity, race, socioeconomic background, etc., could be useful to tease out any discriminatory patterns.

How to measure:
Data for this indicator should be available in court records.

To get a sense of how frequently judicial officers remand accused persons to pretrial detention it is necessary to calculate the ratio or proportion of arraignments that lead to a pretrial detention

order by a judicial officer. As mentioned previously, cases involving non-bailable offenses should be removed entirely from the data.

FREQUENCY (AND EXCEPTIONALITY) OF THE USE OF PRETRIAL DETENTION, INDICATOR 2

Number of pretrial detentions ordered by judicial officers

Use: This indicator measures the extent to which judicial officers order pretrial detention in cases where they have the discretion whether to release or detain the accused awaiting trial or the finalization of his trial.

Strengths:

1. This indicator can uncover judicial practices that diverge from the general norm that pretrial detention should be an exceptional measure.
2. Helps us understand the cases where judicial officers seem overly eager to comply with the prosecutions' requests.

Weaknesses:

1. Without further contextual information and the application of other indicators, it is difficult to make a conclusive "exceptionality" finding.
2. Does not reveal the cases in which judicial officers technically permit pretrial release but effectively prevent it through onerous conditions of release.

Ancillary uses:

1. Ascertain to what extent judicial officers are abiding by the intent and letter of the law as it applies to pretrial detention.
2. Determine whether judicial officers are more likely to order pretrial detention for accused charged with certain offenses.
3. Develop a hypothesis of which institution is particularly influential in swaying judicial officers' decisions.

Disaggregated data:

- Demographic information (age, gender, employment status, and ethnicity).
- Charge(s) leveled against the accused person.

D. DEFENDANTS' COMPLIANCE WITH THE CONDITIONS OF PRETRIAL RELEASE

Number or proportion of defendants complying with judicial officers' pretrial measures

The indicator helps us understand whether courts' pretrial detention practices adequately protect the proper administration of justice and the criminal justice process. For policy-makers, the indicator can show whether pre-trial justice practices fail to ensure arrestees' appearance at trial.

This indicator measures the extent to which accused persons who are released pending trial (some of whom may have experienced pretrial detention and its attendant impacts but were eventually released pending trial) complied with the conditions of their release. Release conditions vary in intensity and the level of restrictions they

impose on an accused. A common low-restriction condition is "release on own recognizance," whereby an accused person must only attend all future court hearings. Other common conditions of release require accused persons to report regularly to a local police station or pretrial services agency, not leave the jurisdictional area of the court without prior official permission, and not be arrested. More onerous conditions include not being in the proximity of certain individuals (typically witnesses in the case), and "house arrest," whereby the accused person must be at home outside of regular working hours.

Strengths:

This is a politically important indicator. Public safety concerns often motivate opposition to pretrial release. To the extent that the public believes accused persons released pretrial have a tendency to commit "further" crimes, intimidate witnesses, or abscond and not stand trial, they will support pretrial detention. This indicator puts such assertions to the test.

The indicator also serves as a useful proxy for system effectiveness—a measure of whether an important component of the pretrial stage of the criminal justice system is functioning as designed. In particular, the indicator reflects the extent to which accused persons respect the courts and their pretrial decisions.

Weaknesses:

Typically efforts to gather indicators of compliance with conditions of release make no distinction between a defendant who fails to appear at a court hearing because of negligence or forgetfulness, ill health, or some another unforeseen event and one who willfully absconds to evade justice.

In jurisdictions where a large proportion of accused persons suffer from a mental illness, or where many rely on erratic public transportation —particularly common among the poor—this blurring may be very significant. As such defendants eventually make an appearance (e.g., because they remember their obligation to appear, their health improves, they find transportation, or they are arrested), their cases rarely warrant pretrial detention, given the costs to the state and the individual. When jurisdictions will not record these nuances of non-compliance, this indicator can support unnecessary pretrial detention in the eyes of the public.

Moreover, when the violation of condition of pretrial release is an arrest, the presumption of innocence nonetheless applies to this offense. Non-compliance data should count only those rearrests that lead to a conviction.

Conversely, many instances of criminal conduct during pretrial release will remain hidden and consequently not registered by the system. The indicator can reliably measure only failure to appear at court or to report to authorities as required. Police do not locate most cases of criminal conduct. This is likely to hold for persons released awaiting trial as well.

Ancillary uses:

Provided non-compliance data are collected in a relatively sophisticated manner, it is possible to use the collected information to identify risk factors associated with non-compliance. For example, the data may show that many accused persons do not appear on their court date, not because they absconded and tried to evade justice but because they forgot their court dates. In such a case, an intervention such as a letter, a phone call a day before the court date, or a visit by a social worker can be designed to help defendants remember their court dates.

The data may also show that some categories of defendants (e.g., the elderly, the young, persons charged with drug-related offenses) are particularly prone to forgetting their court dates. Armed with this knowledge, care may be taken to target interventions to these categories of individuals.

Similarly, the collected data, cross-tabulated with other information, can be used to identify factors that increase the risk of willful non-compliance (e.g., prior convictions or lack of ties to the community). Such information can be used to design risk-assessment instruments for use by pretrial services agencies to thereby help courts gauge the individual levels of risk defendants pose of not complying with their conditions of pretrial release.

Conversely, the data can be used to identify factors that indicate a high probability that accused persons are likely to comply with their conditions of release (e.g., no prior convictions, strong community ties). Pretrial services agencies can use these data to design risk-assessment instruments to increase courts' confidence in releasing such categories of defendants awaiting trial.

Disaggregated data:

As described previously, disaggregating the data by factors that either increase or decrease the risk of non-compliance will allow for the development of evidence-based risk-assessment instruments. This implies disaggregating the data by risk factors (which will become known only over time, as a certain volume of analyzable data becomes available, and may also change over time), such as defendants' prior convictions, community ties, and employment status. Data should also be disaggregated by the type or category of the charge.

Geographically disaggregated data can reveal whether non-compliance rates differ between regions. Such analyses support the development of testable hypotheses to determine the reasons for such differences.

Disaggregating non-compliance rates by the type of alternative to pretrial detention imposed by the court may also alleviate the need for pretrial detention to ensure compliance with the terms of pretrial release by illuminating the con ditions of pretrial release that improve compliance without detention. Conditions such as house arrest or mandatory regular reporting may relate to compliance rates. Properly cross-tabulated with other data, such as the personal circumstances of the accused person and/or the type of charges, may reveal which alternatives to pretrial detention are most suited to maximizing compliance in specific cases.

How to measure:

Data for this measure should be available from court records and police case files or investigating dockets. As pointed out previously, some of the non-compliance data should be collected in a longitudinal manner to, for example, ascertain the reasons why defendants do not appear in court on the date they had been scheduled to do so, and the ultimate outcome with respect to defendants who are arrested while they are awaiting trial at liberty.

DEFENDANTS' COMPLIANCE WITH THE CONDITIONS OF PRETRIAL RELEASE

Number or proportion of defendants complying with judicial officers' pretrial measures

Use: The indicator helps us understand whether courts' pretrial detention practices adequately protect the proper administration of justice and the criminal justice process, focusing on accused persons who were not placed in pretrial detention.

Strengths:

1. The indicator provides an empirical basis for refuting—or confirming—the public's concerns about safety.
2. The indicator serves as a useful proxy for system effectiveness—whether an important component of the pretrial stage of the criminal justice system is functioning as designed.

DEFENDANTS' COMPLIANCE WITH THE CONDITIONS OF PRETRIAL RELEASE

Weaknesses:

1. When a defendant who has been released pretrial fails to appear at his subsequent court hearing, his non-appearance typically results in the court issuing a warrant for his arrest and the system registering the defendant's action as having absconded irrespective of the defendant's reason for failing to appear.
2. A common condition of pretrial release is that the defendant does not engage in criminal conduct while awaiting trial. This condition is considered breeched in cases where a defendant is (re)arrested while awaiting trial at liberty on a new charge. Strictly speaking, however, an arrest does not equate to a finding of guilt.

Ancillary uses:

1. To identify risk factors associated with non-compliance.
2. To show that some categories of defendants are particularly prone to forgetting their court dates.
3. To identify factors that increase the risk of willful non-compliance.
4. To identify factors that indicate a high probability that accused persons will comply with their conditions of release.

Disaggregated data:

- By factors that either increase or decrease the risk of non-compliance.
- By geographic region.
- By the type of alternative to pretrial detention imposed by the court.

E. LEGITIMACY OF THE CRIMINAL JUSTICE SYSTEM

Legitimacy, indicator 1: Number or proportion of acquitted pretrial detainees

This indicator helps us understand the extent to which the state is using pretrial detention in cases where little incriminating evidence exists and/or where the defendants are, in fact, innocent. A high acquittal rate for defendants who awaited trial in pretrial detention is an indication that detention may be used excessively. Moreover, it may indicate the state is using pretrial detention as a form of punishment in cases where it cannot prove guilt.

Arrest should not occur prior to sufficient investigation to warrant "reasonable suspicion" or "probable cause" of guilt. Further, the likelihood of an innocent defendant absconding or interfering with the administration of justice is likely to be relatively low, just as it is where the state's case against the defendant is weak or non-existent.

Strengths:

A high acquittal rate of pretrial detainees suggests either the excessive use of pretrial detention, or weaknesses in police investigations and prosecutions. Either finding is helpful to criminal justice administrators with an interest in, respectively, minimizing the costly use of pretrial detention or identifying flaws in the investigative and/or prosecutorial process.

Weaknesses:

The indicator gives little information by itself as to the difference between excessive use of pretrial detention and weaknesses in a system leading to the acquittal of guilty persons. In poorly resourced or dysfunctional criminal justice systems a high acquittal rate may not indicate that many accused persons are innocent of the charges against them.

In such cases, a high acquittal rate may not necessarily imply an excessive use of pretrial detention but rather is indicative of other flaws within the criminal justice system.

The indicator can create a perverse incentive for state actors as well. It may encourage the use of physical and psychological pressure against pretrial detainees, including torture, to secure convictions.

Ancillary uses:
By cross-tabulating acquittal data with other in formation on the cause(s) of the acquittals, it should be possible to pinpoint particular weak nesses in the criminal justice process. For example, if cases that take a long time to go to trial disproportionately end in an acquittal (e.g., because witnesses have difficulty recalling what they witnessed a long time ago, or because witnesses have disappeared or died over the course of time), then such a finding will assist criminal justice administrators and policymakers in designing interventions that reduce the acquittal rate (such as increasing case processing time).

Disaggregated data:
Disaggregating acquittal data geographically can help identify regions where police may engage in overzealous arrest practices, or where judicial officers may impose pretrial detention unnecessarily. This can, for example, alert criminal justice officials to the need for better police training in the use of arrest, or more detailed guidelines for prosecutors and judges in the use of pretrial detention.

High acquittal rates in certain regions may also be indicative of corrupt police arrest practices. Disaggregating acquittal data by the type of charge(s) in the case may reveal excessive and arbitrary police arrest practices for minor or petty offenses. Since these offenses are relatively easy to prove, a high acquittal rate suggests corruption or the harassment of marginalized populations. Moreover, such a finding would tend to suggest that prosecutors are not properly vetting police requests for pretrial detention in cases involving minor offenses.

High acquittal rates in certain categories of pretrial detainees may be an indicator of—and serve as an early warning for—discriminatory arrest and detention practices. For example, if members of a particular ethnic group who are detained awaiting trial are twice as likely to be acquitted than pretrial detainees in a different ethnic group, this may indicate discriminatory arrest and pretrial detention practices with respect to the first ethnic group.

How to measure:
Data for this indicator should be available from court records.

LEGITIMACY OF THE CRIMINAL JUSTICE SYSTEM, INDICATOR 1

Number or proportion of acquitted pretrial detainees

Use: This indicator helps us understand the extent to which the state is using pretrial detention to hold people with little incriminating evidence and/or who are, in fact, innocent.

Strengths:

1. A high acquittal rate with respect to pretrial detainees is indicative of either the excessive use of pretrial detention, or weaknesses in police investigations and prosecutions resulting in acquittals.

Weaknesses:

1. A high acquittal rate with respect to persons awaiting trial in pretrial detention is not necessarily an indication that many detainees are innocent of the charges against them.

LEGITIMACY OF THE CRIMINAL JUSTICE SYSTEM, INDICATOR 1

2. There is a risk that the indicator can create a perverse incentive for the state (i.e., police and prosecution) to secure convictions at all costs with respect to persons awaiting trial in pretrial detention.

Ancillary uses:

1. The data underlying the indicator can be used to identify weaknesses in the justice system that result in high acquittals.
2. May be indicative of corrupt police arrest practices.

Disaggregated data:

- By geographic region.
- By demographic information (age, gender, employment status, and ethnicity).

Legitimacy, indicator 2: Number or proportion of pretrial detainees who are released due to insufficient evidence

This indicator helps us understand the extent to which the police arrest, and the prosecution advocates for pretrial detention, in cases where police and prosecutors themselves subsequently come to the conclusion that insufficient evidence exists to proceed with trial. A high proportion of cases leading to detainees' release due to insufficient evidence may be indicative of overzealous arrest and prosecution policies and practices, and/or police corruption and discrimination.

Strengths:

This is a reliable indicator of the excessive and arbitrary use of pretrial detention. Ideally, defendants should be remanded to pretrial detention only if law enforcement has detected credible evidence that they are guilty of having committed the offense(s) with which they have been charged. A high number or proportion of pretrial detainees who are subsequently released because of insufficient evidence is an indication that persons are arrested and detained arbitrarily or on the basis of no or very little incriminating evidence.

Weaknesses:

No criminal justice system is perfect. Whether witnesses are credible or forensic evidence supports a conviction may not be foreseeable at the time of arrest. Every individual case where a pretrial detainee is released due to insufficient evidence is consequently not indicative of the excessive or arbitrary use of pretrial detention. Rather, this indicator should be used to discern trends over time, and to serve as a warning for criminal justice managers and policymakers of particularly high numbers or proportions of pretrial detainees who are released because of insufficient evidence.

There is a risk that this indicator can act as a perverse incentive, encouraging police and prosecutors to proceed to trial even where the evidence against the defendant is poor or inadequate. More seriously, the indicator could entice the police or prosecution to exert pressure on defendants to plead guilty in cases where the available admissible evidence against them is insufficient to lead to a conviction.

Ancillary uses:

The indicator can help interrogate police arrest and prosecutorial charging decisions. If a significant proportion of pretrial detainees are released before standing trial because of insufficient evidence, police may be too quick to arrest, and prosecution to charge. This may indicate an

abusive policy or practice to arrest first and investigate later.

Disaggregated data:
Data disaggregated by the reason for the withdrawal of charges due to insufficient evidence can help identify particular weaknesses in the criminal justice system. For example, if the cause of insufficient evidence is a lack of witness testimony, further research may reveal that this is because investigations take too long, and that witnesses forget what they observed, lose interest in testifying, or become difficult to locate. Alternatively, disaggregated data may show that many cases are withdrawn because of insufficient incriminating forensic evidence. This finding can lead to inquiries to identify weaknesses in the state's ability to collect and analyze such forms of evidence, or, if no real incriminating evidence ever existed in numerous cases, to open the possibility that the police's arrest policy is too broad and/or that corrupt police officers are arresting persons on frivolous grounds.

Data disaggregated by the personal attributes of defendants (e.g., race, ethnicity) can show whether certain groups are disproportionately likely to be arrested and charged only to have the cases against them dismissed before the beginning of trial. Such a finding may indicate discriminatory arrest and/or charging decisions.

How to measure:
Data for this indicator should be available from court records.

LEGITIMACY OF THE CRIMINAL JUSTICE SYSTEM, INDICATOR 2

Number or proportion of pretrial detainees who are released due to insufficient evidence

Use: This indicator helps us understand the extent to which the police arrest, and judicial officers impose pretrial detention, in cases with insufficient evidence.

Strengths:

1. This is a reliable indicator of the excessive and arbitrary use of pretrial detention.

Weaknesses:

1. The reliability of evidence may not be clear at the time of arrest. Thus, pretrial detainees who are released due to insufficient evidence are not necessary indicative of the excessive or arbitrary use of pretrial detention.
2. It may create perverse incentives.

Ancillary uses:

1. The indicator can help interrogate police arrest and prosecutorial charging decisions.
2. Data disaggregated by the reason for the withdrawal of charges due to insufficient evidence can help identify particular weaknesses in the criminal justice system.

Disaggregated data:

- The reason for the withdrawal of charges due to insufficient evidence.
- Demographic information (age, gender, employment status, and ethnicity).

SECTION 4: RECOMMENDATIONS

This guide has described a range of measurements —divided into five categories and nine indicators— that can collectively provide an accurate and useful picture to criminal justice policymakers and administrators of the effectiveness and efficiency of their pretrial justice system. This section provides some general recommendations for the development of data collection systems.

- ***Some indicators are better than no indicators, but more is better:*** Without measuring a criminal justice system's performance, policymakers and administrators have no sense of the status of policy objectives, whether the system's outputs justify their human and financial resources, and which aspects of the system are performing poorly and are in need of special attention. While even some data are better than none, this guide demonstrates that more data points allow for increasingly sophisticated analyses. This applies to a greater number of types of data—which can be best understood in relation to one another, a greater number of relevant disaggregation of data—which allows for application of certain types of data, and a longer history of data—which allows for comparisons over time.

- ***Demand-driven and context-specific:*** The indicators criminal justice officials employ should depend on the specific circumstances that are impeding the delivery of pretrial justice in their jurisdictions. For example, there may be a concern that judges are releasing defendants too readily. In such a case, it would be useful to know the characteristics of released arrestees (e.g., the charges they face or demographic characteristics), the conditions of release they impose, and rates of failure to comply with such conditions. Such data support an informed assessment as to whether judges are releasing too many defendants awaiting trial, and measuring whether certain conditions of release are more effective than others in bringing about compliance, and whether specific types of defendants are at particular risk of not complying with the conditions of their release.

- ***Flexibility:*** While it is helpful to collect the same data over long periods of time to allow for the identification of trends and changes in performance, new indicators should be created (and old ones revised) if changing circumstances so dictate. For example, if a jurisdiction experiences a surge in home robberies with concomitant growing public disquiet, it may be helpful to disaggregate the available data to permit closer analysis of home robbery cases. For example, such a jurisdiction might measure non-appearance or reoffending rates specifically with respect to persons charged with home robbery.

- ***Experimentation:*** Indicators are useful not only to measure and gauge the impact of existing criminal justice policy but also to experiment with new policies and practices. For example, some jurisdictions have long schedules of offenses for which pretrial release is prohibited. Policymakers wanting to reduce the number of pretrial detainees without endangering public security and the administration of justice can remove categories of offenses in batches from such schedules. By closely monitoring the impact de-scheduling has on outcomes such as non-appearance rates or cases of released defendants awaiting trial interfering with the criminal justice process, policymakers can discern which categories of offenses can be de-scheduled without adverse consequences, and which should be de-scheduled only once extra precautions (e.g., better or more robust supervisory mechanisms) are in place.

- ***Identify good practices:*** Indicators should be designed to allow for the identification of good practices. Too often criminal justice policymakers and administrators use indicators primarily to find faults in the system and criticize the criminal justice officials under their control. While this is a legitimate reason for developing criminal justice indicators, it is arguably even more important to make use of indicators to identify good practices. By disaggregating data by geography (state, province, court jurisdiction, police precinct, etc.) it is possible to pinpoint the best-performing regions, courts, prosecutors' offices, or police precincts within a country. These not only demonstrate what is possible within the constraints of local criminal justice practice (e.g., an outmoded criminal procedure code, lack of resources, high crime, or poor training) but also should help identify what makes good practices and outcomes possible.

- ***Transparency and open debate:*** Contrary to the instincts of some policymakers and criminal justice administrators, data and the indicators they inform should be transparent and open to public comment and debate. Otherwise, there will be a temptation to focus—and predominantly release information—on indicators that show the criminal justice system (or the criminal justice policy priorities of the governing party of the day) in a particularly good light. Such a piecemeal release of data will invariably lead to public distrust and undermine the legitimacy of all data and indicators. Relatedly, to encourage accurate and reliable reporting, the political and bureaucratic message from, respectively, criminal justice policymakers and administrators must be clear that individual officials will not to be punished for poorly performing indicators. The high-level systemic indicators discussed in this guide measure general system performance and trends, not individual wrongdoing or poor performance.

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The decision to detain a person before he is found guilty of a crime, whether made by an arresting officer, prosecutor, or judicial officer, can have a severe, lasting, and adverse impact. Pretrial detention is one of the worst things that can happen to a person: the detainee immediately loses his freedom, and can also lose his family, health, home, job, and community ties.

Informed policymakers are aware of these problems, and understand the need to eliminate the avoidable costs that the excessive and arbitrary use of pretrial detention generate. In addition, policymakers must preserve judicial independence and promote efficiency of the prosecution and police. In short, they need to achieve a balance among a number of factors to ensure the system is performing optimally.

But how do decision-makers obtain a more informed picture of how the pretrial justice system is performing? And, how can information be used to manage the system in an efficient way, while respecting important principles such as judicial independence, due process, and prosecutorial discretion? To implement good practices, a crucial first step is to gain a better understanding of the nature of the problem underpinning the less than optimal use of both pretrial detention and pretrial release.

This guide proposes a methodical approach, whereby empirically-based indicators are developed, refined and deployed to identify exemplary and problematic practices. This will empower policymakers and justice system managers to promote the former and improve the latter – and measure changes in performance over time and between places.