Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

RICHARD A. STEFANI
Deputy Director
Information Technology

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

VERISE V. CAMPBELL
Deputy Director
Foreclosure Mediation

MEETING NOTICE AND AGENDA

Committee to Study Evidence-Based Pretrial Release

VIDEOCONFERENCE

Date and Time of Meeting: Thursday, December 3, 2015 @ 1:30 p.m.

Place of Meeting:

Carson City	Las Vegas
Supreme Court Courtroom 201 S. Carson Street Carson City, Nevada	Regional Justice Center Supreme Court Courtroom 200 Lewis Avenue Las Vegas, Nevada
Teleconference Access: 1-877-336-1829, passcode 2469586	

AGENDA

I. Call to Order
   a. Call of Roll
   b. Approval of 11-05-15 Meeting Summary * ***(Tab 1)***
   c. Opening Remarks
   d. Public Comment

II. Guest Speaker Presentations
   a. *Magistrate Judge Peggy Leen and Ms. Shiela Atkins, U.S. District Court, District of Nevada* ***(Tab 2)***
   b. *Judge Janiece Marshall, Las Vegas Justice Court, Dept. 3* ***(Tab 3)***
   c. *Mr. Jeffrey Clayton, Esq., American Bail Coalition* ***(Tab 4)***
   d. *Mr. Stephen Krimel, Esq., Nevada Bail Agent's Association*

III. Review of Risk Assessment Tools
   a. Kentucky ***(Tab 5)***
   b. Virginia ***(Tab 6)***
   c. Ohio ***(Tab 7)***
   d. Arizona ***(Tab 8)***
   e. District of Columbia ***(Tab 9)***

IV. "Homework" Discussion

a. Technology/System Compatability
b. Pilot Sites

V. Next Meeting Date: January 8, 2016

VI. Public Comment

VII. Adjournment

- Action items are noted by * and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested. Public comment is welcomed by the Commission but may be limited at the discretion of the Chair.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: Jamie Gradick, (775) 687-9808 - email: jgradick@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030 (4)(a))
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations**: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Regional Justice Center, 200 Lewis Avenue, 17th Floor.

TAB 1

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JUDICIAL COUNCIL OF THE STATE OF NEVADA

"To unite and promote Nevada's judiciary as an equal, independent and effective branch of government."

Committee to Study Evidence-Based Pretrial Release

Summary Prepared by Jamie Gradick and Raquel Rodriguez
November 5, 2015
1:30p.m. – 4:45 p.m.
Videoconference (Carson City, Las Vegas)

Members Present

Chief Justice James Hardesty, Chair
Judge Heidi Almase
Assemblyman Elliot Anderson
Judge David Barker
Judge Stephen Bishop
Judge Joe Bonaventure
Jeremy Bosler
Heather Condon
Kowan Connolly
Judge Gene Drakulich
Tad Fletcher
Judge David Gibson, Sr.
Joey Orduna Hastings
Judge Douglas Herndon
Chris Hicks
Dana Hlavac (Proxy for Judge Kerns)
Judge Bita Khamasi
Judge Jennifer Klapper
Phil Kohn
Judge Victor Miller
Judge Michael Montero
Judge Scott Pearson
Judge Thomas Perkins
Judge Melissa Saragosa
Judge Elliott Sattler
Judge Mason Simons
Judge John Tatro
Judge Alan Tiras
Judge Ryan Toone
Judge Natalie Tyrrell
Anna Vasquez
Jeff Wells
Steven Wolfson

AOC Staff

Jamie Gradick
John McCormick
Raquel Rodriguez

I. Call to Order
- Chief Justice Hardesty called the meeting to order at 1:30 p.m.

II. Call of Roll
- Ms. Jamie Gradick called roll.
- Approval of September 30, 2015 meeting summary. Judge Michael Montero moved to approve the meeting summary; Mr. Jeremy Bosler seconded the motion, the meeting summary was unanimously approved.

III. Opening Remarks and Discussion of Committee Goals and Objectives
-

IV. Guest Speaker Presentation—*Kathy Waters, Director of Adult Services, Arizona Supreme Court*
- Ms. Waters provided a brief summary of her background working for the state of Arizona. She also provided information regarding the Arizona Supreme Court five-year agenda.
- Ms. Waters stated Arizona had modeled their strategic agenda after the COSCA white papers.
- The pretrial foundational concepts honor a presumption of innocence, a right to bail that is not excessive, legal and constitutional rights for persons awaiting trial, and balancing the individual's rights with a need to protect the public and the assurance of a court appearance.
- The focuses for judicial officers in setting release conditions include a person's likelihood of reoffending, committing a violent crime or failure to appear in court.
- The purpose of pretrial was to assist the court in making informed pretrial decisions, effectively supervise defendants, and ensure that defendants meet court obligations and uphold legal and constitutional rights of the defendants.
- 61% of people waiting are in jail pretrial, not adjudicated. Many do not have the ability to make bail.
- There are many supporting agencies nationally which include COSCA, Counsel of Chief Justices, the ACLU, the National Association of Counties, the Associations of Chief of Police, prosecuting attorneys, the American Bar Association, etc.
- The goal is to provide current research regarding evidence based pretrial practices and provide the courts as much information as possible on future release.
- Other goals are to expand the use of validated, research based risk assessments and establish the pretrial services.
- Arizona's Juvenile Probation System has adopted evidence-based practices.
- Ms. Waters provided highlights for using a Public Safety Assessment (PSA) which includes a three-part breakdown; a score for failure to appear, a score for new criminal activity, and the propensity a person, if released, would be of risk of committing a violent offense.
- The PSA does not require an interview of the defendant; it is based on criminal history and court access records.
- Judge Scott Pearson asked for more information regarding validation for the use of the PSA. Ms. Waters would forward information of studies regarding the PSA to the Committee.
- Ms. Waters stated the PSA is a tool which is only one piece of information but it does not prevent the court from considering other factors.

- Mr. Steven Wolfson asked if most judges in Arizona use additional information to the PSA, if so, how could it be determined that information from the PSA is valid. Ms. Waters stated additional information is given to judges upon their request; judges would need to trust the information in the PSA but would not need to solely depend on one source of information, although information in the PSA may be sufficient.
- Chief Justice Hardesty noted the fact that judges in Arizona are using additional information in making their pretrial release decision would be germane as the validation of the PSA which was based upon the prior validation that was built on evidence-based practices. Ms. Waters stated more information would be available as data is revealed.
- Judge David Gibson, Sr. asked if Arizona has released more individuals. Ms. Waters stated the numbers would not be available until the data is received to know how many individuals are being released. Chief Justice Hardesty shared information from Kentucky and Washington D.C. which shows the substantial increase in release percentages.

V. Public Comment
- Chief Justice Hardesty invited public comment in Carson City.
- Mr. Steve Krimel (1:18:00)
  - Thank you your honor. My name is Steve Krimel; I'm a California lawyer since 1981. I am presently the president of the Nevada Bail Agents Association. I own two bail agencies here in Northern Nevada; Action and Annie's. I have the executive summary from (1:18:27 inaudible) 2007 publication for Luminosity Incorporated; I don't know who they are, but in looking at it she relies, first of all, there is no such thing as corporate bail in her assessment. In looking at this she relies upon a 1927 article against corporate bail and a 1954 article against commercial bail. She says that she worked from the presumption that money bail was basically both color biased and racially biased, then noted that Hispanic and Black defendants were more likely to be held on bail due to an inability to post bail. Since she is not, in any way, assessing the (1:19:52 inaudible) bail system, apparently what she is referencing is the existing OR system which we would take great disagreement with, because we don't think the system has structure as racially biased. We have a tremendous amount of data and research from various studies previously done that contradict many of the assessment components that you've been introduced to. And as the bail industry would like the opportunity to submit those to the Committee. Thank you.

- Mr. Jeff Clayton
  - Good afternoon, my name is Jeff Clayton; I'm a licensed attorney in the great state of Colorado, here today on behalf of the American Bail Coalition. I'm the national policy director for the American Bail Coalition, which is a coalition of the bail insurance companies; I work on bail issues across the country. Happy to be here today as I said. I was a former federal civil rights lawyer, I also served in a political and legislative capacity on behalf of the two prior chief justices of the Colorado Supreme Court, Justices Mullarkey and Bender. ABC is working on best practices in bail around the nation, there's a lot of information, there's a lot of misinformation and there's a lot of things to understand as you go through this process. What I want to offer you is that we're here to help, we're here to provide a resource to you, we are here to provide any information or any perspective that we can. We have amongst our members companies and lawyers and the agents who write on our paper,

expertise and bail issues from around the country, and I think we can provide a unique perspective to you on these issues. I think it's important not to make this a money, bail, versus the world conversation, it's not productive. And I don't think it's productive in any of the states where we are seeing these reforms, I think the reality is to simply admit that money, financial conditions, do have a place in the bail system and go from there. I think there's a lot of reforms, I think that can be made, there's reforms that the American Bail Coalition has agreed with, things like individualized bail setting like Pennsylvania, no bail schedules, things like that. I think risk assessments have a role, information to judges has a role to help judges make better decisions and so we are here to be part of that conversation and part of the process. I will offer you all of the resources of our member companies, of our association to help you in your road forward and I'll fly out to meet with any one of you if you'd like to talk about bail, that's what I do for a living. I think if given the opportunity, we can prove the worth of financial conditions and that they should be a mix in the system. As I always tell folks, it's about sorting people in the right categories, that's the essence of what we are doing here. We don't think a computer will ever replace judicial discretion; it's only a way to determine who's risky. None of these risk assessments are validated to set bail, that's the reality, that's your job as judges and none of this will replace that. I'd also encourage you to listen to victim's groups, a lot of times what we see nationally is that these policies are not victim driven and that's entirely important in this area. I have two requests. My first request and I think this panel would be unusual to not include representatives from our industry, the American Bail Coalition and/or a (1:23:21 inaudible) company member. I would ask to have a seat at this table. I would also ask that one of the agents, the several agents in here, also be afforded a seat at this table. I think nationally that's been important, it's been an important conversation to have that voice and this Committee would be unusual nationally to not include that voice. The second thing I would ask is an opportunity to come back out here, either at the next meeting or the meeting after, to provide a different perspective on the issues nationally. I and our member companies would come out here and give you our best shot at what we think is going on and some things to think about and reforms and other issues to consider as you move forward. But like I said, we're here to help, we're here to be a resource to you and if there's anything I can do or information I can provide to help you move forward, I'd be glad to do so. Chief Justice, thank you so much.

- Chief Justice Hardesty thanked Mr. Clayton and welcomed the input. Chief Justice Hardesty stated Mr. Clayton would be added to the agenda for the December 3rd meeting to make a presentation. Chief Justice Hardesty clarified that the purpose of the Committee was focused on bail versus no bail. The purpose of the Committee would be on how to best address improved practices for judges who are ultimately responsible for making the decisions. Chief Justice Hardesty also invited Mr. Steve Krimel to present at the December 3rd Committee meeting.
- Chief Justice Hardesty invited public comment from Las Vegas. There was no public comment in Las Vegas.

VI. Review of New York Pretrial Release Initiatives—*Ms. Heather Condon and Ms. Anna Vasquez*

- Ms. Heather Condon introduced herself to the Committee and provided a brief background. *(See meeting materials packet for PowerPoint)*

- The Second Judicial District Pretrial Services have established common goals which include providing timely, unbiased reports and supervising with the least restrictive conditions with the goal of reducing failure to appear and re-offense.
- The Second Judicial District Pretrial Services have many stakeholders including seven courts. Pretrial Services have access to all their court databases and the jail's database and report to all seven courts.
- Pretrial Services have an assessment team located at the jail which operate almost 24 hours a day and interview almost everyone, although a few individuals are not interviewed because those candidates are in transit or in holding.
- Pretrial Services are able to assess and release defendants; they have authority to release certain misdemeanor defendants. Pretrial Services provide a written report for each defendant that is interviewed; the report makes it to court within 24-48 hours. A written report is also provided to the public defender and the defendant is also reported to video court. Pretrial Services also run criminal histories which do take up much time. At times the defendant needs to be re-interviewed and Pretrial Services also conducts those follow up interviews. Pretrial Services also work closely with Specialty Courts; enter after-hours TPO's, weekends and holidays, and alcohol test defendants on supervision.
- Each person who enters the jail will be interviewed by Pretrial Services. There are two supervision teams; one located at the Sparks Justice Court and one located in District Court.
- There are about 120-140 defendants on each Pretrial Service officer's caseload.
- Pretrial Services have referred defendants to social services, which is a new concept for them within the last few years. This has been a great resource to guide defendants to community resources.
- Ms. Condon stated she had been working on a data report through the sheriff's office to find information regarding how many people are in custody. The report utilizes a three day snapshot to identify what happens with a defendant's case within three days after the arrest; which defendants have been released, released on OR, released with supervision and without, who has been bailed with and without supervision and who has been sentenced. The information will help in identifying the population.
- Pretrial Service has seen a decrease in the amount of individuals that are monitored rather than supervised and have also seen a good success rate in closed cases.

- Ms. Anna Vasquez introduced herself to the Committee and provided a brief background. *(See meeting materials packet for PowerPoint)*
  - The Las Vegas Pretrial Services was started under an LEA grant. Ms. Vasquez provided a brief overview of staff hours and tasks. Discussion was held regarding disparity in staff with respect to pretrial functions workload.
  - The purpose of beginning Las Vegas Pretrial Services was to help decrease the population in detention centers and reduce overcrowding.
  - Another purpose for developing Las Vegas Pretrial Services was to provide information to the court for release determination.
  - Las Vegas Pretrial Services operates with a points system.
  - Las Vegas Pretrial Services handles court related functions including processing arrest paperwork, arrest reports, separate court information, verifying posted bail, etc.

- The length of stay in custody prior to being released is, on average, 19 days with a minimum of two days, this includes many jurisdictions within Clark County
- Ms. Vasquez provided a snapshot of information for the Clark County Detention Center for October 2015 which showed how many releases, bookings, inmates in custody, and interviews had been recorded.
- Discussion was held regarding points system used in administrative releases; point system designed into defendant management system and managed electronically.
- Discussion was held regarding differences and disparities between pretrial services in the urban counties; Chief Justice Hardesty informed attendees that this is an issue that the Committee will need to look at further. There is not uniform approach to this in the state.
- Discussion was held regarding capturing stats; currently switching to a new system so statistics will be forthcoming on high-risk.

VII. Pretrial Release Processes

- Judge Stephen Bishop discussed processes for pretrial release used in the rural counties and explained that the lack of a uniform system generally leads most rural jurisdictions to "guessing."
  - In most cases, once he receives the PC sheet, Judge Bishop will reassess the bail; it's initially set by the Sherriff's office based upon the bail schedule.
  - Because of the first appearance/arraignment schedule, the defendant can go anywhere from 2-6 days in jail if he/she doesn't post bail in that time.
  - At arraignment/first appearance, defendant may ask for OR release or bail reduction; Judge Bishop suggests they file a written motion for a bail reduction.
  - No formal tools to assess bail; only uses PC sheet but does consider priors. This process generally works because of the small size of the jurisdiction.
  - Judge Bishop has spoken with the district court judges in his county and they basically follow the same process.
  - Discussion was held regarding a statewide computer system for conducting risk assessments and communicating data and risk assessment results on a statewide basis.
- Judge Melissa Saragosa provided an overview of the pretrial release processes used in her court.
  - Jurisdiction uses a standard bail schedule; bail is set at arrest. Step number one is to assess whether defendant is eligible for an administrative OR.
  - At 48 point the only tool available is the PC sheet.
  - The 72 hour point (arraignment) takes place 3-6 days after arrest; at that time, the Judge does have access to criminal history and a pretrial information sheet with charges and current bail amount and FTA. If interviews were done (approx. 50% of cases) can get additional verified info about employment and/or living arrangements. No point system or recommendations are in place.
  - Many judges don't review bail unless the defendant's attorney asks them to do so (usually via motion).
  - Discussion was had regarding which courts use the Las Vegas Justice Court bail schedule.
- Judge Natalie Tyrrell provided an overview of the pretrial release processes used in her court.
  - North Las Vegas Justice Court interacts with two jails which leads to inconsistencies.

- No pretrial services or information reports. During the week, the judges are provided with whatever background information/criminal history the JEAs can find along with the PC sheet; on the weekends, only the PC sheet is provided.
- It's a balancing act; supervision is utilized often. House arrest is not a feasible option for many defendants since many people do not have landlines anymore
- Discussion was held regarding ability to post bail during limited hours and the "transport status limbo" that occurs and interferes with the ability to post bail during transport process.
- A risk assessment tool would be welcome when setting and assessing bail.

VIII. Review of Risk Assessment Tools

- Chief Justice Hardesty asked those in attendance to provide input on the risk assessment tools provided in the meeting material packet (Kentucky, Virginia, Ohio, Arizona, and the District of Columbia).
  - Attendees were asked to start thinking about what should be included in a risk assessment tool utilized in Nevada.
  - Concern was expressed regarding the ability of achieving a statewide uniformity in terms of data collection and communication.
  - Discussion was held regarding the Ohio instrument; Mr. Bosler suggested a presentation by Dr. LaTessa would be beneficial to the Committee. The fact that the tool is validated and available free of cost is significant; Dr. LaTessa is a "pioneer" in the field.
  - Discussion was held regarding the feasibility if validating a tool at this early point in the process and the need for a tool that can be reviewed and updated as necessary.
  - Discussion was held the feasibility of setting up and maintaining a statewide system to maintain data; Judge Pearson and Heather Condon discussed the development of a case management system that would have to be developed as part of a unified pretrial risk assessment tool and process.
  - Chief Justice Hardesty asked the judges in attendance to complete a "homework" assignment: Look at the tools and have a discussion with your local IT department to determine possible compatibility concerns and issues. Additionally, the Committee needs to identify possible "pilot sites" around the state to test this ability to communicate; if willing to be a pilot site, please let the Chief Justice know as soon as possible.

IX. Next Meeting Date - December 3, 2016 at 1:30 p.m.

X. Adjournment

- Chair Hardesty adjourned the meeting at 4:45 p.m.

TAB 2

UNITED STATES DISTRICT COURT

for the

District of Nevada

United States of America)
v.)
) Case No.
_____)
Defendant)

APPEARANCE BOND

Defendant's Agreement

I, _____ *(defendant)*, agree to follow every order of this court, or any court that considers this case, and I further agree that this bond may be forfeited if I fail:

(X) to appear for court proceedings;
(X) if convicted, to surrender to serve a sentence that the court may impose; or
( ) to comply with all conditions set forth in the Order Setting Conditions of Release.

Type of Bond

( ) (1) This is a personal recognizance bond.

( ) (2) This is an unsecured bond of $ _____ .

( ) (3) This is a secured bond of $ _____ , secured by:

( ) (a) $ _____ , in cash deposited with the court.

( ) (b) the agreement of the defendant and each surety to forfeit the following cash or other property *(describe the cash or other property, including claims on it – such as a lien, mortgage, or loan – and attach proof of ownership and value)*:

If this bond is secured by real property, documents to protect the secured interest may be filed of record.

( ) (c) a bail bond with a solvent surety *(attach a copy of the bail bond, or describe it and identify the surety)*:

Forfeiture or Release of the Bond

Forfeiture of the Bond. This appearance bond may be forfeited if the defendant does not comply with the above agreement. The court may immediately order the amount of the bond surrendered to the United States, including the security for the bond, if the defendant does not comply with the agreement. At the request of the United States, the court may order a judgment of forfeiture against the defendant and each surety for the entire amount of the bond, including interest and costs.

Release of the Bond. The court may order this appearance bond ended at any time. This bond will be satisfied and the security will be released when either: (1) the defendant is found not guilty on all charges, or (2) the defendant reports to serve a sentence.

Declarations

Ownership of the Property. I, the defendant – and each surety – declare under penalty of perjury that:

(1) all owners of the property securing this appearance bond are included on the bond;
(2) the property is not subject to claims, except as described above; and
(3) I will not sell the property, allow further claims to be made against it, or do anything to reduce its value while this appearance bond is in effect.

Acceptance. I, the defendant – and each surety – have read this appearance bond and have either read all the conditions of release set by the court or had them explained to me. I agree to this Appearance Bond.

I, the defendant – and each surety – declare under penalty of perjury that this information is true. (See 28 U.S.C. § 1746.)

Date: _____

_____
Defendant's signature

_____
Surety/property owner – printed name

_____
Surety/property owner – signature and date

_____
Surety/property owner – printed name

_____
Surety/property owner – signature and date

_____
Surety/property owner – printed name

_____
Surety/property owner – signature and date

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Approved.

Date: _____

_____
Judge's signature

UNITED STATES DISTRICT COURT

for the

District of Nevada

United States of America
v.

Case No.

_____
Defendant

ORDER SETTING CONDITIONS OF RELEASE

IT IS ORDERED that the defendant's release is subject to these conditions:

(1) The defendant must not violate federal, state, or local law while on release.

(2) The defendant must cooperate in the collection of a DNA sample if it is authorized by 42 U.S.C. § 14135a.

(3) The defendant must advise the court or the pretrial services office or supervising officer in writing before making any change of residence or telephone number.

(4) The defendant must appear in court as required and, if convicted, must surrender as directed to serve a sentence that the court may impose.

The defendant must appear at: _____
Place

_____

on _____
Date and Time

If blank, defendant will be notified of next appearance.

(5) The defendant must sign an Appearance Bond, if ordered.

ADDITIONAL CONDITIONS OF RELEASE

Upon finding that release by one of the above methods will not by itself reasonably assure the defendant's appearance and the safety of other persons or the community, IT IS FURTHER ORDERED that the defendant's release is subject to the conditions marked below:

SUPERVISION

( ) (6) The defendant is placed in the custody of:
Person or organization _____
Address *(only if above is an organization)* _____
City and state _____ Tel. No. _____
_____ *(only if above is an organization)*
who agrees (a) to supervise the defendant in accordance with all of the conditions of release, (b) to use every effort to assure the defendant's appearance at all scheduled court proceedings and (c) to notify the court immediately if the defendant violates any condition of release or disappears.

Signed: _____ _____
Custodian or Proxy *Date*

( ) (7) The defendant shall report to: ( ) **U.S. Pretrial Services Office** ( ) Las Vegas 702-464-5630 ( ) Reno 775-686-5964
no later than: _____ ( ) **U.S. Probation Office** ( ) Las Vegas 702-527-7300 ( ) Reno 775-686-5980

( ) (8) The defendant is released on the conditions previously imposed.

BOND

( ) (9) The defendant shall execute a bond or an agreement to forfeit upon failing to appear as required the following sum of money or designated property: _____

( ) (10) The defendant shall post with the court the following proof of ownership of the designated property, or the following amount or percentage of the above-described sum: _____

( ) (11) The defendant shall execute a bail bond with solvent sureties in the amount of $ _____.

PENDING MATTERS

( ) (12) The defendant shall satisfy all outstanding warrants within _____ days and provide verification to Pretrial Services or the supervising officer.

( ) (13) The defendant shall pay all outstanding fines within _____ days and provide verification to Pretrial Services or the supervising officer.

( ) (14) The defendant shall abide by all conditions of release of any current term of parole, probation, or supervised release.

IDENTIFICATION

( ) (15) The defendant shall use his/her true name only and shall not use any false identifiers.

( ) (16) The defendant shall not possess or use false or fraudulent access devices.

TRAVEL

( ) (17) The defendant shall surrender any passport and/or passport card to U.S. Pretrial Services or the supervising officer.

( ) (18) The defendant shall report any lost or stolen passport or passport card to the issuing agency as directed by Pretrial Services or the supervising officer within 48 hours of release.

( ) (19) The defendant shall not obtain a passport or passport card.

( ) (20) The defendant shall abide by the following restrictions on personal association, place of abode, or travel:
Travel is restricted to the following areas:
( ) Clark County, NV ( ) Washoe County, NV ( ) State of NV ( ) Continental U.S.A. ( ) Other

( ) (21) The defendant may travel to _____ for the purpose of _____.

RESIDENCE

( ) (22) The defendant shall maintain residence at ( ) current or ( ) at:

_____
and may not move prior to obtaining permission from the Court, Pretrial Services or the supervising officer.

( ) (23) The defendant shall maintain residence at a halfway house or community corrections center as Pretrial Services or the supervising officer considers necessary.

( ) (24) The defendant shall pay all or part of the costs for residing at the halfway house or community corrections center based upon his/her ability to pay as Pretrial Services or the supervising officer determines.

( ) (25) The defendant shall return to custody each (week) day at _____ o'clock after being released each (week) day at _____ o'clock for employment, schooling, or the following purpose(s): _____

EMPLOYMENT

( ) (26) The defendant shall maintain or actively seek lawful and verifiable employment and notify Pretrial Services or the supervising officer prior to any change.

( ) (27) The defendant shall not be employed in, or be present in, any setting directly involving minor children.

( ) (28) The defendant shall not secure employment in the following field(s): _____

( ) (29) The defendant is prohibited from employment/self-employment in a setting where he/she has access to financial transactions or the personal identifiers of others.

EDUCATION/VOCATION

( ) (30) The defendant shall maintain or commence an education or vocational program as directed by Pretrial Services or the supervising officer.

CONTACT

( ) (31) The defendant shall avoid all contact directly or indirectly with any person who is or may become a victim or potential witness in the investigation or prosecution, including but not limited to: _____.

( ) (32) The defendant shall avoid all contact directly or indirectly with co-defendant(s) unless it is in the presence of counsel.

( ) (33) The defendant is prohibited from contact with anyone under the age of 18, unless in the presence of a parent or guardian who is aware of the alleged instant offense.

( ) (34) The defendant shall report as soon as possible to Pretrial Services or the supervising officer any contact with law enforcement personnel, including but not limited to any arrest, questioning, or traffic stop.

FIREARMS/WEAPONS

( ) (35) The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapons.

( ) (36) Any firearms and/or dangerous weapons shall be removed from the defendant's possession within 24 hours of release from custody and the defendant shall provide written proof of such to Pretrial Services or the supervising officer.

SUBSTANCE ABUSE TESTING AND TREATMENT

( ) (37) The defendant shall submit to an initial urinalysis. If positive, then (38) applies.

( ) (38) The defendant shall submit to any testing required by Pretrial Services or the supervising officer to determine whether the defendant is using a prohibited substance. Any testing may be used with random frequency and may include urine testing, the wearing of a sweat patch, a remote alcohol testing system and/or any form of prohibited substance screening or testing. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or monitoring which is/are required as a condition of release.

( ) (39) The defendant shall pay all or part of the cost of the testing program based upon his/her ability to pay as Pretrial Services or the supervising officer determines.

( ) (40) The defendant shall refrain from use or unlawful possession of a narcotic drug or other controlled substances defined in 21 U.S.C. § 802, unless prescribed by a licensed medical practitioner.

( ) (41) The defendant shall refrain from any use of alcohol.

( ) (42) The defendant shall refrain from the excessive use of alcohol.

( ) (43) The defendant shall refrain from the use or possession of synthetic drugs or other such intoxicating substances.

( ) (44) The defendant shall not be in the presence of anyone using or possessing:

- ( ) (44A) A narcotic drug or other controlled substances
- ( ) (44B) Alcohol
- ( ) (44C) Intoxicating substances or synthetics

( ) (45) The defendant shall participate in a program of inpatient or outpatient substance abuse therapy and counseling if Pretrial Services or the supervising officer considers it advisable.

( ) (46) The defendant shall pay all or part of the cost of the substance abuse treatment program or evaluation based upon his/her ability to pay as determined by Pretrial Services or the supervising officer.

MENTAL HEALTH TREATMENT

( ) (47) The defendant shall undergo medical or psychiatric treatment.

( ) (48) The defendant shall submit to a mental health evaluation as directed by Pretrial Services or the supervising officer..

( ) (49) The defendant shall pay all or part of the cost of the medical or psychiatric treatment program or evaluation based upon his/her ability to pay as determined by Pretrial Services or the supervising officer.

LOCATION MONITORING

( ) (50) The defendant shall participate in one of the following location monitoring program components and abide by its requirements as Pretrial Services or the supervising officer instructs.

- ( ) (50A) Curfew.
  The defendant is restricted to his/her residence every day from _____ to _____ and/or a time schedule deemed appropriate by Pretrial Services or the supervising officer.
- ( ) (50B) Home Detention.
  The defendant is restricted to his/her residence at all times except for employment; education; religious services; medical, substance abuse or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities pre-approved by Pretrial Services or the supervising officer.
- ( ) (50C) Home Incarceration.
  The defendant is restricted to 24-hour-a-day lock-down except for medical necessities and court appearances or other activities specifically approved by the court.

( ) (51) The defendant shall submit to the type of location monitoring technology indicated below and abide by all of the program requirements and instructions provided by Pretrial Services or the supervising officer related to the proper operation of the technology.
- ( ) (51A) Location monitoring technology as directed by Pretrial Services or the supervising officer.
- ( ) (51B) Voice Recognition monitoring.
- ( ) (51C) Radio Frequency (RF) monitoring.
- ( ) (51D) Global Positioning Satellite (GPS) monitoring.

( ) (52) The defendant shall not tamper with, damage, or remove the monitoring device and shall charge the said equipment according to the instructions provided by Pretrial Services or the supervising officer.

( ) (53) The defendant shall pay all or part of the cost of the location monitoring program based upon his/her ability to pay as determined by Pretrial Services or the supervising officer.

INTERNET ACCESS AND COMPUTERS

( ) (54) The defendant shall not have access to computers or connecting devices which have Internet, Instant Messaging, IRC Servers and/or the World Wide Web, including but not limited to: PDA's, Cell Phones, iPods, iPads, Tablets, E-Readers, Wii, PlayStation, Xbox or any such devices, at home, place of employment, or in the community.

( ) (55) The defendant may only use authorized computer systems at his/her place of employment for employment purposes.

( ) (56) The defendant shall refrain from possession of pornography or erotica in any form or medium.

FINANCIAL

( ) (57) The defendant shall not obtain new bank accounts or lines of credit.

( ) (58) The defendant shall not act in a fiduciary manner on behalf of another person.

( ) (59) The defendant shall not use any identifiers, access devices, or accounts, unless under his/her true name.

( ) (60) The defendant shall not solicit monies from investors.

( ) (61) The defendant shall disclose financial information as directed by Pretrial Services or the supervising officer.

( ) (62) The defendant shall reimburse the Treasury of the United States for the cost of _____ (name of attorney) representation at the rate of $_____ per _____, payable to the Clerk of the Court for deposit in the Treasury, as follows:

_____

_____

SEARCH

( ) (63) The defendant shall be subject to search of person, residence and/or vehicle as directed by Pretrial Services or the supervising officer to ensure compliance with these conditions.

OTHER PROHIBITED ACTIVITIES

( ) (64) The defendant shall refrain from gambling or entering any establishment whose primary business involves gambling activities.

( ) (65) The defendant is prohibited from entering any establishment whose primary source of business involves pornography, erotica, or adult entertainment.

( ) (66) The defendant shall withdraw from any interest, in any state, that he/she may have in any business which is related to the sale, distribution, manufacture or promotion of marijuana or synthetic marijuana. This includes other dispensaries or paraphernalia stores.

( ) (67) The defendant shall not obtain or renew a "medical marijuana" card within the State of Nevada or any other state.

( ) (68) All aspects of the _____ dispensary shall be closed.

( ) (69) All promotion, web sites and advertising associated with the establishment should be discontinued.

( ) (70) The defendant shall seek and maintain full time employment outside the field of medical marijuana and hydroponics.

( ) (71) The defendant shall have no involvement whatsoever in any medical marijuana program, to include consulting, manufacture, or dispensing of controlled substances, either voluntary or in return for compensation, nor can defendant be involved with individuals seeking a doctor's recommendation.

( ) (72) The defendant shall not visit or associate with any hydroponic, paraphernalia or dispensing stores.

( ) (73) The defendant shall have no involvement in the referral of medical marijuana.

OTHER CONDITIONS

( ) (74) The defendant shall abide by other conditions as noted below:

_____

_____

_____

_____

_____

ADVICE OF PENALTIES AND SANCTIONS

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

Violating any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of your release, an order of detention, a forfeiture of any bond, and a prosecution for contempt of court and could result in imprisonment, a fine, or both.

While on release, if you commit a federal felony offense the punishment is an additional prison term of not more than ten years and for a federal misdemeanor offense the punishment is an additional prison term of not more than one year. This sentence will be consecutive (*i.e.*, in addition to) to any other sentence you receive.

It is a crime punishable by up to ten years in prison, and a $250,000 fine, or both, to: obstruct a criminal investigation; tamper with a witness, victim, or informant; retaliate or attempt to retaliate against a witness, victim, or informant; or intimidate or attempt to intimidate a witness, victim, juror, informant, or officer of the court. The penalties for tampering, retaliation, or intimidation are significantly more serious if they involve a killing or attempted killing.

If, after release, you knowingly fail to appear as the conditions of release require, or to surrender to serve a sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more – you will be fined not more than $250,000 or imprisoned for not more than 10 years, or both;
(2) an offense punishable by imprisonment for a term of five years or more, but less than fifteen years – you will be fined not more than $250,000 or imprisoned for not more than five years, or both;
(3) any other felony – you will be fined not more than $250,000 or imprisoned not more than two years, or both;
(4) a misdemeanor – you will be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender will be consecutive to any other sentence you receive. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgment of the Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release, to appear as directed, and surrender to serve any sentence imposed. I am aware of the penalties and sanctions set forth above.

_____
Defendant's Signature

_____
City and State

Directions to the United States Marshal

( ) The defendant is ORDERED released after processing.
( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judge that the defendant has posted bond and/or complied with all other conditions for release. If still in custody, the defendant must be produced before the appropriate judge at the time and place specified.

Date: _____

_____
Judicial Officer's Signature

_____
Printed name and title

DISTRIBUTION: COURT DEFENDANT PRETRIAL SERVICE U.S. ATTORNEY U.S. MARSHAL

TAB 3

JUDGE JANIECE MARSHALL

Justice Court, Las Vegas Township

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, FIRST FLOOR
BOX 552511
LAS VEGAS NV 89155-2511
(702) 671-3361 -- OFFICE
(702) 671-3362 -- FAX

November 30, 2015

Chief Judge Joseph Bonaventure
Las Vegas Justice Court

Committee to Study Evidence-Based Pretrial Release
Clark Regional Judicial Council Meeting
Regional Justice Center
200 Lewis Avenue, 17th Floor
Las Vegas, NV 89101

Re: Pilot Program Conducted by CCDC in conjunction with LVJC, Dept. 3 re: "Risk Evaluation"

Dear Chief Judge and Committee Members:

In conjunction with the Las Vegas Metropolitan Police Departments' Detention Services Division Electronic Monitoring Program ("House Arrest") and pursuant to the Committee's request, we submit the attached report presenting "House Arrest Risk Assessment Evaluation" Pilot Program conducted on November 21, 2015. House Arrest Officers assessed the risks of flight as well as danger to the community, making recommendations for purpose of setting initial bail conditions for in-custody defendants at the probable cause determination and initial bail setting ("48 Hour Review") by a justice of the peace.

Attached, please also find the following documents relating to the pilot program:

1. House Arrest (Electronic Monitoring Program) Risk Assessment Evaluation Form setting forth factors House Arrest utilized in recommending whether a defendant was a viable candidate for a pretrial release either Own Recognizance "OR" or OR with an additional Special Bail Conditions of House Arrest and/or additional special bail setting conditions.

2. Summary of the results from the Pilot Program with respect to changes made to the initial bail setting as a consequence of the House Arrest's recommendation based upon data bases and information not available to a justice of the peace at the 48 Hour Review.

3. House Arrest Risk Assessment Evaluation and Cost Comparison to Incarceration as Well as Additional Requirement of Parole and Probation.

4. Eleven month Analysis of defendants released on House Arrest.

5. International Association of Chiefs of Police: *"Law Enforcement's Leadership Role in the Pretrial Release and Detention Process."*

6. Las Vegas Metropolitan Police Department Detention Services Division Standard Operating Procedures for the Electronic Monitoring Program ("House Arrest S.O.P.).

Respectfully submitted by:

Judge Janiece Marshall
Department 3
Las Vegas Justice Court
(702) 671-3361

Las Vegas Metropolitan Police Department
Detention Services Division
Captain William Teel
Lieutenant Andrew Peralta
House Arrest Sergeant Dante Tromba

House Arrest (Electronic Monitoring Program) Risk Assessment Evaluation

Name:_____ ID#:_____ Case#:_____

Date of Conviction:_____ Current Charges:_____

Criminal History (if yes, please print date): YES_____ NO___

Violent History: YES_____ NO___

a. Kidnap
b. Rape
c. Batt/W/SBH
d. Att/Murder
e. Murder
f. Robb/WDW
g. DV/W/Strangulation
h. Sexual Assault
i. Registered Sex Offender
j. Crimes Against Children
k. Home Invasion
l. Domestic Violence History 1st – 2nd – 3rd

Institutional History: YES_____ NO___

Mental Health History: YES_____ NO___

Flight Risk: YES_____ NO___

No Contact Order/TPO/EPO: YES_____ NO___

Risk to the Community: YES_____ NO___

Registered Sex Offender: YES_____ NO___

Homeless: YES_____ NO___

Gang/STG: YES_____ NO___

Dear Judge:

House Arrest has completed a Risk Assessment Evaluation with respect to whether this Defendant would be a danger to the Community and/or a high risk of flight. Based on our Risk Assessment Evaluation House Arrest concludes that this Defendant **is/is not** a good candidate for pretrial release whether as an Own Recognizance Release or House Arrest.

Respectfully,

Officer_____

Date_____

Summary of Pilot Program Conducted on November 21, 2015

Judge Marshall reviewed arrest reports and charges to determine probable cause and set initial bail conditions of 60 persons in-custody. Of those 60 defendants,

14 Bail - Set In Court
12 Bail - Standard + House Arrest
3 Bail - Standard + House Arrest and Source Hearing or Scram Device
23 Bail - Standard or House Arrest
4 OR release
4 Posted Standard Bail before or during PC review

House Arrest simultaneously conducted its "Risk Assessment Evaluation" Checklist and made recommendations to Judge Marshall following her initial bail setting that she based solely on the Arrest Reports. Of the 60 defendants, **12 resulted in increased release conditions** due to Criminal History and Institutional Behavior reports provided by House Arrest to Judge Marshall; 1 resulted in decreased bail conditions. Additionally, 2 of the 60 were identified as homeless and House Arrest arranged for housing for pretrial release.

HOUSE ARREST RISK ASSESSMENT EVALUATION AND COST COMPARISON TO INCARCERATION AS WELL AS ADDITIONAL REQUIREMENT OF PAROLE AND PROBATION

I. Benefits of House Arrest (with or without posting of bond or monetary bail)

a. Many jurisdictions provide for House Arrest (Electronic Monitoring Program), including the Clark County Detention, to permit a defendant to continue employment, maintain a home and keep a defendant's family together while ensuring the safety of the community and ensuring that a defendant answers for the case

b. Excessive pre-trial detention can inflict economic hardship, psychological harm, disrupt family, and cause loss of income and home

c. Children of defendants suffer due to incarceration of one parent, financially as well as emotionally

II. House Arrest Officers Uniquely Qualified to Make Risk Assessment Evaluations for Recommendations to Judicial Officers in Setting Conditions of Bail Based Upon Training and Access to Extensive Data Bases

a. House Arrest Officers have access to numerous data bases containing vital information of past criminal and institutional behavior including: SCOPE, CJIS, JLINK, ITAG, and Odyssey. Pretrial Services relies upon JLINK for the Pretrial Services Information Sheet that is currently provided at the "Initial Court Appearance" (72 Hour appearance).

b. House Arrest Officers trained to timely and accurately interpret Scope, CJIS, JLINK, ITAG, and Odyssey data bases, utilized not only for classification purposes at

booking for housing purposes in jail but also for eligibility of release on House Arrest (pre- and post-conviction).

c. House Arrest Risk Assessment Evaluation enables House Arrest Officers to collect data that can be used to predict recidivism and place an individual in proper classes and groups in order to better their chances in re-entry type programs. House Arrest screens the following information for a proper risk assessment:
    i. Criminal History
    ii. Violent History
    iii. Institutional History
    iv. Mental Health History
    v. Flight Risk
    vi. No Contact Order/
    vii. Risk to Community
    viii. Domestic Violence History
    ix. Registered Sex Offender
    x. Homeless-will need housing assistance

d. This highly critical information is used to formulate a proper risk assessment prior to releasing to the community

e. House Arrest staff has the experience to interpret criminal history and convictions from other states

III. Procedure Utilized by House Arrest to Assess Risk of Flight and Danger to the Community Pre- and Post-Conviction and as Additional Condition of Parole and Probation

a. CCDC pre-screens sentenced inmates every 24 hours for placement on House Arrest. Clark County's "iTAG" (Information Technology Advisory Group) data base generates report regarding sentenced inmates who may be eligible for House Arrest.

b. House Arrest conducts a background investigation to determine if an inmate meets the minimum qualifications:

Criminal History, Institutional History, Court Documents and qualified residence.

1. Scope: Defendant ineligible if awaiting sentencing on any out of custody charges, verified through SCOPE.

2. iTAG used to determine any behavior issues that would be incompatible House Arrest.

3. Criminal history ineligibility for House Arrest:

    a. Arrest record must not reveal a history within the past three years. of sexual offenses

    b. Defendant cannot be currently charged with a predatory sexual offense (unless court specifically orders House Arrest to place the defendant on House Arrest). Misdemeanor offenses may be allowed if they can be effectively managed using the Electronic Monitoring system.

    c. House Arrest Sergeant makes final determination regarding a defendant's eligibility.

IV. Costs of House Arrest versus Incarceration

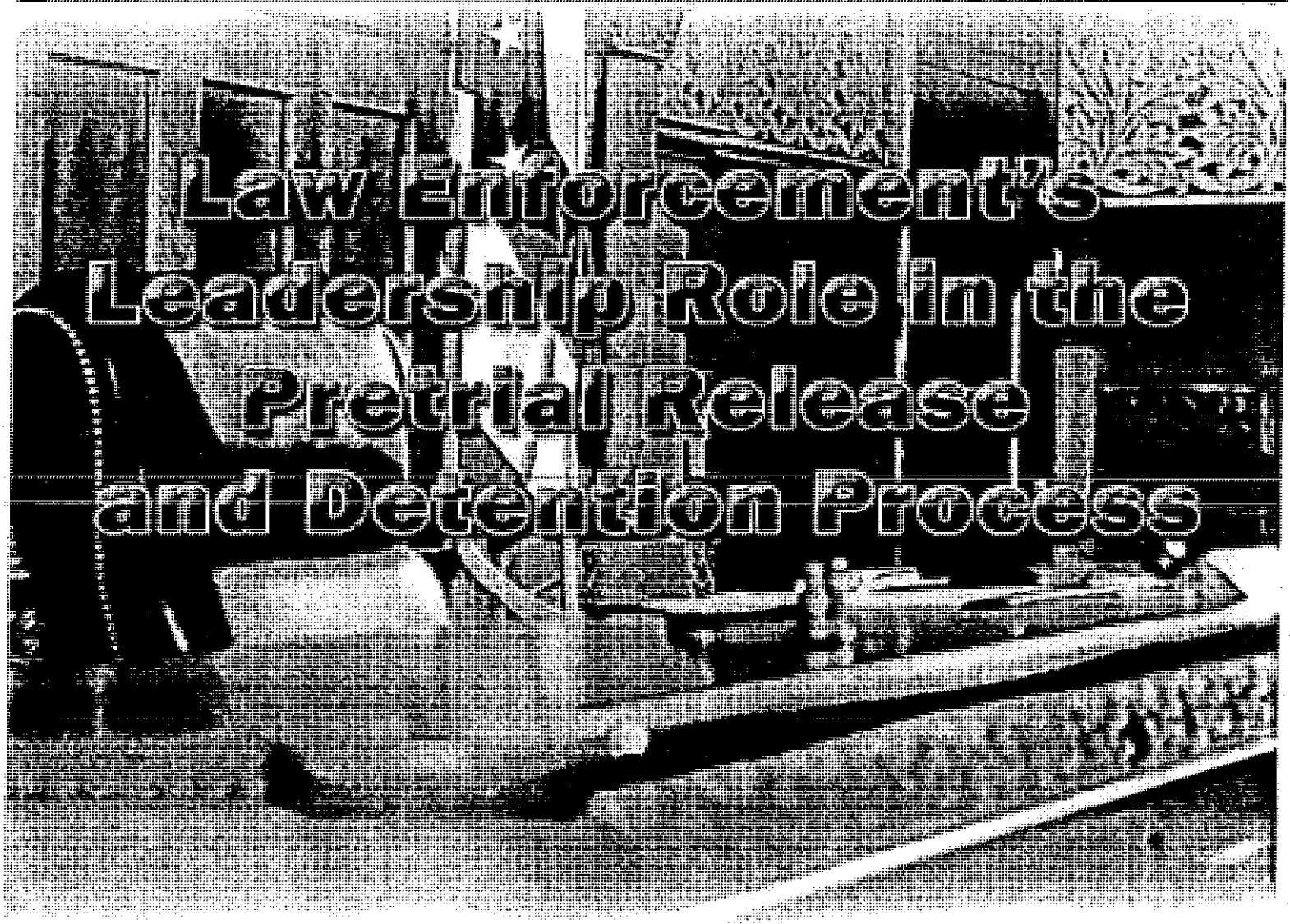
House Arrest costs $2.65 per day (fees can be waived based upon financial hardship).

Incarceration costs depend upon the total number of defendants per day ranging from $135.00 to $142.00 per day.

Defendants Released
on House Arrest
January–November 2015
DAILY AVERAGE

Month:	Daily Average:
January 2015	247
February 2015	240
March 2015	259
April 2015	245
May 2015	258
June 2015	311
July 2015	311
August 2015	288
September 2015	307
October 2015	393
November 2015	1-14 385

THE INTERNATIONAL ASSOCIATION
of CHIEFS
of POLICE



Law Enforcement's Leadership Role in the Pretrial Release and Detention Process

February 2011

In Collaboration With

BJA
Bureau of Justice Assistance
U.S. Department of Justice

and

PJI
PRETRIAL JUSTICE INSTITUTE
FOUNDED 1977

1. Introduction

On November 29, 2009, Maurice Clemmons, a convicted felon with a lengthy criminal record that included numerous violent offenses, executed four police officers[1] in Lakewood, Washington while they were preparing for their shifts. Rather than being a rare and isolated incident, the events that led up to this tragedy are not that uncommon in our criminal justice system.

Previously classified by the Washington State Department of Corrections as at a "high risk to reoffend," on May 9, 2009, Clemmons assaulted two Pierce County sheriff's deputies after exclaiming, "I'll kill all you bitches." He was released from jail the following day, without ever having seen a judge, after posting $1,700 with a local bail bondsman to satisfy his $40,000 bond on these assault charges. Two days later, on May 11, 2009, Clemmons raped a 12 year-old girl. Upon his arrest for the rape, a court-ordered mental health evaluation deemed him to be "dangerous" and said that he "presented an increased risk of future criminal acts." A Pierce County judge set bail on the rape charges at $150,000, ultimately allowing the release of Clemmons and his dangerous behavior into society. On November 23, 2009, Clemmons again paid only a fraction of his bond, this time $8,000 to Jail Sucks Bail Bonds. On November 26, 2009, Clemmons told several people that he planned to murder police officers. Three days later, he did . . . (*New York Times*, "Tacoma Suspect Said to Threaten to Shoot Officers," December 1, 2009).

The safety of these slain officers and the community at large may not have been jeopardized if the criminal system had taken into account the danger that the defendant posed to the community rather than simply his financial means to post bail. The killings in Lakewood are just one example of crimes, including the shooting of other police officers,[2] committed by defendants who were released on financial bond without consideration for whether or not they pose a danger to society or whether or not they will return for their court appearances. As a result of the Clemmons case, Washington State legislators, local prosecutors, and the bail bond industry have teamed up to change the "largely unregulated bail-bond business" (*Seattle Times*, "Lax Bail System Helped Clemmons Get Out of Jail," June 6, 2010).

A suspect's release or detention pending trial currently is not based on an informed assessment of whether or not he or she is a danger to society and or is likely to return to court for trial, but on whether the suspect has enough money to bail himself or herself out of jail. (*Pretrial Justice Institute* website at www.pretrial.org.)

> "We are allowing dangerousness rather than assessing dangerousness."
> – PJI Executive Director Timothy Murray at the April 14, 2010 Focus Group

The Maurice Clemmons incident is just one example of how across the United States, law enforcement has had little, if any, role in determining whether a defendant should be released back into the community pending trial. Surprisingly, in only a handful of jurisdictions does law enforcement play a role in helping a judge determine who should and should not be released back into society. Public and officer safety and defendant accountability are the foremost considerations in the issue of pretrial release. Considering this significant gap, various leaders in the justice field felt that the time has come for law enforcement to become a part of the dialogue on pretrial release and eventually to take its appropriate leadership role in improving the pretrial system.

---

1. The officers who were killed were Tina Griswold, Ronald Owens, Mark Renninger and Greg Richards.

2. A Detroit police officer was killed by a suspect with a lengthy criminal record, including battling with law enforcement, and who was recently released on a $50,000 bond. (*The Detroit News*, "Suspect Had Long Record of Violence," May 4, 2010). Two police officers were killed and one was wounded by a man who was released on $10,000 bond for an earlier carjacking in a neighboring jurisdiction. (*Washington Post*, "Officer Fatally Shot Outside Police Station," May 9, 2008; and *Washington Post*, "A Slow Lane, Safe Station Still Eluding," May 8, 2007. See also, *Orlando Sentinel*, "Three Officers Arrested in Shooter Incident," January 8, 2001 (Two defendants out on pretrial release for stabbing an elderly man killed a police officer in a barrage of bullets); and *New York Times*, "Two Pentagon Police Officers Shot, Gunman Killed," March 4, 2010.)

In response, on April 14, 2010, the International Association of Chiefs of Police (IACP), in collaboration with the Bureau of Justice Assistance (BJA), Office of Justice Programs, U.S. Department of Justice and the Pretrial Justice Institute (PJI), convened a focus group of criminal justice professionals to discuss the issue of setting bail and supervising suspects released into the community pending trial. The group consisted of police executives from large, medium, and small jurisdictions; prosecuting attorneys; academic researchers and scholars; judges; and defense attorneys. (The complete list of attendees is attached as Appendix A.) The consensus among the group was that law enforcement can and should play a leadership role in addressing the issues relative to the pretrial process, particularly those that directly affect public and officer safety and defendant accountability.

"They are letting the scariest people out. It is more dangerous than it needs to be right now."
Orlando Sentinel, "Flaws Allow Accused to Escape Justice," January 8, 2001

2. Background

Across the country, police officers often complain that a suspect is back on the street before the officer completes the arrest paperwork. When citizens see the "bad guy" who was just arrested back on the street, they often ask law enforcement why. The answer is often simply because the defendant was able to pay his or her way out of jail. This issue and many others relevant to pretrial recourse were the reasons for the IACP to convene the pretrial focus group meeting.

Before documenting the work of focus group participants, the concerns they articulated, and the final recommendations they offered, it is first important to set the stage with pertinent background information on bail, the bail bond industry, pretrial release programs, and the relevant case law and statutes that govern these activities.

A Brief History of the Bail System

Rooted in English common law, bail was intended to ensure that a defendant returned to court for trial. However, beginning in the early 1900s, scholars and practitioners began to reevaluate the financial bail process. They started to question a system that bases pretrial release or detention on whether the suspect can pay money (often obtained through ill-gotten means), without regard to the danger the suspect may present to the community (Beeley, Arthur L., *The Bail System in Chicago,* Chicago: University of Chicago Press, 1927: reprinted, 1966).

In 1961, the Vera Institute of Justice was established to study the effectiveness of a bail system that based a suspect's liberty solely on financial status. Vera created the first pretrial screening program in the country, the Manhattan Bail Project, which demonstrated that a defendant could be released and return to court for trial based on factors that included strong ties to the community rather than his or her ability to pay the bail amount. In 1966, the United States Congress passed the Bail Reform Act, which set forth conditions of release based on appearance risks rather than money (The Bail Reform Act of 1966, 18 U.S.C. § 3146, et. seq.). Finally, in 1984, Congress expanded the 1966 Act by adding whether a suspect poses a danger to the community as a determination of bail (The Bail Reform Act of 1984, 18 U.S.C. § 3141, et.seq.).

The Current Pretrial System

> *"Using only monetary bail is basically like rolling the dice at the cost of public safety."*
> – Senior Judge Truman A. Morrison at the April 14, 2010 Focus Group

The bail laws in the United States are not typical of those throughout the rest of the world. Many U.S. jurisdictions use preset fees arranged by the type of charge (e.g., $2,500 for burglary or $5,000 for manslaughter in Orange County, Florida) to determine whether a suspect should or should not be released back into the community. Accused felons, therefore, are often released on bail with little or no attention paid to their criminal histories, their danger to society, or whether they are likely to become fugitives. According to the American Bar Association's (ABA) *Standards for Criminal Justice for Pretrial Release*, 3rd edition, 2007, bail is generally set in "a routinely haphazard fashion" (ABA Standards, Introduction commentary, p. 31) and "when bail amounts are fixed solely on the basis of the charge, information relevant to assessing the real risk of nonappearance or pretrial crime is never considered" (ABA Standard 10-1.7 commentary, p. 51). In addition to the ABA, the Association of Prosecuting Attorneys, the National District Attorneys Association, and the National Association of Counties have formally called for rational, safe, and transparent pretrial release based on a risk assessment rather than on the suspect's financial means.

Overview of Case Law, Statutes and Studies

> *"We cannot continue to operate without a rational and transparent pretrial system."*
> – Police Chief Margaret Ryan at the April 14, 2010 Focus Group

Case Law

The seminal case on the issue of bail and pretrial release is *United States v. Salerno*, 481 U.S. 739 (1987), which held that detaining a suspect based on the suspect's potential danger to the community if released is appropriate and outweighs the suspect's individual right to liberty (*Salerno*, p. 748). Prior to the U.S. Supreme Court's decision in *Salerno*, courts were not allowed to consider a defendant's dangerousness or the community's safety when setting bail. If a judge felt that a defendant was too dangerous to be released, the judge would be forced to set an inordinately high bail amount, hoping that the defendant would not be able to meet such a financial burden. It is important to note, however, that many states have not followed the Supreme Court's *Salerno* decision to allow danger to be considered in denying release.

Another important case is *Stack v. Boyle*, 342 U.S. 1 (1951) in which the U.S. Supreme Court held that someone "arrested for a non-capital offense shall be admitted to bail . . ." and that bail cannot be set at a sum higher than an amount reasonably calculated to ensure that the defendant gives "adequate assurance that he will stand trial and submit to the sentence if found guilty" (*Stack*, p. 2). Furthermore, in *Carlson v. Landon*, 342 U.S. 524 (1952), the United States Supreme Court held that bail is not an absolute right and may be denied if there is a "reasonable foundation" to do so (*Carlson*, p.541).

State Statutes

The bail laws in each state and territory vary widely, except for one commonality: they all accept cash as a condition of pretrial release. As a matter of fact, a small number of jurisdictions set financial bail as the only condition of pretrial release. Approximately 40 jurisdictions allow a court to consider the dangerousness of the defendant.[3] Of those, fewer provide the court with pertinent information about the defendant, including prior criminal history or fugitive status.

3. For a complete listing of the laws, log on to the Pretrial Justice Institute's website at www.pretrial.org.

Pretrial Release Studies and Financial Bail

> *"It's hard to explain to citizens when someone out on bail commits another crime. They often ask, 'Why was this guy out when he already committed a crime?'"*
> – James C. Quinn, Senior Executive Assistant District Attorney, at the April 14, 2010 Focus Group

In 1985, a study conducted by the National Council on Crime and Delinquency found that supervised pretrial release programs (i.e., those that include governmental oversight of defendants released from pretrial custody) are the most effective ways to ensure that defendants appear for all of their court hearings and do not commit additional crimes while back in the community. The study also found that, in the longrun, these types of programs save jurisdictions money on the costs of pretrial detention (Austin, James, et. al. "The Effectiveness of Supervised Pretrial Release," *Crime and Delinquency*, Vol. 31, No. 4, October 1985, pp. 519-537). Subsequently, other studies have suggested that financial bail is not a reliable predictor of whether a defendant will appear in court or remain free of crime while out on bail. Rather, a defendant's prior criminal history; prior court appearances; and interviews of defendants, witnesses, and arresting officers are the best predictors. (Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, *Pretrial Release of Felony Defendants in State Courts*, Special Report, November 2007; and Goldkamp, John, et. al., *Personal Liberty and Community Safety: Pretrial Release in the Criminal Court*, New York: Plenum Publishing, 1995).

According to the ABA, "financial bail is not an appropriate response to concerns that the defendant will pose a danger if released. Money bail should not be used for any reason other than to respond to a risk of flight" (ABA Standard 10-1.4(d) commentary, p.44). ABA Standard 10-1.4 strictly proscribes the practice of setting very high financial bail when a defendant poses a risk of dangerousness (ABA Standard 10-1.4, p 42). The commentary to Standard 10-5.3(a) furthers the philosophy of the ABA that financial bond should be severely restricted to "when no less restrictive, nonfinancial release condition will suffice to ensure a defendant's appearance in court" and "prohibits the setting of financial conditions of release in order to prevent future criminal conduct or protect public safety" (ABA Standard 10-5.3(a) commentary, p. 111).

Based on these studies, various national organizations have determined that financial bail has little or no bearing on whether a defendant will return to court and remain crime-free. Yet, many jurisdictions continue to use it as a litmus test for release. The reason may simply be due to the fact that financial bail has been in place for centuries with little public sentiment for changes to the existing system.

The Commercial Bail Industry

> *"In England, Canada, and other countries [Australia, India, South Africa], agreeing to pay a defendant's bond in exchange for money is a crime akin to witness tampering or bribing a juror – a form of obstruction of justice."*
> *New York Times*, "Illegal Globally, Bail for Profit Remains in the U.S.," January 29, 2008

According to BJS, two million defendants are released annually from pretrial detention by approximately 14,000 commercial bail agents throughout the United States (BJS, *Pretrial Release of Felony Defendants in State Courts*, Special Report, p. 4). Only the United States and the Philippines allow the use of private bail bondsmen (*Orlando Sentinel*, "Flaws Allow Accused to Escape Justice"). Despite the recommendations of the ABA to abolish commercial bail (ABA Standard 10-1.4 commentary, pp. 42-47), only four states (Illinois, Kentucky, Oregon, and Wisconsin) have done so thus far. The District of Columbia, Maine, and Nebraska have limited the use of commercial bail activity as well (BJS, *Pretrial Release of Felony Defendants in State Courts*, Special Report, p.4).

How the Commercial Bail System Works

A commercial bail bondsman, usually with the backing of an insurance company, promises to pay a defendant's bail to the court in the event that the defendant does not appear in court. The bondsman charges the defendant a nonrefundable fee of usually 10 percent.[4] The bondsman's focus, from a purely business model, is on how much money will be made to profit the company versus broader concerns like public safety. One bail bondsman admitted that he will not accept $500 bond cases (usually set in cases involving lesser offenses) because it is not financially worth his while (*Orlando Sentinel*, "Flaws Allow Accused to Escape Justice").

If a defendant, while out on bail, is arrested for another crime, the bondsman no longer owes the court the original bail amount, and the bondsman can also choose to post bail in the second case. Accordingly, defendants with a high bond amount because of their risk of committing another crime before trial are often of more interest to bail bondsmen ("The Truth about Commercial Bail Bonding in America," The National Association of Pretrial Services Agencies, *Advocacy Brief*, Vol. 1, No. 1, August 2009, p. 3).

"It's really the only place in the criminal justice system where a liberty decision is governed by a profit-making entity that will or will not take your business," said Temple University Professor of Criminal Justice John Goldkamp (*New York Times*, "Illegal Globally, Bail for Profit Remains in the U.S."). Because of this, the ABA set forth the following rationale for abolishing compensated sureties: (1) A defendant's ability to post financial bail "through a compensated surety is completely unrelated" to public safety risks, as a commercial bondsman is not obligated to try to prevent criminal behavior. (2) Decisions "regarding which defendants will actually be released move from the court to the bondsmen. It is the bondsmen who decide which defendants will be acceptable risks – based to a large extent on the defendant's ability to pay . . . ." (3) Decisions of bondsmen are "made in secret, without any record of the reasons for these decisions." (4) Compensated sureties unfairly burden those who cannot afford the nonrefundable fees, while cash-rich drug dealers, robbers, and gang members can easily pay for their freedom (ABA Standard 10-1.4(f) commentary, pp. 44-47).

Accordingly, in many instances, the commercial bail industry is making the decisions about who should or should not be released. However, any system that makes pretrial release decisions should, at least, ensure public safety and hold defendants accountable and, at best, save taxpayer money. It is therefore important that law enforcement review and discuss the advantages and disadvantages of various pretrial release mechanisms and pretrial services programs.

4. Like any for-profit business, some bail bondsmen put their products "on sale," requiring the defendant to pay as little as one percent of the set bail, with a promissory note for the remaining money. Thus, a suspect with a $500,000 bond for a violent offense can be released for as little $5,000. Baltimore, Maryland, State's Attorney Patricia Jessamey called this a mockery of the justice system. ("The Truth about Commercial Bail Bonding in America," The National Association of Pretrial Services Agencies, *Advocacy Brief*, Vol. 1, No. 1, August 2009, p. 3) See also, *Baltimore Sun*, "In Maryland, Many Get Discount on Bail: Cut Rate Bonds Set Dangerous People Loose, Critics Say," February 20, 2008.

3. Pretrial Services Programs

As supervised pretrial release programs have grown and developed over the past several decades, their vision has clarified. The goals and objectives of effective pretrial released programs include

- ensuring the safety of the public and the officers entrusted to protect the public,
- providing supervision to defendants awaiting trial,
- ensuring that defendants return to court, and
- reducing jail overcrowding, thereby reducing costly expenditures of public resources for construction and maintenance of new jail facilities.

Supervision of Defendants and Safety of the Public

In the mid 1960s, a handful of jurisdictions around the country began to look at factors other than financial ability to determine whether or not to release a suspect prior to trial. In 1968, the first pretrial services program, which still exists today, was developed in Washington, D.C. "In addition to interviewing, collecting background information, verifying information, producing reports, and making recommendations to the court, the pretrial services program began supervising defendants on various release conditions" (*Pretrial Justice Institute* website, "History of Pretrial Services Programs," www.pretrial.org).

Government run and publicly funded, a properly planned and operated pretrial services program can assess the risks associated with releasing (or not releasing) a defendant and supervising that individual throughout the entire pretrial process. These programs can help judges make informed release decisions by providing comprehensive and important information on each defendant. Through research-based tools that assess a defendant's likelihood of appearing in court and remaining crime-free while on pretrial release, "pretrial programs provide a cost-effective and safe method for recommending release into the community" (*Jail Population Management: Elected County Officials' Guide to Pretrial Services*, National Association of Counties, September 2009, pp. 7-8). According to the ABA, these agencies "should perform an information, collection, and analysis function, a recommendation function, and a monitoring function" (ABA Standard 10-1.10(a) commentary, p. 56).

Pretrial programs consist of the following five operational elements:

(1) The screening of everyone arrested and booked into the jail;

(2) The interviewing and investigation[5] of a defendant prior to the defendant's first appearance before a judicial officer;

(3) The use of research-based risk assessment tools to guide appropriate release decisions that ensure public safety and the defendant's return to court;

(4) The supervision of, and regular reporting on, any defendant who has been placed on pretrial release; and

(5) Reminders to defendants of upcoming court appearances and other appointments (*Jail Population Management,* National Association of Counties, p. 8; and ABA Standard 10-4.2 commentary, p. 86). Appointments may include drug testing, counseling, or evaluations (National Association of Counties' website, "Pretrial Services Reduce Costs, Improve Public Safety," www.naco.org).

5. The investigation includes a defendant's prior criminal record; prior behavior on bond; community ties; and employment history, among other things.

According to the ABA, the decision to release or detain a suspect prior to trial "should have defined goals, clear criteria, adequate and reliable information, and fair procedures" (ABA Standards, General Principles commentary, p. 5). Through pretrial services, pretrial release can be tailored to the circumstances of each individual defendant, providing valuable information on whether or not to release a defendant. Those who can safely be released will be released; and those who pose a risk will be detained.

Pretrial services programs can provide for public safety by monitoring defendants awaiting trial. While protecting the community and the police officers that serve it, pretrial programs also can save tax money spent on unnecessary pretrial incarceration.

Minimizing Fugitive Status

Once an individual fails to appear, he or she moves to fugitive status. Warrants are issued for the individual's arrest. While many defendants simply fail to appear and continue about their day-to-day affairs, others become fugitives bent on avoiding the justice system entirely. They become mobile and opportunistic, preying on innocent citizens by committing additional crimes against persons and property in order to sustain their flight from justice. Unable to hold jobs, they become even more dangerous, supporting their existence through the commission of more crimes, leaving additional victims in their wake.

Critical to the law enforcement community, the investigative resources to rearrest and in some cases extradite these fugitives is costly, both to the law enforcement agencies and their governments. In fact, not all law enforcement agencies are financially able to extradite fugitives who are located and arrested outside their jurisdictions, causing problems for the original arresting agency, the rearresting agency, and, of course, the public if the fugitive cannot be detained and is released. Effective pretrial screening and, in many cases, preventive detention addressed next can help reduce this problem.

Preventive Detention

In circumstances in which pretrial incarceration is deemed necessary, preventive detention needs to be imposed to uphold community safety because of the potential risk of reoffending by those defendants who pose such risk. Participants at the April 2010 focus group commented that the failure of the current system in many states was most acute when it came to the release of such dangerous defendants due to their ability to make bond.

Preventive detention legislation provides a safer approach than attempting to use money bond to address the pretrial dangers of defendants awaiting trial. Preventive detention laws empower the court to consider pretrial danger when making release decisions, and enable the prosecutor to seek detention without bail for select defendants after an evidentiary hearing in which the court assesses the strength of the case coupled with the defendant's past behaviors. The court must find that no condition or combination of conditions of supervision will provide reasonable assurance of community safety in order to grant detention. For example, statutes in the District of Columbia, and even federal courts, call upon an array of supervision conditions — including preventive detention — designed to protect the community. As a result of these laws, money bond is no longer used in the hope that the defendant, especially a dangerous one, will not be able to post it. The result can lead to a decrease in a defendant reoffending, deterrence in bail-jumping, and ultimately the protection of the community

Defendant Accountability

> *"Accused criminals by the thousands escape justice."*
> *-- Orlando Sentinel,* "On the Run: Florida's Fugitives," January 7, 2001

The April 2010 focus group suggested that regardless of the pretrial release modality in any given case, the defendant must be held accountable in terms of supervision. The participants expressed interest in the notion that complete forfeiture be ordered in money bond cases when a substantive violation of the terms of a defendant's release has occurred, such as the defendant's failure to appear in court or his or her rearrest for a new offense.

Similarly, participants felt that defendants released to supervision conditions should be held accountable in regard to those conditions, and that sanctions be applied by the court for any violations to those terms.

Pretrial services programs can provide defendant accountability, in comparison with financial bond where the sole determining factor as to whether or not a defendant is released back into the community is money. Many police chiefs and criminal justice experts have noted that people of varying levels of dangerousness are being let out on financial bond, and essentially, nothing is being done to monitor these suspects who are released into the community. This can ultimately lead to law enforcement having to "do the job twice," by first making the original arrest and then by having to apprehend the defendant again when he or she becomes a fugitive through willful failure to appear in court. BJS found that one in four defendants who failed to appear in court remained a fugitive one year later (BJS, *Pretrial Release of Felony Defendants in State Courts*, Special Report, p. 8). Moreover, BJS data show that supervised pretrial release programs produce favorable re-arrest and appearance rates (BJS, *Pretrial Release of Felony Defendants in State Courts*, Special Report, p. 10).

Defendants currently released on financial bond often commit additional crimes or become fugitives. Presumably, because there are so many perceived holes in the existing pretrial justice system, they feel that they can commit other crimes or fail to appear in court with little or no consequences. Effective pretrial services programs, however, can provide swift and certain consequences to those who do not comply with the conditions of their pretrial release. Also, jurisdictions that ensure that bail-jumping statues, which make willful failure to appear a separate crime, are enacted and vigorously prosecuted, which can help deter and bring appropriate punishment to those defendants who do fail to appear in court. With rapid sanctions for noncompliance of these conditions, pretrial services programs can send a message to violating defendants and to the community at large that no one will be allowed to flee justice.[6]

Cost Savings

Pretrial services programs can not only promote defendant accountability, but also cost savings. Estimates show that the American tax system supports pretrial detention at a rate of $25 million per day or $9 billion per year ("The Truth about Commercial Bail Bonding in America," The National Association of Pretrial Services Agencies, *Advocacy Brief*, pp. 8-9). Community-based supervision has proven to be less costly than secure detention. It is, however, not without its own costs. Therefore, jurisdictions must decide whether to spend money on building and operating more jails or shift a portion of those resources to the implementation and operation of a comprehensive pretrial services program. Individual state and county cost benefit analyses suggest that pretrial services programs can, in the long-run, save taxpayer money.

A study of 10 counties with pretrial services programs in North Carolina found that, among other things, each county spent approximately $6.04 per defendant per day on pretrial release, but would spend approximately $57.30 per defendant per day to keep those same defendants detained. The total cost savings of pretrial services versus pretrial incarceration amounted to a little more than $1,050,000 per county per year (*Jail Population Management*, National Association of Counties, p. 9). Similarly, Maine conducted a study that demonstrated that one pretrial services staff member, who costs taxpayers $50,000 per year saves between $250,000 and $1,320,000 per year on detention costs (National Association of Counties' Website, "Counties Look for Money, Alternatives to Bail," www.naco.org). Lastly, the *Miami Herald* reported that Broward County, Florida, would save taxpayers approximately $110 per defendant per day if it had a pretrial services program (*Miami Herald*, "In Tallahassee, Broward-inspired Bail-bond Bailout Could Break Us," April 17, 2010).

6. See *Seals v. United States*, No. 03-CO-51, slip. op. (D.C. Feb. 11, 2004). (The Appellate court upheld a three-year sentence for contempt of court for not following the conditions of pretrial release, based on the defendant's criminal history and non-compliance with the court).

4. Law Enforcement's Role in the Pretrial Release Process

The April 14, 2010, focus group began its dialogue on the role that law enforcement should play in the discussion and development of pretrial services. The first and overriding observation was that it is imperative that police executives continue to address this issue. At the conclusion of the meeting, the group suggested that the IACP, PJI, and BJA convene a national summit to discuss further actions and to resolve the issues addressed by the focus group members. This national summit can bring national and local law enforcement leaders together to develop best practices and model legislation on the issue of pretrial release.

It is important to note that the group arrived at the summit recommendation after a full day of careful and thoughtful dialogue on all pretrial release, detention, and bond issues. One observation that carried through most of the day's work was the incredible complexity of the pretrial detention and release issues facing the U.S. justice system. Many of the issues raised and debated fueled the idea for a larger summit, since participants quickly realized that there were no quick, simple answers to the complex problems being discussed. Some examples of those issues, and potential courses of action, include the following:

- The balancing of release decisions versus detention decisions; e.g., what set of criteria will ensure that the right people are released (those assessed unlikely to fail to appear and/or commit new crimes while on bond) and that the wrong people (those assessed as likely fail to appear and to commit new crimes) are detained until trial
- The varying size, budgets, and resources of the some 18,000 local law enforcement agencies in the United States as they attempt to gather information pertinent to pretrial release and detention decisions by the courts, particularly the many smaller agencies with less than 25 officers
- The potential for regional, unified central processing center models where all arrestees can be effectively evaluated for release or detention status, and how these centers could function in a more cost-effective manner to support local law enforcement agencies and their respective local justice systems
- Determination of consequences (beyond financial) for those who fail to return to court on their court date, in particular, "bail jumping" laws that allow charging defendants with an additional crime 30 days after their failure to appear
- The need for shared wisdom from the many other professional organizations representing the law enforcement community, in particular, leadership organizations like the National Sheriff's Association, police unions, and all others with a stake in bail/pretrial release reform
- The impact of pretrial release and detention decisions on public and officer safety, and also on public and officer perception, including potential witness or victim intimidation before trial when the defendant is allowed to return to the community inappropriately
- Balancing current bond system decisions with the urgent need for dangerousness assessment and, in particular, looking at the many variations across the U.S. on how (or whether) dangerousness is assessed

Based on the discussions from the IACP focus group, members felt that many questions remain unanswered and need to be addressed with respect to pretrial matters before law enforcement can take a position on the subject. Some of those questions include the following:

(1) What level of involvement should law enforcement leaders provide in these pretrial services programs, and how can they help to support an effective pretrial system so that there are no backlogs?

(2) How can we ensure that pretrial release decisions are based upon the individual risks posed by each defendant, rather than on a bond schedule that merely takes into account the title of the charge?

(3) Is it feasible to insist that pretrial program outcomes, such as appearance, rearrest, and completion rates, be published regularly?

(4) How can the arresting officers involved work more closely with the local prosecutor to ensure appropriate release conditions that are designed to minimize failure-to-appear rates and future crimes?

(5) How can we advocate for state bail legislation that takes into account officer and public safety and provides the court with safe alternatives in dealing with defendants whose potential danger to the community cannot be reasonably assured through supervision and monitoring?

These are just a few of the many issues that law enforcement leaders would take up at any future national policy summit on this topic.

The ideas that emerge from a summit can then be presented to a wide variety of audiences that are examining criminal justice issues. For example, Congress is currently considering legislation (S.714) originally proposed by the IACP and now being supported by Senator Jim Webb (D-VA)[7] to establish a National Criminal Justice Commission. If enacted, this legislation will task the commission with conducting a comprehensive examination of various aspects of the criminal justice system, including pretrial processes. The views and expertise on pretrial issues expressed at the national summit would provide the commission with critically needed information and direction as it undertakes its review.

Focus group members felt that law enforcement's attention to pretrial release issues is timely and critical. Police executives have not always been involved in the pretrial services dialogue. Yet, as the major stakeholder in protecting the community and the officers that serve it, the members realized that now is the time for law enforcement leadership to meaningfully discuss how to help improve the pretrial process. As with any new endeavor, the members acknowledged that some in the profession may be uncomfortable with, and perhaps resist, the change that may come with the dialogue. However, as we learned through the transition to community policing more than 30 years ago, different can also mean better.

7. The IACP has advocated for the creation of such a commission for more than two decades, similar to that of the 1965 Presidential Commission on Law Enforcement and the Administration of Justice, which built the framework for many of the highly effective law enforcement and public safety initiatives that have been in place for almost the last half century.

5. Conclusion

Given the number of issues discussed at the focus group and the difficulty of each, participants realized that arriving at conclusive findings or consensus recommendations at the end of the focus group was not a viable option, but that a call for a much more in-depth effort and a national law enforcement policy summit made a great deal of sense. Given that the primary duty of law enforcement is to protect the community, it makes sense for law enforcement leaders to be contributing members in pretrial release policy and procedure development that would ensure that a defendant's danger to society and the likelihood of his/her appearance in court are equally considered. Law enforcement's voice in pretrial system development can help to create rational and transparent release programs.

Throughout the U.S. justice system, defendants will continue to be released after their arrests and before their trials. Because of this release, their next actions and decisions may directly affect officer and citizen safety. Focus group members had a clear vision that in the future, law enforcement should and can play a critical role in supporting and guiding rational criteria for pretrial release and in helping to reduce system failures. This future role can only occur if law enforcement leaders are 1) aware of and fully understand the laws, policies, and practices of pretrial release in their jurisdictions, and 2) appreciate their role as critical stakeholders in helping to influence pretrial policy. Law enforcement leaders also can improve community and officer safety and defendant accountability by elevating the discussion of these issues to the national level. BJA, IACP, and PJI are committed to the issue and support the concept of a national policy summit to ensure that law enforcement can significantly contribute to this important topic.

At the time of publication of this report, the United States Department of Justice, Office of Justice Programs, with the principle support of the Bureau of Justice Assistance (BJA), has inaugurated plans for a National Policy Summit on Pretrial Justice slated for early 2011. From this early information, it is clear that DOJ's intent is to address pretrial issues on a global scale. To support this important work, IACP and PJI will continue to work closely with our BJA counterparts to ensure that the national law enforcement summit called for in this report is designed and held after the larger policy summit so that it can further the recommendations that will doubtless emerge from the DOJ/OJP systemwide effort.

The ultimate goal of each of these efforts will be identical: to make certain that another tragedy like the one in which four Lakewood, Washington, police officers were slain by an individual at high risk for reoffending, who was nonetheless out on bail, will never happen again.

STANDARD OPERATING PROCEDURE

SUBJECT: ***ELECTRONIC MONITORING PROGRAM***

POLICY

The Detention Services Division (DSD) will operate and maintain a***n Electronic Monitoring P***rogram ***(EMP)*** that allows qualified inmates to be incarcerated in their home or other approved residence, under electronic supervision in lieu of incarceration in the Clark County Detention Center (CCDC) or North Valley Complex (NVC).

REFERENCE

4th Edition ACA Standards for ALDF:	2A-30, 6B-05
Nevada Revised Statutes (NRS):	211.250, 211.260, 211.270, 211.280, 211.290, 211.300
LVMPD Department Manual:	5/207.00 Driving/Vehicle Procedures Section 1, Policy and General Rules
DSD Standard Operating Procedures:	13.01.01 Releases of Chronically Ill and Incapacitated Inmates
ACA Standards for Electronic Monitoring Programs:	1-EM-1A-01 thru 1-EM-4C-02

OVERVIEW

The ***EMP*** is administered by DSD and provides a housing alternative for qualified sentenced inmates. DSD also provides ***EMP*** services to pretrial or participating program offenders referred by the courts, within the jurisdictional boundaries of Las Vegas Metropolitan Police Department (LVMPD).

Placement of inmates on ***EMP*** will not be based on age, sex, race, religion, handicaps, national origin, or political views.

EMP staff will prepare the necessary reports and maintain a permanent log that records routine information, emergency situations, and unusual incidents. South Tower Bureau (STB), third floor sergeant, will assist when the inmate is assigned to ***EMP*** and ***is*** housed at UMC or another hospital.

Sentenced inmates ***will be pre-screened every 24 hours*** for placement on the ***EMP***. Inmates will be advised that ***the*** program is available by posting notices in each housing unit and by providing written notice to each sentenced inmate. ***An inmate requesting EMP that has previously been denied will only have a request accepted if the inmate can demonstrate the issue given rise to his/her initial denial for the program has been resolved, e.g., warrants have been resolved, obtained a residence, etc.***

Inmates placed on ***EMP*** will be required to reimburse the DSD, as far as ability to pay for services provided by the program.

PROCEDURE

I. ADMINISTRATION

A. The ***EMP*** will be administered by the Staff ***Administration*** Operations Bureau (***SAOB***), through a lieutenant of the ***SAOB***, managed by a sergeant.

B. The ***EMP*** will have long-range goals and objectives that outline the future of the program as well as define current policies and procedures.

1. ***EMP*** staff should be provided with a means for input concerning the formulation of policies, procedures, goals, and objectives of the program.

2. Policies, procedures, goals and objectives will be reviewed at least annually and updated as necessary.

3. The policies and procedures comply with the NRS.

C. ***EMP*** staff shall maintain close communication and cooperation with other members of the criminal justice community, especially with those agencies with whom it has regular contact in the course of doing business. These agencies include, but are not limited to:

1. Clark County Justice Court

a. Misdemeanor Driving Under the Influence (DUI) program

b. Mental Health Court

c. Veterans Court

d. ***Battery Domestic Violence Court***

2. District Court, including Drug Court, Family, and Uniform Interstate Family Support Act (UIFSA) Court

3. District Attorney, Felony DUI program

4. State of Nevada Parole and Probation

5. Hospital security staff where inmates are located and monitored through ***EMP***.

D. Regularly scheduled staff meetings between the captain, ***SAOB***, and ***EMP*** staff are important and can be used to address problems, goals, objectives, and policies and procedures. Staff meetings shall be held at least quarterly.

E. The captain, ***SAOB***, or designee, shall inspect the operation of the ***EMP*** to ensure compliance with goals, objectives, policies, and procedures. These inspections shall be held at least annually.

F. A report of ***EMP*** activities shall be completed at least annually to outline all activities and to provide statistical and financial information.

G. In order to avoid accusations of impropriety, any decision involving a friend, family member, or acquaintance's participation in the ***EMP*** as an inmate shall be deferred to the next level of supervision. ***EMP*** staff will not carry any friend, family member, or acquaintance on their case load. ***If the officer discovers the above, the officer will notify his/her supervisor immediately.***

H. ***If it is discovered an individual on an officer's case load is related to any known LVMPD employee, officer, civilian, or contractor, he/she will notify his/her supervisor immediately.***

II. ***ALTERNATIVES TO INCARCERATION*** SECTION

Admittance to the ***Alternatives to Incarceration*** office will be limited to authorized staff only. Exceptions are conditional and may not interfere in any way with procedures.

A. Inmates will not be permitted in the ***Alternatives to Incarceration*** office unattended.

B. ***Alternatives to Incarceration*** staff will ensure that inmates who are in the office on business do not have access to files, computer information, monies, or any item or piece of information of a sensitive nature.

III. RULES AND DISCIPLINE

A. As part of the orientation process, inmates placed on ***the EMP*** will be advised of the rules and regulations of the program and will be provided with a written copy of the rules. ***Prior to placement on Electronic Monitoring, inmates will watch a training/orientation video that explains how the monitoring device/service works, rules and sanctions for violation of the Electronic Monitoring agreement, and take a quiz on the rules of the EMP.***

B. Inmates will also be advised of the disciplinary process and the sanctions they can expect for violations of ***EMP*** rules and regulations.

1. Minor violations of the rules will result in a verbal warning to the inmate:

    a. The violation and warning will be annotated in the inmate's file.

    b. Continued minor violations will also result in verbal warnings and annotations and will be accompanied by a curtailment of privileges.

2. Major rule violations may result in the inmate being taken into custody and may be placed on a lockdown status and will require the generation of a Conduct Adjustment Report (CAR) ***or a Violation Report*** in iTAG by a***n EMP*** officer.

    a. Upon completion of the report, the officer will notify the ***EMP*** sergeant for completion of the required investigation. If the ***EMP*** sergeant is unavailable, the floor sergeant will be notified to complete the investigation. The officer will verbally confirm an investigating party has received the report.

b. After completion of the CAR and investigation, the matter will be handled as other disciplinary matters in accordance with SOP #15.04.00, "Inmate Discipline."

c. The following are major rule violations that will require the inmate to be taken into physical custody.

1) Continuous violation of curfew restrictions for any reason. ***Depending on the circumstances, one violation may be enough to return a client to custody.***

2) Tampering with the monitoring equipment. Continual failure or intentional failure to maintain equipment (charging of device).

3) Absence from place of confinement unless pre-approved by ***EMP*** staff.

a) Pre-approved absences will be limited to employment, court, and pre-scheduled medical and program appointments. ***EMP*** staff may authorize overnight or other absences ***after notifications to the EMP sergeant are made and approved.***

b) Inmates will not be allowed to visit casinos, bars, or similar businesses unless employed there. Employment in these areas must be approved by ***EMP*** staff.

c) Unauthorized absences may be excused in the case of a medical emergency. In all cases, the inmate must advise **EMP staff** within ***four*** hours and must present evidence (receipt) of medical treatment.

d. Changing place of confinement or telephone number without prior approval of ***EMP*** staff. ***A 24 hour notice to EMP staff must be given prior to any changes of housing or deviation from scheduled activities.***

e. Damage or loss of monitoring equipment. In addition to internal disciplinary action, inmates will be held financially and criminally responsible for damaged or lost equipment.

f. Consumption or use of alcoholic beverages or illegal drugs.

g. Abuse, misuse or taking any prescribed medication in a manner other than specifically instructed by a physician.

h. Arrested or charged with any additional offense with the exception of minor traffic violations.

i. Associating with ex-felons, persons with a criminal history, or any person that ***EMP*** staff advises the inmate not to associate with.

j. Allow a social gathering of more than two adults (other than residents) at their home without prior approval by ***EMP*** staff.

k. Possessing, transporting, or using any type of firearm or police radio monitor.

l. Lying to or being uncooperative with ***EMP*** staff.

m. Possession of chemicals/drugs designed to alter the accuracy of a drug test or possession of stored urine to be used for testing. Tampering in any way with drug/alcohol testing.

3. Any deviation concerning rules and discipline must be approved by the ***EMP*** sergeant or lieutenant.

C. Inmates may be allowed free time if it's an absolute necessity. Free time generally will be limited to two hours per week for such things as food shopping, doing laundry, etc. ***EMP*** officers may authorize additional free time as necessary ***after consulting with the EMP sergeant***.

D. In addition, the ***EMP*** staff maintains contact with State of Nevada Parole and Probation staff regarding probation violators placed on the facility's ***EMP***.

1. ***Some clients may be under dual supervision with Parole and Probation while on the EMP***.

2. If a probation violator placed on the CCDC ***EMP*** fails to follow the rules and regulations, that incident will be reported to the Parole and Probation office.

IV. FISCAL MANAGEMENT

A. The captain, ***SAOB***, shall have authority over fiscal matters concerning ***the EMP***. Expenditure of any funds shall be subject to his approval.

Submittal of fee rates for the ***EMP***, as well as rates for the sliding scale, to the Clark County Board of County Commissioners (BCC) will be at the discretion and direction of the captain, ***SAOB***. This fee and sliding scale will be reviewed annually to determine if adjustments need to be made due to cost of inflation or operations. If an increase is requested, it will be approved by the BCC.

B. Cash Management:

1. Inmates placed on ***the EMP*** will be required to pay $30.00 to cover processing fee and $12.00 per day for each day on ***the EMP*** or such amount as is determined by their ability to pay. An approved financial statement and sliding scale will be used to determine fee schedule if applicable.

a. Sliding scale payments (see attachment) to the program can be authorized. Recommendation for a sliding scale payment method will be authorized by the section's supervisor or lieutenant.

b. At the request of the inmate, the Sliding Fee Scale will be applied with a request for financial assistance. LVMPD Alternatives to Incarceration – Instructions for Person Applying for Assistance will be completed and submitted to the section supervisor.

c. The sergeant or lieutenant will review and approve all sliding scale recommendations.

d. The inmate's financial obligations to the program will be adjusted depending on the inmate's current situation. Any adjustments will be authorized by the section's supervisor or above.

e. Inmates will be required to prove they are in need of financial assistance and/or receiving some type of government assistance, e.g., food stamps, disability, Supplemental Security Income (SSI) or welfare. This proof will be required, considered and weighed at the time of adjustment submission and will be the basis for approving a fee reduction from ***the EMP***.

2. Detention Services Technicians (DST) will be the only staff authorized to access the transaction safe and to issue receipts. Login passwords for Sage Accounting Software Users will be changed and updated every six months (January and July) to maintain consistency with LVMPD's password security policy. It will also be the responsibility of the ***EMP*** sergeant to edit user profiles within the accounting system and ensure duties are appropriately segregated to maintain financial security.

3. ***Fees will be mailed to "LVMPD Electronic Monitoring Program, Alternatives to Incarceration."***

   a. The DST will verify amount, issue receipt, and place money in the transaction safe.

   b. Fees paid will be posted to inmate's account as received.

4. Monies from the transaction safe will be balanced at the end of each shift.

   a. One DST at a time will be assigned to cash handling duties.

   b. The DST, utilizing their own six digit code, will access the contents of the transaction safe. They will count the money received on their shift and verify it balances with receipts issues. This will be verified by a second staff member.

   c. Cash Receipt Journals will be printed under Sage "DST Daily Drop." Two copies will be made, one for the deposit and one for the Law Enforcement Support Technician's (LEST) records.

   d. Daily money balance sheets and receipts will then be bundled, placed in a sealed bag, and dropped in the depository safe.

   e. The ***EMP*** sergeant will be immediately advised of all discrepancies.

f. Each business day, the Business office will open the depository safe. They will accomplish this using the combo or key, with a***n EMP*** staff member (witness) present. They will count and verify the day's deposits from the depository safe. Any discrepancies will be immediately brought to the supervisor's attention for resolution.

g. Once verified the Business office will sign for the deposit and deposit it in the ***EMP*** Bank Account.

h. The ***EMP*** LEST will record the deposit and transaction.

i. The Business office will be responsible for generating and sending invoices/billing statement.

5. Receipts will be issued from the ***SAGE*** Accounting System.

   a. The receipt will indicate the following information:

      1) Date

      2) Payment amount

      3) Inmate's name and ID number

      4) What payment is for

      5) P# of personnel receiving payment

      6) Denomination of cash or number of money order

   b. Two receipts will be printed out and distributed as follows:

      1) Inmate

      2) With payment into the transaction safe

   c. Refunds:

      1) Fees will not normally be collected prior to the inmate being released from jail.

      2) In the event an inmate is due a refund, it will be issued in accordance with NRS 354.220. (see attached CCDC Refund Request).

      3) If it is determined by the sergeant that a refund is due, a (see attached) CCDC Refund Request will be initiated.

      4) Once the forms are completed, the package will be approved by the lieutenant.

      5) The CCDC Refund Request will be forwarded to the County Comptroller for recommendation of payment.

6) A copy of all transactions will be placed in the inmate's file.

The lieutenant will be notified of any discrepancies.

Receipts and money will be turned over to the Business office each business day. See Section IV, B, #4, d & e above.

6. ***EMP*** personnel will not involve themselves in any financial transaction with inmates who are relatives or acquaintances.

7. ***EMP*** DST's along with the sergeant will undergo annual online training to stay current with the ever changing features of the section's accounting system.

V. RECORDS MANAGEMENT

A. Case records will be maintained on all inmates assigned to ***the EMP***. Case records include hard files as well as computer data.

B. Access to case files will be limited to authorized personnel.

C. Case files are divided into six sections and will include documents in the following order:

1. Section 1 of Inmate's File:

   Shared Computer Operation for Protection and Enforcement (SCOPE) printout (criminal history), e.g., F2-38, SCOPE w/ National Crime Information Center (NCIC), F2-6.

2. Section 2 of Inmate's File:

   a. Correspondence/letters to court/Parole and Probation office, Court Status Slip/Court Order, and Inmate Requests/Grievances for acceptance.

   b. ***EMP*** Incident Report, if applicable

   c. Attempt to Locate (ATL), if applicable

   d. Officer's Report, if applicable

   e. Arrest documents (TCR, Arrest Report, etc.), if applicable

   f. CAR, Conduct Adjustment Board (CAB) information, if applicable

3. Section 3 of Inmate's File:

   a. Omni link personal information page

   b. iTAG photo

   c. Update of inmate's information, if applicable

d. ***EMP*** Application to include:

1) Personal information

2) Employment data

3) Vehicle information

4) Social, family history

5) Medical, mental health information

e. Signed documents to include:

1) ***EMP*** Consent Form

2) Information Waiver - Right to Privacy Act

3) Escape - Consent to Waiver of Extradition

4) 4th Amendment Waiver - Permission to Search

5) Signatures acknowledging cost of replacement for equipment

6) Responsibility for Equipment Document (signed)

4. Section 4 of Inmate's File:

a. Fee payment tracking document

b. Fee refund document, if applicable

c. Financial statement, if applicable
d. Inmate's payment, outlining the $30.00 processing and $12.00 daily fees

e. Payment agreement if not paid in full at release

5. Section 5 of Inmate's File:

a. Officer notes on inmate's status

b. ***EMP*** Field Log, if applicable

6. Section 6 of Inmate's File:

a. Weekly verification form with associated documentation

b. Daily Global Positioning System (GPS) zone activity reports

c. Work Verification Form

D. Records will be broken down and prepared for imaging with the exception of financial documents that will be maintained in a separate file.

VI. OPERATIONS

A. Selection:

1. Assignment of sentenced inmate/probation violators:

a. Sentenced inmates ***will be pre-screened every 24 hours*** for placement on the ***EMP***. iTAG ***external reports*** will be used to obtain a list of sentenced inmates who may be eligible for the facility's ***EMP***.

b. ***By*** utilizing the list of sentenced inmates housed within the facility, ***EMP*** staff will perform a background investigation to determine if ***an*** inmate meets ***the*** minimum qualifications. At a minimum, the investigation ***will look at the following areas: Criminal History, Institutional History, Court Documents, stable residence, and cover*** the following requirements:

1) Sentenced to CCDC/NVC (sentencing judge hasn't banned inmate from participating in the ***EMP***) or probation violators (the decision whether to release a probation violator will be made at or after the set revocation hearing).

2) Must have no open charges, detainers, or active warrants. ***EMP staff will notify the DSD Records Bureau of any inmate meeting the qualifications for EMP who have local, City of Las Vegas, North Las Vegas and/or Henderson warrants. Subjects will be released to those jurisdictions and a CCDC detainer placed on them. Upon returning to our facility, these applications will take priority for placement on the EMP.***

3) Must not be awaiting sentencing on any out of custody charges, verify through a check of SCOPE.

4) iTAG ***will be used to determine any behavior issues that would be incompatible with the EMP***.

2. Criminal history must not reveal any of the following:

a. Arrest record must not reveal a history of sexual offenses ***within the past three years***.

1) Candidates must not have a current arrest/charge for a predatory sexual offense, unless court ordered. ***Misdemeanor offenses may be allowed if they can be effectively managed using the Electronic Monitoring system.***

2) Any questions regarding these offenses will be referred to the ***EMP*** sergeant, who will make the final determination regarding the candidate's qualifications.

b. Arrest record must not reveal a pattern of violence, verified through a check of SCOPE ***and Triple I***.

Pattern of ***crime: If in the past three years the subject was arrested multiple times for the same charge and it appears likely that he/she will commit this offense again based on the current charge being the same; it will be considered that the subject has a pattern for committing that crime.***

Any conviction for the charges identified in section "c" below will be automatic disqualifiers.

If a single arrest for a charge identified in section "c" below, the arrest report will be reviewed to determine if actual violence occurred and to what extent. It will also be determined what the final case disposition was. These things will be considered in conjunction with all other criteria to determine suitability for EMP.

Any inmate recommended for EMP who has an arrest for a charge identified in section "c" below will require approval from the EMP sergeant and lieutenant. If still in question the bureau commander will make the final decision.

c. Examples of violent crimes:

1) Assault/battery ***with substantial bodily harm***

2) Stalking/aggravated stalking/coercion***/violation of TPO***

3) ***Rape/Kidnap***

4) Any offense committed with a weapon ***or gang enhancement***

5) Robbery ***or Robbery w/deadly weapon***

6) ***Murder or attempt murder***

7) ***Child molestation or abuse***

d. Any candidate who fits the description of 'pattern of violence' will not be placed on ***the EMP*** if it appears that he/she will be a threat to the community. Things to consider when evaluating these candidates are:

1) Is the event a single, isolated incident?

2) ***Was violence involved?***

3) Is the event or events related to a variable that can be controlled? (e.g., use of alcohol, drugs; pattern of locations--bars, casinos, etc.)

4) Does the candidate have a stable place of residence?

5) Are there community/family ties that can offer support?

If the above questions can be answered positively and the candidate meets all other criteria, the candidate may be qualified for ***EMP***.

3. Any candidate who is believed to be mentally ill or unstable, is a sociopath, has a personality disorder, or otherwise has a pattern of committing random acts of violence for no apparent reason will be evaluated by the DSD Mental Health Services to determine suitability for ***EMP***.

4. Due to the volatile nature of such situations, all ***battery*** domestic violence ***(BDV), BDV with strangulation***, stalking, violation of a Temporary Protection Order (TPO) and related cases will be handled with special care. Candidates who are charged with any of those offenses will not be placed on ***EMP*** until the following steps are completed:

    a. Review criminal history (SCOPE). If history shows a pattern of similar offenses, the candidate will not be placed on ***EMP***.

    b. Contact victim of crime. If victim would be threatened or in danger, the candidate will not be placed on ***EMP***.

    c. Candidate will not be placed on ***EMP*** or be allowed to live in any residence if he/she is the subject of any kind of protective order concerning another person in the residence.

    d. All above criteria apply even when considering a candidate with an unrelated charge but whose criminal history reveals a pattern of arrests for domestic violence, stalking, or related charges.

    e. The ***EMP*** sergeant will be advised of all cases where there is any doubt as to the candidate's qualifications.

    f. Inmates may be required to attend crisis counseling at their own expense as a condition of being placed or remaining on the program. Examples: Spousal Abuse Counseling, Anger Management.

    g. In cases where the victim of the assault, battery or domestic violence posts bail, does not object to the OR, and or subsequent placement of candidate on ***EMP***, ***EMP staff*** will have the victim sign a waiver prior to candidate's placement.

    h. ***Pre-trial detainees and sentenced inmates will be checked for any gang affiliation. Detention Gangs/Special Investigation Unit (DGSIU) will assist EMP staff in properly identifying any known gang members. EMP staff will take this in consideration if the candidate meets the qualifications for EMP.***

5. Any candidate***s*** who ***are on detoxification protocols*** will not be placed on ***the EMP until the*** appropriate detoxification period has expired.

    a. Detoxification may take 7 to 14 days. Medical staff will be contacted to evaluate the candidate and certify the detoxification period is completed.

b. Inmates who have completed an appropriate detoxification period and who have been approved for ***EMP*** may be required to seek/attend treatment programs as a condition of being placed or remaining on the program. Examples: Alcoholics Anonymous (AA), Narcotics Anonymous (NA), inpatient/outpatient treatment at their own expense.

B. ***Institutional History***

1. Institutional history must not reveal subject is ***violent towards staff*** nor has a serious problem following institution rules.

2. Must not have a record of escape attempt(s) or battery on staff.

3. Inmates must not have items in their personal or criminal background indicating an obvious flight risk. These items include but are not limited to:

   a. Multiple runaway notations in SCOPE in recent years.

   b. ***Multiple f***ailure***s*** to appear (other than traffic violations).

   c. Insufficient ties to the community.

   d. ***Previous EMP failures.***

C. ***Residence Requirements***

1. Inmate must have a stable place of residence and a telephone.

   An inmate <u>will not</u> be allowed to live in or move to any ***Indian Reservation,*** gated community, condo, townhouse, or apartment that does not offer unfettered, unannounced access to ***EMP*** staff. ***EMP staff must notify Indian Reservation Law Enforcement prior to entering a Reservation.***

   Unfettered access includes:

   a. Immediate entry either by gate code or security guard ***without notification to or approval from inmate***.

   b. ***Immediate access to residence upon arrival***.

2. Inmates will not generally be placed on ***the EMP*** unless they meet all of the criteria. The following procedure will be followed when exceptions are granted:

   a. The ***EMP*** sergeant ***will review, approve or deny, and sign all applications***.

   b. The ***EMP*** sergeant will consult with the lieutenant or captain, ***SAOB***, and a decision will be made whether or not to override the criteria. ***All applications will be forwarded to the SAOB lieutenant and/or captain for review.***

   c. Staff will be advised of the decision.

d. All overrides will be documented on a memo to file or on an Inmate Status Sheet for placement in the inmate's ***EMP*** file.

3. When an inmate is denied placement on ***the EMP*** as a result of the background investigation, an annotation will be made in the alert section of iTAG including the reason for the denial.

4. Inmates who appear suitable will be provided with a***n EMP*** Application that must be completed. The application will include the following information:

   a. Name and address

   b. Date and place of birth

   c. Personal characteristics (race, hair color, etc.)

   d. Social Security (SS) number

   e. Employment history

   f. Name, address, phone number of current employer

   g. Name, address, phone number of relatives not living with inmate

   h. Name, address, phone number of personal references

   i. Make, model, year, color, and license plate number(s) of vehicle(s) subject will be using

   j. Criminal history to include convictions, incarcerations, arrests, pending cases and weapons charges

   k. Name and address of attorney, if any

   l. Name and phone number of subject's parole/probation officer, if any

   m. Name, address, phone number and relationship of person(s) with whom they will be living

   n. Emergency contact (someone other than who you live with)

   o. Name and phone number of physician, if any

   p. Medical problems including the name of any prescribed medication

   q. Type and location of treatment programs attending

5. ***EMP*** staff will verify information on the application form. If applicant meets all selection criteria, he/she will be scheduled for release to ***EMP***.

6. A***n EMP*** Approval Checklist will be completed and will include details relevant to the decision to place the inmate on ***EMP***. It will be signed by the ***EMP*** sergeant indicating review and approval. ***Additionally, all approved applications***

shall be reviewed by the EMP lieutenant within one week of their placement on the program.

7. ***E***fforts to work with both Justice and District Courts of Clark County, Nevada and court programs ***have been established***; ***these courts have been offered two options for access to the EMP program – "Court Ordered" and "Referred if Qualified." EMP staff*** will create and maintain a risk assessment evaluation for those who are court ordered to ***the EMP*** who did not meet the criteria in Section VI "Operations." Procedures for placing inmates on ***the EMP*** for the courts will be the same as for sentenced.

8. Inmates recommended for ***"Referred if Qualified"*** by the courts ***for EMP*** as a condition of bail or Release on Own Recognizance (OR) with ***EMP*** and who do not meet the criteria will not be placed on the program until the following steps are taken:

    a. ***EMP*** sergeant is advised.

    b. ***EMP*** sergeant or designee will ***notify the court via email with the explanation of why the inmate did not qualify.***

    c. ***EMP*** lieutenant will be advised when court(s) still insist inmate be placed on the program. ***The lieutenant will review, approve or deny, sign, and notify the court.***

    d. Captain, ***SAOB*** will be consulted and a decision will be made concerning whether ***EMP staff*** will place the inmate on the program or request a court hearing. ***The captain will review, approve or deny, sign, and notify the court.***

    e. ***EMP*** staff will be advised of the decision.

9. All information pertaining to each event will be documented on a memorandum to file or on an Inmate Status Sheet for placement in ***the*** inmate's ***EMP*** file.

10. Status letters to the courts reference an inmate on ***EMP*** as a condition of bail or release on OR will be made available upon request; unless subject is violated or remanded where a letter will be sent.

D. ***Court Orders***

1. ***Court orders will be adhered to.***

2. ***The only circumstances for denying a court order are:***

    a. Subject does not have a stable residence

    b. Subject did not meet other criteria contained in the court order; e.g., bail required

    c. Subject is in custody on other cases/charges

3. ***If a conflict exists with a court order, the court will be notified via email about the situation and asked "how would you like us to proceed?" (EM Court Order Example)***

E. Hookup:

1. Once an inmate has been approved for ***EMP*** and date of release determined, the DSD Records Bureau will be notified of the date and time of transfer. At the appropriate time of transfer, ***EMP*** staff will proceed to the releasing area and accomplish the following:

    a. Ensure releasing process goes as scheduled.

    b. Escort inmate to ***EMP*** office.

2. Upon arrival at the ***EMP*** office, the following will be accomplished:

    a. Inmate will be thoroughly briefed on the rules, regulations, and procedures for ***the EMP***.

    b. Inmate will read and sign the following documents:

        1) ***EMP*** Consent Form

        2) Information Waiver - Right to Privacy Act

        3) Escape - Consent to Waiver of Extradition

        4) 4th Amendment Waiver - Consent to Search

        5) Responsibility for Equipment Form

        6) ***EMP*** Payment Sheet – noting $30.00 processing and $12.00 Daily Fee

3. Subject's work program and curfew will be determined and all appropriate data will be entered into the internet-based management software.

4. A $30.00 processing fee and one week of daily fees will be collected at first check-in.

    a. Inmates unable to pay the standard fees may request a fee reduction (inmates are given sufficient time to seek employment before fees are adjusted).

    b. Inmate will complete a financial statement outlining personal, family, employment, and income information.

    c. Information will be verified to determine gross monthly income.

    d. If gross income justifies a fee reduction, fees will be set per approved sliding scale.

5. Inmate will be given complete instructions concerning the operation of the electronic monitoring equipment and a transmitter will be attached to the inmate's ankle.

6. A transmitter will be attached to the inmate's ankle; its successful operation will be verified.

7. Upon completion of all hookup procedures, inmate's release date will be verified for good time and/or work time credits. If the appropriate credits have not been applied, ***EMP*** staff will notify the Classification Section and obtain a current release date.

F. Technology:

1. The use of GPS technology is a tool for law enforcement; as such it will be combined with other methods of verification and enforcement such as home visits, work visits, surveillance, breath analysis and drug tests. The current system for ***the EMP*** is a "passive system" of monitoring.

2. The use of GPS technology for inmate monitoring is currently used by the ***EMP***. Proficient use of both hardware and software will be maintained by all personnel. At a minimum the following will be applied to the inmate to verify compliance with the program:

    a. Inclusion zones (home, work, counseling, court, CCDC, attorney, religious services, AA, NA).

    b. Exclusion zones (if known, victims, subjects of TPO's, EPO, areas of Clark County that are prohibited by the courts or ***EMP***).

    Officers ***will*** use a scheduling feature to apply to the inmate as a tool to enforce and monitor the subject.

3. The use of GPS technology allows the officer to receive notifications via text messaging or email notifications when the inmate is in non-compliance. At a minimum the following notifications will be applied to verify compliance:

    a. Strap tamper

    b. Back plate tamper

    c. Case tamper

    Officers should utilize and are encouraged utilizing the following notifications to manage their workload:

        1) Buffer zone

        2) Moving on charger

        3) Curfew violations

        4) Low battery

5) Inclusion zone

6) Exclusion zone

7) No communication/clear

8) No location/clear

4. Schedules are a tool that law enforcement can use to keep inmates on a regimented routine. Officers have the ability to receive notifications when an inmate is in non-compliance. Officers should utilize and are encouraged utilizing the following schedules to manage their work load. These are:

    a. Curfew

    b. Recharging

5. Technical issues may occur when dealing with any electronic devices. If a device has been identified as malfunctioning, that device will be swapped out with another device immediately. Preferably same day or next business day depending on circumstances, time of day, weekend, holidays, and in some instances where the officer is able to determine there is no immediate danger or threat to the community. This change out of equipment will not exceed ***24 hours***. Preferred method is to change out the device immediately at the ***EMP*** office to address any issues that may occur. However, based on the situation and or case, a device can be swapped out in the field for immediate replacement.

    Critical Failure of Service:

    In the event that the vendor's (contracted by ***EMP***) servers crash or fail for an extended period, the ***EMP staff*** will make contact with the vendor to determine the length of time the system will be down. Should the length of time extend beyond two days, the ***EMP staff*** will determine a contingency plan for monitoring and/or incarceration, including but not limited to:

    a. Notifying chain of command.

    b. Contacting courts.

    c. Determining if they want to return inmate back in the custody of the CCDC or to continue with diminished services.

    d. Contacting DSD Records.

    e. Identifying high risk inmates, court ordered, sentence or otherwise.

    f. Having inmates report to the office daily.

    g. Increase service in the field.

G. Hospital ***Electronic Monitoring***:

Once an inmate has been approved for Hospital ***EMP***, the ***EMP*** officer will notify the STB 3rd floor sergeant. The assigned ***EMP*** officer will proceed to the hospital and complete the following procedure:

1. Inmate will be thoroughly briefed on the rules, regulations, and procedures for ***EMP***.

2. If able, the inmate will read and sign the following documents (if the inmate is unable to sign, the officer will sign and notate the reason):

    a. ***EMP*** Consent Form

    b. Information Waiver - Right to Privacy Act

    c. Escape - Consent to Waiver of Extradition

    d. Responsibility for Equipment Form

    e. ***EMP*** Payment Sheet - noting $30.00 processing and $12.00 daily fees.

    EMP fees will be waived if the inmate is transferred to the hospital either administratively or involuntary. If the inmate is assigned to the hospital for elective surgery, then all fees will be needed prior to transfer. This waiver is for sentenced inmates only.

    f. All signed documents will be returned to ***the EMP***.

    g. The ***EMP*** officer will contact hospital administration and security staff and inform them of any pretrial and sentenced individuals assigned to the hospital under ***EMP***.

    h. ***Hospital Visits:***

        1) ***Visual inspections of monitoring device***

        2) ***The EMP sergeant will coordinate with the South Tower 3rd floor sergeant to ensure daily welfare and equipment checks are completed for inmate(s) on this status.*** See Section X.

        3) ***Documentation of home visit will be placed in the inmate's file.***

H. Supervision:

1. ***EMP*** staff will supervise inmates in the following manner:
Inmates may be required to personally visit the ***EMP*** office at least once per week during which the following will be accomplished:

    a. Visual check of transmitter for evidence of tampering.

    b. Payment made for current week.

c. Rule violations will be discussed and corrective measures will be explained.

d. Random drug/alcohol testing.

e. Notations will be made in the inmate's file with above information.

f. Inmates meeting all the ***EMP*** requirements and were voluntarily placed on Hospital ***Electronic Monitoring***, will be required to report to the ~~HA~~ ***EMP*** office to complete ***EMP*** processing upon their release from the hospital.

2. ***EMP staff will have direct verbal communication with each client at least weekly. Text or voice mail will not be sufficient to meet this weekly requirement***.

3. Inmates should be contacted in the field within the first week of placement.

   Subjects on the program will continue to be monitored on a random schedule and visited at home or at work. This does not limit the increased frequency with certain persons or cases. Inmates should be seen ***at least*** once every 30 days in the field by an officer. This will be documented.

   During which the following will be accomplished:

   a. Home Visits:

      1) Visual check of transmitter and receiver for evidence of tampering

      2) Visual check of premises for prohibited items

      3) Visual check of inmate for use of alcohol/drugs

      4) Random urine analysis, especially if inmate has a documented drug problem

      5) Instruct him/her to ***mail in*** payment, if necessary ***to the Alternatives to Incarceration office***

      6) Documentation of home visit will be placed in the inmate's file

   Note: Anytime personnel are conducting business in outlying areas of the county, they will contact these municipalities or resident personnel in advance. ***EMP* officers will let these jurisdictions know they will be in the area conducting police business in plain clothes and give a description of their unmarked vehicles. All ***EMP*** officers will also have the brightly colored LVMPD wind breakers or tactical vests with "POLICE" emblems clearly visible on their front and back when it is necessary to deploy rifles in the field or conduct police business alongside other agencies. This will give ***EMP*** officers added protection should it become necessary to interact with local law enforcement.
   **Note: Texting, e-mailing, or use of a cellular phone device without a hands-free mechanism while driving is prohibited while a vehicle is in motion.

Employees using cellular devices while operating a department vehicle shall use good judgment and discretion, constantly keeping in mind officer and public safety. Reference SOP 09.18.09, "Safe Driving Policy."

b. Work Visits:

1) Visual check of inmate for use of drugs/alcohol

2) Random urine analysis, especially if inmate has a documented drug problem

3) Random visits will also be made to any program, medical office, location of scheduled free time, or any other location to check that the inmate is present.

4) Documentation of home visit will be placed in the inmate's file.

I. Revocation:

1. Inmates who violate the rules, regulations, or conditions of ***EMP*** will be returned to custody in the following manner:

a. The recommended method of arrest is to take the inmate into custody ***by having the inmate come to the Alternatives to Incarceration office for a visit/check in***.

b. A field arrest will be accomplished when inmates won't report to the office or the violation is of a serious nature and immediate action is required.

2. When operating in the field, ***EMP*** staff will adhere to all LVMPD regulations, procedures, and safety practices as outlined in the department manual.

3. Units may operate as single man units for routine activities such as house visits and surveillance activities. Two man units are required any time an arrest is anticipated or other circumstance exists which might compromise officer safety.

4. A field unit will not proceed to any location/residence where weapons are located or where the officer(s) suspect that force may be used without contacting his/her immediate supervisor first who will determine back-up requirements. If an arrest must be made by a single man unit, due to an emergency situation, the single man unit will request a patrol unit for back up.

5. Prior to attempting an arrest, notify LVMPD Communications with the possible arrest, reason, and location. If there is any reason to think the arrestee will resist, call for and wait for the arrival of back-up.

6. Pick up all required equipment from residence (e.g., charger).

7. An inmate who can't be located will be considered as escaped (RUNNER) and the following will be accomplished:

a. Officers will physically verify at residence that the inmate has left their assigned residence and retrieve equipment if possible.

b. If time and distance is a concern (e.g. Laughlin, Mesquite, high risk, etc.), the appropriate Dispatch will be called to request a knock and talk to verify whereabouts.

c. The event number generated by this action must be used to complete all pertaining reports.

8. An ATL will be completed immediately upon verification of residence. The field unit will call the ***Alternatives to Incarceration*** office and initiate a Runners Checklist and request an ATL. Obtain a***n EMP*** Runners Checklist (see attached) from the runner's drawer; annotate initials and P# as each step is completed.

   EMP staff answering the call will fill out the Runners Checklist and ensure an ATL is placed on the inmate.

   Notify ***EMP*** sergeant immediately with the following information:

   a. Inmate's full name (last, first, middle, if any), spell name out if necessary

   b. ID#

   c. Current charges

   d. Release type (Bail, CCDC sentenced, OR/Intake, DUI programs)

   e. Time of last alert notification

9. Complete an Attention all Officers Form on the LVMPD Intranet (Form 30) and an Officer's Report (procedure is located in the ***Alternatives to Incarceration*** office). Copies of the reports will be routed through the chain of command to the captain, ***SAOB***.

10. ***EMP sergeant will notify the EMP lieutenant. EMP lieutenant or designee will notify the SAOB bureau commander via telephone immediately or as soon as reasonably possible followed by a briefing email containing the information identified in 8a-8e above with a narrative of the circumstances.***

11. ***EMP lieutenant or designee will notify the CCDC watch commander to make an entry in the Watch Commander Log.***

12. ***SAOB bureau commander will make telephonic notification to the Deputy Chief, DSD followed by a briefing email/memorandum.***

13. If the inmate has not been returned to custody within 48 hours or the field officer has concluded the investigation before then, the following additional steps will be followed:

    a. Annotate runner information on "Monthly Completed" clipboard, on corresponding date, located in DST's office. Use red ink, enter the following: first initial, last name, Runner.

b. Retrieve equipment within 48 hours. Update information in inmate's file to include date(s) and action(s) taken and/or results, continue to look for inmate.

c. Take inmate out of the monitoring system.

d. Adjust ***SAGE*** Accounting System to reflect actual charges due, include any equipment cost where applicable.

e. Ensure the Officer's Notes section in the inmate's file is updated to reflect any and all contact/actions regarding the investigation.

f. Notify the court and judge of the escape. Start the process for a warrant.

g. Route a copy of the completed package through the chain of command to the captain, ***SAOB***.

14. When an inmate is apprehended and returned to custody the following will be accomplished:

    The ATL must be cancelled in the computer (procedure located in the ***Alternatives to Incarceration*** office).

    Annotate inmate's Return to Custody (RTC) on clipboards located in the DST's office as follows:

    a. "Monthly Completed" clipboard – use red ink, enter first initial, last name, Runner – RTC on corresponding date.

    b. "Return to Custody" clipboard – use red ink, enter required information.

15. In the event an inmate is taken into custody who was court ordered to ***EMP*** (includes court ordered own recognizance, bail, or other jurisdiction), the court will be notified immediately as follows:

    a. Send an email to the court.

    b. Phone call to the judge's chambers.

    c. Fax a written letter to the court with a hard copy placed in the inmate's file.

    These actions are to be completed prior to the close of business on the date of arrest, or next available day.

J. Inmates returned to custody for violating rules concerning substance abuse may be considered for a "2nd chance" on ***EMP*** if they attend a series of classes and programming as determined by case officer and/or ***EMP*** sergeant.

1. Programs may include AA, NA, Early Release Drug program, or any applicable program meeting at that time.

2. Inmates should be referred to the program coordinator using the pre-printed Program Referral Memo located in the forms pack.

K. Upon final release from ***EMP***, the following will be accomplished:

1. Computer will be checked to ensure inmate's release date is indicated and NCIC for any warrants.

2. Final checkout on activities.

3. All unpaid fees will be collected, or payment contract completed.

4. Equipment will be returned and checked for damage.

5. DSD Records will be notified via a Release from Custody Order when an inmate has completed ***EMP***.

L. Temporary removal from ***EMP*** for medical or travel:

1. Inmates on ***EMP*** are not allowed to travel outside the confines of Clark County, Nevada. If they do need to leave Clark County, there are two ways this can be accomplished:

a. Inmates can be allowed to travel outside of Clark County with a court order (for legitimate purposes, medical, legal, etc.), with court order stipulating travel (time, duration and locations) while on ***EMP***.

b. Or, the inmate can be removed by court order from ***EMP*** for the duration of travel and ordered back on ***EMP*** upon return.

2. Inmates undergoing medical treatment who are on ***EMP*** may have their device removed for the duration of the treatment due to the following:

a. A court order and verifiable long term care beyond one day. When possible:

1) Coordinate placement back on ***EMP*** once stable, to include placement of ***EMP*** bracelet at hospital after treatment is completed and inmate is stable.

2) Coordinated release from hospital and placement on ***EMP*** for return to residence.

3) And/or law enforcement medical detainer if release date is unknown.

b. Verifiable outpatient procedures, verifiable less than a day (MRI, biopsy, etc.).

c. Medical emergencies.

M. Contraband and prohibited items:

1. Contraband such as weapons, drugs and drug paraphernalia will be impounded in accordance with LVMPD Department Manual Policies 2/130 "Personal Property Inventories" and 5/210.00-20 "Evidence and Property Procedures."

2. Prohibited items identified by the court may result in the inmate being taken into custody for non-compliance or the items being impounded and the court being notified.

VII. ***ELECTRONIC MONITORING*** CUSTODIAL DEATHS

A. ***EMP*** residential visit, first responding officer, it is the responsibility of the first officer on scene to:

1. Utilize the radio code "463" (investigation/follow-up) to be established self at the residence. If a forced entry is necessary, notify the ***EMP*** sergeant prior to gaining entry. Exhaust all other options prior to using force.

2. Notify LVMPD Dispatch of a "419" (dead body) upon discovering the deceased person(s).

3. Ask dispatch for a "Code Red" (emergency exists – emergency traffic only) in order to clear the residence. The life and safety of officers and the public will take precedence over any other consideration of crime scene preservation.

4. After the residence is cleared of any possible threat, clear the "Code Red," and exit the residence.

5. Ensure that dispatch has made all of the proper notifications (e.g., area supervisor, coroner, fire department, Homicide Section, public administrator, and Police Employee Assistance Program (PEAP).

6. Notify ***EMP*** sergeant, if unavailable; notify the ***EMP*** lieutenant.

7. ***EMP lieutenant or designee will notify the DSD watch commander and SAOB bureau commander telephonically. Provide SAOB bureau commander briefing email/memorandum with information outlined in Section VI. Operations, Subsection I. Revocation, part 10 above.***

8. ***SAOB bureau commander will notify the Deputy Chief, DSD, telephonically and with briefing email/memorandum. If circumstances of death appear other than natural, the SAOB bureau commander will respond to the scene.***

9. Utilize crime scene tape to create a large perimeter around the residence, along the edge of the property line if possible.

10. Assign a "scribe" to record all events that have taken place, as well as document everyone already on scene and those arriving.

11. The primary officer will remain in command of the scene until properly relieved.

12. Coordinate with the responding homicide detectives before removing any monitoring equipment from the residence.

B. Hospital Death:

1. Get information from hospital records/time of death.

2. Call the Coroner's office/Homicide.

3. Call PEAP.

4. Call STB Administration for all documentation requirements.

C. Ensure appropriate custody status notification is made:

1. For sentenced individuals, ensure a Release from ***EMP*** Custody Order Form is forwarded to DSD Records.

2. For individuals who were released to ***EMP*** per court order, ensure that a letter is written apprising the presiding judge that the individual is deceased.

D. ***EMP*** sergeant:

Upon arrival on the scene, the sergeant will:

1. Assume command of the scene, unless the area supervisor or homicide detective has already arrived and taken command.

2. Notify ***EMP*** lieutenant.

3. Coordinate with area supervisor to ensure all proper notifications have been made.

4. Ensure that a "scribe" has been assigned.

5. Ensure all necessary paperwork has been completed and submitted.

E. ***EMP*** lieutenant:

1. Notify appropriate bureau commanders.

2. Ensure all necessary paperwork has been completed.

VIII. NOTIFICATION OF DEATH BY DISPATCH/PATROL

A. The monitoring officer will:

1. Notify ***EMP*** sergeant.

2. Retrieve the monitoring unit from the coroner's office, residence or public administrator.

3. Complete the ***EMP*** Custodial Death Package.

B. ***EMP*** sergeant:

1. Ensure that the ***EMP*** lieutenant has been notified.

2. Ensure that all necessary paperwork has been completed and submitted.

C. ***EMP*** lieutenant:

Ensure that the appropriate bureau commander has been notified and/or the ~~DSD~~ Deputy Chief***, DSD***.

IX. ***ELECTRONIC MONITORING*** CUSTODIAL DEATH PACKAGE

A. The following information should be included in the completed package with a memorandum.

1. ***EMP*** Custodial Death Cover Sheet.

2. Officer's Report (including a summary along with a chronological list of events. The summary should use phrases such as "appears to," and not make conclusions on our part. The conclusions should be left up to the investigators. The report should end with "conclusions pending outcome of the investigation.")

3. SCOPE printout.

4. Copy of court disposition or Custody Status Sheet (Blackstone minutes or actual court order, in the event the inmate was ordered to ***EMP*** by the court).

5. Copy of iTAG screen (legal cases).

B. Make copies of the completed package; one package to the appropriate bureau commander, one to the ***EMP*** sergeant, and one copy for the ***EMP*** inmate's file.

Attached at the end of this SOP are a EMP Custodial Death Cover Sheet and EMP Responding Officer Checklist.

X. ***ELECTRONIC MONITORING*** FOR INMATES AT THE HOSPITAL

A. Per NRS 211.160, Officers may not be required to be assigned to hospitalized inmates who are categorized as chronically ill or terminally ill or are on life-support equipment to the degree they are incapacitated or are not ambulatory. These inmates may qualify for a University Medical Center (UMC) police hold. Reference SOP 13.01.01, "Releases of Chronically Ill and Incapacitated Inmates," for further information.

B. Qualified inmates for Hospital ***EMP*** must meet one or more of the below criteria:

1. Court ordered

2. If inmates are sentenced to county time

3. Have charges/criminal history consistent to ***EMP*** and housed at a local hospital

4. Police hold

5. Other considerations:

    a. STB supervisors and officers will work with the ***EMP*** Section if they believe the inmate meets the ***EMP*** requirements while housed at the hospital. STB will be responsible for transporting inmates who were administratively placed on Hospital ***EMP*** and medically discharged from the hospital. ***EMP staff*** will make the final approval if an inmate stays on ***EMP*** or is returned to the CCDC. If the inmate returns to the jail, the ***EMP staff*** will be notified so they can retrieve the monitoring device.

    b. The STB, 3rd floor sergeant is responsible for reviewing all hospital inmate charges for possible ***EMP*** consideration at the beginning of each shift.

    c. Incapacitated individuals that are in our custody, whether pre-trial detainee or sentenced, that will be long term or permanently incapacitated, will be considered for ***EMP***. Their current and past charges will be considered. ***EMP staff*** will review their SCOPE to see if the individual meets the qualifications for ***EMP*** or police hold. STB Administration will notify the courts if they are pre-trial detainees and request the court's approval for the individual to be placed on ***EMP***. Reference SOP 13.01.01, "Releases of Chronically Ill and Incapacitated Inmates."

C. Placing the monitor on the inmate:

1. The ***EMP*** officer assigned to monitor the inmate will place the device on the inmate. The ***EMP*** officer will communicate expectations and requirements to the inmate. When not feasible, any available ***EMP*** officer will accomplish the hook up.

2. If the inmate will remain on ***EMP*** after discharge, if possible, the inmate will fill out all ***EMP*** paper work at the hospital. If any special needs arise, the officer will contact the STB lieutenant.

3. The ***EMP*** fees will be calculated or determined through the ***EMP*** supervisor and policies set forth by DSD. If the ***EMP*** status will remain with the inmate once discharged from the hospital, then the fees will be determined by ***EMP staff*** and appropriate follow up will be completed by the ***EMP***. If the inmate is administratively placed on ***the EMP***, the fees will be waived.

4. If the inmate will be receiving routine Magnetic Resonance Imaging (MRI) or Computer Tomographic (CT) scans, they should be reconsidered as a possible candidate for ***EMP*** as this could be detrimental to the inmate as well as the equipment.

5. The hospital, rehabilitation facility or other location, responsible for long term care, will be notified of the individual's ***EMP*** status. Contact information will be provided to the medical facility's administration and security office. Proper communication will be maintained at all times.

D. Court Approval:

1. District Court inmates housed at the hospital that meet ***EMP*** requirements must acquire District Court judge approval before being placed on ***EMP***.

2. Justice Court inmates who have not received ***EMP*** will require approval through the Justice Court judge. If the judge is not available for approval, STB Administration will contact the on call Justice Court judge for approval.

3. All ***EMP*** referrals will go through the ***EMP*** office when the inmate is housed at the hospital. This does not preclude the court from ordering ***EMP*** in any manner they choose as authorized by law. All others meeting the standards for ***the EMP***, set forth in policy, will be looked at on a case by case basis.

E. Visits:

If a hospitalized inmate is placed on ***the EMP***, the inmate(s) will be assigned to a***n EMP*** officer.

1. While at the hospital, daily charging of the ***EMP*** monitor for incapacitated pre-trial detainees or sentenced inmates must occur. The monitor needs to be charged for three hours per day, consecutively. ***EMP*** officer responsible for assigned inmate will monitor.

2. All pre-trial detainees and/or sentenced inmates at the hospital will be checked on at a random, frequent basis, as determined by the ***EMP*** officer. Documentation of visit will be placed in the inmate's file.

CHARLES L. HANK III, DEPUTY CHIEF
DETENTION SERVICES DIVISION

CLH:cc

Attachments: Refund Request
Sliding Fee Scale
EMP Runner Checklist
EMP Responding Officer Checklist
EM Court Order Example
EMP Incident Briefing Memorandum
EMP Custodial Death Critical Information
EMP Application/Social Support Case Plan

Clark County Detention Center
Electronic Monitoring Program

330 South Casino Center Blvd
Las Vegas, Nevada 89101
702-671-3761 Fax: 702-671-3646

REFUND REQUEST

Refund requested by:

Name: _____ ID#: _____

Address: _____

Signature: _____ Date: _____

Date Refund Requested: _____

How Refund Requested: Phone call _____ In Person _____ Mail _____

_____

Amount of refund: $_____

Reason for refund: _____

_____

Supporting documentation, if available, is attached.

Request Received by Employee: _____ Date: _____
Signature of Employee

Approved by Section Supervisor: _____ Date: _____
Sergeant, ***Electronic Monitoring Program***

Final Approval ***SAOB***: _____ Date: _____
Lieutenant

Electronic Monitoring Program Sliding Fee Scale (Based on Gross Monthly Income)

Household Size 1	Household Size 2	Household Size 3	Household Size 4	% Waived	Daily Fee $	Monthly Fee (30 day)	Hook-Up Fee $
$0 - $931	$0 - $1261	$0 - $1591	$0 - $1921	100%	0	0	0
$932 - $1080	$1262 - $1463	$1592 - $1846	$1922 - $2228	80%	2	60	6
$1081 - $1231	$1464 - $1668	$1847 - $2104	$2229 - $2540	60%	5	150	12
$1232 - $1379	$1669 - $1868	$2105 - $2356	$2541 - $2845	40%	7	210	18
$1380 - $1517	$1869 - $2055	$2357 - $2592	$2846 - $3130	20%	10	300	24
$1518+	$2056+	$2593+	$3131+	0%	12	360	30

Household Size 5	Household Size 6	Household Size 7	Household Size 8	% Waived	Daily Fee $	Monthly Fee (30 day)	Hook-Up Fee $
$0 - $2251	$0 - $2581	$0 - $2911	$0 - $3241	100%	0	0	0
$2252 - $2611	$2582 - $2994	$2912 - $3377	$3242 - $3760	80%	2	60	6
$2612 - $2977	$2995 - $3413	$3378 - $3850	$3761 - $4286	60%	5	150	12
$2978 - $3334	$3414 - $3823	$3851 - $4312	$4287 - $4800	40%	7	210	18
$3335 - $3667	$3824 - $4205	$4313 - $4743	$4801 - $5280	20%	10	300	24
$3668+	$4206+	$4744+	$5281+	0%	12	360	30

Percentages (%) are rounded to the nearest whole dollar amount.
Sliding Fee Scale is based on current Health and Human Services Poverty Guidelines – 2012 shown.

Revised 07/14

ELECTRONIC MONITORING PROGRAM RUNNER CHECKLIST

INMATE'S NAME	ID#	OFFICER

#	ACTIONS/RUNNER	INITIALS/P#
1	Notify ***EMP*** Sergeant	
2	Complete ATL (If sentenced, ensure case # & charges are listed)	
3	Complete Officer's Report	
4	Complete ***EMP*** Runner Info Sheet	
5	Fax ATL to Criminal History Supervisor in Police Records @ 702-828-1559	
6	Fax ATL to Detention Records Supervisor @ 702-671-3917	
7	E-mail ATL to Criminal History Supervisor in Police Records	
8	E-mail ATL & Officers Report to ***EMP*** Sergeant	
9	Fax Runner Info Sheet to DSD Records Supervisor @ 702-671-3917	
10	E-mail ATL & Officers Report to ***EMP*** Lieutenant (Sergeant Only)	
11	Send ATL to Criminal History Supervisor in Police Records	
12	Put copy of forms in inmate's file	
13	Update Officer's Notes in file/Ensure warrant is issued	
14	Annotate runner info on "Monthly Completed"/use red ink	
15	Retrieve equipment within 48 hours (If not recovered - email to Sergeant)	
16	Take inmate out of OmniLink System	
17	Adjust ***SAGE*** Accounting System	
18	Update ***EMP*** Inmates On Runner Status List	
19	ITAG: Ensure inmate's housing is moved to ***ELECTRONIC MONITORING***-ESCAPE	
#	ACTIONS/RETURNED TO CUSTODY	INITIALS/P#
1	Complete ATL Cancellation Information Box	
2	Complete ***EMP*** Runner Info Sheet/RTC	
3	Fax ATL to Criminal History Supervisor in Police Records @ 702-828-1559	
4	Fax ATL to Detention Records Supervisor @ 702-671-3917	
5	Fax Runner Info Sheet to DSD Records Supervisor @ 702-671-3917	
6	E-mail ATL to ***EMP*** Sergeant & Lieutenant	
7	Send ATL to Criminal History Supervisor in Police Records, Criminal History	
8	Put copy of ATL in inmate's file	
9	Update Officer's Notes in inmate's file	
10	Send payment agreement up to inmate to sign	
11	Enter inmate's return info on clipboards in CA's office/use red ink	

ELECTRONIC MONITORING RESPONDING OFFICER CHECKLIST

Upon discovering a***n Electronic Monitoring Program*** custodial death, the following procedures are to be followed.

Mark an X as each step is done:

____ Seal off the affected area.

____ Call the Detective Bureau, Homicide Section (702-828-3521) per Department Regulation 5/206.16.

____ Identify a scribe (recorder) to begin an accurate accounting of occurrences.

____ When the Detective Bureau arrives, ensure they are going to make contact with the Criminalistics Bureau. If they have not contacted Criminalistics, do so.

____ Coordinate with the on-site detectives from the appropriate bureaus ensuring they have all assistance necessary.

____ Ensure that the affected area remains secure until it has been released by the appropriate bureau representative, e.g., Homicide detective, etc.

____ Ensure all completed reports are forwarded to the ***EMP*** sergeant for review.

____ Retrieve the monitoring equipment when cleared by the on scene detective in charge.

EM Court Order Example

Email

To: JEA, Court Clerk

CC: Sergeant, Eligibility Coordinators

Subject: Inmate Name / Scope ID# / Case #

Good morning,

The above defendant states his only option for housing is with his wife, the victim in this case. This is in violation of the court order which stipulates "no contact with the victim".

How would you like us to proceed?

Thank you,

Signature

Email

To: JEA, Court Clerk

CC: Sergeant, Eligibility Coordinators

Subject: Inmate Name / Scope ID# / Case #

Good morning,

The above defendant does not meet house arrest minimum qualifications due to the nature of his/her current charges, his/her criminal history, and his/her institutional behavior.

How would you like us to proceed?

ELECTRONIC MONITORING PROGRAM
INCIDENT BRIEFING MEMORANDUM

Name of Inmate:	
ID#:	
Event#:	
Sentenced or Court Order:	
Judge:	
Incarceration Date:	
Sentenced Date:	
Start EMP Date:	
Charges:	
Narrative:	
Inmate was last seen:	
Name of watch commander briefed: Date & Time:	
Name of watch commander notified when inmate brought back to custody:	

ELECTRONIC MONITORING PROGRAM CUSTODIAL DEATH
CRITICAL INFORMATION

INMATE INFORMATION					
NAME:		***ID#:***		***OFFICER ASSIGNED:***	
EMP CASE # & CHARGES:					
DATE PLACED ON EMP:		***INCARCERATION DATE:***			
PREVIOUS EMP PLACEMENT:					
PRESUMED CAUSE OF DEATH:					
COURT INFORMATION					
JUDGE:		***COURT:***		***DEPARTMENT:***	
COURT ORDER APPEARANCE DATE:				***SENTENCING DATE:***	
SENTENCE:					

PERSON COMPLETING FORM:	
DATE:	

Electronic Monitoring Program (EMP)
Application/Social Support Case Plan

Ensure all questions are completed on both sides of the form and return to EMP. Some of the information requested will assist with the development of case plans and statistical research.

Client Contact Information and General Demographics				
Last Name: First Name: Middle Name: ID Number				
Other Names Used (Maiden, Previous, Marriage, Nicknames, Monikers):				
Social Security Number:	Gender ☐ M ☐ F	Date of Birth: (MM/DD/YY)		Age:
Place of Birth:		City: State:		Zip Code:
Permanent Address:		City:	State:	Zip Code:
Address after release from custody:		City:	State:	Zip Code:
Primary Phone Number: ( )		Cell Phone Number: ( )		
Email Address:		Computer Access? Yes____ No ____		
Primary Emergency Contact Name:		Relationship:		
Primary Emergency Contact Address:		City:	State:	Zip Code:
Primary Emergency Contact Phone Number:				

Demographics

- Education

Do you have a High School Diploma or GED? Yes____ No ____ (*if yes, circle one*)

Date of Completion: _____/_____/_____
MM DD YY

HS Attended: _____ City/State: _____

HS Attended: _____ City/State: _____

Do you have any additional certificates or degrees? Yes____ No ____

If yes, where and when?
Institution(s): Date:

_____ _____

_____ _____

Do you possess computer skills? Yes____ No ____ If yes list:_____

What are your educational goals?

_____

Are you a Veteran? Yes____ No ____ If yes, type of discharge?

If yes, which Branch(s)/Year of Service:

_____

Specialized Training? Yes____ No ____ If yes, type of training: _____

Month and Year of Discharge:_____

_____

Are you registered for Selective Service (Males Only) Yes____ No ____

Demographics

- Employment

Current Employer(s) Name/Supervisor/Address/Phone Number/Work Hours/Monthly Income:

Previous Employer(s) (Last Two Years) Name/Address/Phone:

1.

2.

Demographics

- Personal and Social History

Is English your primary language? Yes____ No ____
If no, what is your primary language? _____
If bi-lingual, what other languages do you speak? _____

Race:	Ht: Wt:	Scars, Marks, Tattoos, Body Modifications: (Type/Location)	Eyes: Hair:

Shoe Size: Shirt Size: Pant Size:

Family Status? *(Circle One)*
Single Married Divorced Separate Widow

Give a brief description of your childhood and family environment. (e.g., 2 parent home, stable)

Do you have children? Yes____ No ____
If yes: Number of children living with you? _____
Number of children not living with you? _____

Name, Age and address of child 1:_____

Name, Age and address of child 2: _____

Additional, please include here: _____
_____

Religious Preference:
If housing is needed, are you opposed to a faith based location? Yes____ No ____

How would you describe your previous housing? *(Circle one)*

Foster Care Stable Housing Renter Temporary Homeless Shelter

Sober Living House Rehab Center Family/No Rent Emergency Housing

Do you receive or have you received within the past 3 years, any of the following?

Yes____ No ____ (If yes, c*ircle those that apply*)

SNAP (Food Stamps) TANF SSI SSDI

State of Local Welfare VA Benefits Unemployment

Do you have medical insurance? Yes____ No ____ If yes, what type of coverage? _____

Do you have any form of income not mentioned above? Yes_____ No _____

If yes, what type of income?

_____

Demographics

- Substance Abuse History/Medical History/Mental Health/Criminal

Have you ever attended an alcohol or drug treatment program? Yes____ No ____
If yes, name of program and year attended?
Name: _____ Year: _____

Name: _____ Year: _____

Name: _____ Year: _____

Drug(s) of choice? _____

Length of time of use? _____ Longest period of sobriety? _____

History of IV Drug Use? Yes____ No ____ If yes list when and what drug:

- Medical/Mental Health History

Do you have medical diagnosis? Yes____ No ____ If yes list: _____

Do you have a mental health diagnosis? Yes____ No ____ If yes list: _____

Attending Physician Name & Address:

Attending Physician Name & Address:

Do you take medication? Yes____ No ____ If yes list: _____

Prescribing Physician Name & Address

Prescribing Physician Name & Address

- Criminal History

Current Charges:

_____

_____

List any pending unrelated cases:

_____

Number of Felony Convictions: _____
Number of sex-related/arson arrests: _____
Number of arrests involving a weapon: _____
Arrest outside of NV? Yes____ No ____ If yes, When, Where & Charges: _____

_____

Current Parole/Probation? Yes____ No ____ If yes, Agency & Officer Name: _____

_____

List all Prison Time & Dates of Incarceration:

_____

Public Defender and/or Attorney's Name & Phone Number:

Parental Contact Information
Mother's Name & Contact Information: Name:_____ Address: _____ Phone Number: _____ Mother's Employer Name, Address and Phone Number: _____ _____ Father's Name & Contact Information: Name:_____ Address: _____ Phone Number: _____ Father's Employer Name, Address and Phone Number: _____
Required References – List (5) Nearest Relatives *Not* living with your, does not have to be local
Name:_____ Relationship:_____ Address:_____ Phone Number:
Name:_____Relationship:_____ Address:_____ Phone Number:
Name:_____ Relationship: _____ Address:_____ Phone Number:
Name:_____ Relationship: _____ Address:_____ Phone Number:
Name:_____ Relationship: _____ Address:_____ Phone Number:

Required References – List (5) References *Not related or living with you,* must be local

Name:_____

Address:_____

Phone Number:

Name:_____

Address:_____

Phone Number:

Name:_____

Address:_____

Phone Number:

Name:_____

Address:_____

Phone Number:

Name:_____

Address:_____

Phone Number:

Where You Will Be Living While on EMP?

Address: _____

Apt.#:_____

City:_____

State:_____

Zip:_____

Phone(s) You Will Be Using While On EMP:
Home(s):_____
Cell(s):_____

Who You Will Be Living With While on EMP and Include Owner of the Household and ALL Other Residents?

Name: _____
Relationship: _____
Phone Number: _____

Name: _____
Relationship: _____
Phone Number: _____

Name: _____
Relationship: _____
Phone Number: _____

Are You Related To Or In A Relationship With Any LVMPD Employee or Anyone Doing Business With LVMPD? _____

Name: _____
Relationship: _____
Phone Number: _____

Upon release, will you have transportation? Yes____ No ____
If yes, type (e.g., Bus)_____

TECHNOLOGY USAGE AGREEMENT

WITH THE PREVALENCE OF INTERNET AND CELLULAR SOCIAL NETWORKING SITES, EMP RESERVES THE RIGHT TO MONITOR APPLICANTS' USAGE OF THESE SITES. IF THE APPLICANT FAILS TO DISCLOSE THEIR USAGE, *IE: USERNAME), OR ADDS/DELETES/CHANGES THE ACCOUNTS LISTED WHILE ON EMP, THIS WILL BE GROUNDS FOR TERMINATION FROM THE EMP. FURTHERMORE, THE ELECTRONIC MONITORING PROGRAM (EMP) WILL REQUEST TO BE A SOCIAL NETWORK "FRIEND"; ALL PARTICIPANTS IN THE PROGRAM WILL GRANT THIS "FRIENDSHIP" FOR AS LONG AS THEY ARE ON EMP. FAILURE TO DO SO OR DELETION OF "FRIENDSHIP" WITHOUT PERMISSION WILL BE GROUNDS FOR TERMINATION FROM EMP.

NETWORKING SITE (E.G., MYSPACE, FACEBOOK, TWITTER) USERNAME:

Identification

Do you have the following documents?
Driver's License Yes____ No ____ Valid State ID Yes____ No ____
If yes, State _____

Social Security Card Yes____ No ____ Certified Birth Certificate Yes____ No ____
State_____
List any other documents you may have: e.g., Health card.

Vehicle Information

Make/Model (1st): Year: Color:
Plate Number:

Make/Model (2nd): Year: Color:
Plate Number:

PROGRAMS/REENTRY APPLICATION
INFORMATION WAIVER UNDER RIGHT TO PRIVACY ACT
Release of Information Form

I/We_____ hereby authorize and direct any relatives, employers, bankers, lending institutions, Federal Social Security Administration, United States Armed Forces, State Department of Motor Vehicles, all municipal, county, state and federal law enforcement agencies, Clark County Detention Center Medical Vendor, and other persons or organizations having any information regarding the above named individual(s) to release same to a duly authorized member of the Las Vegas Metropolitan Police Department Detention Services Division staff. I/We also authorized Las Vegas Metropolitan Police Department Detention Services Division staff to exchange information with listed entities, regarding the above named individual(s), for the purpose of reentry discharge planning and community programming assistance. This release of information may include any medical or criminal history information that is provided on the program/reentry application. The above named person(s) understands that any information obtained or exchanged will be used solely for the following purposes:

1) Determine eligibility for the Electronic Monitoring Program.

2) Determine eligibility in community based programs provided by the Clark County Detention Center, community and/or governmental programs in the Clark County jurisdiction that are coordinated with or through the Clark County Detention Center.

3) Maintain compliance with the program(s).

4) Ensure the return of the above named person(s) into the judicial and/or correctional system.

The above named person(s) expressly waives his/her rights with respect to the Right to Privacy Act, and authorizes the use of copies of this document by a duly authorized member of the Las Vegas Metropolitan Police Department EMP staff.

_____ _____
CLIENT SIGNATURE DATE

ATTENTION!!!

Do not send numerous requests to inquire about your status.

Unsolicited calls from Family or Friends

Do not request that family members or friends contact the Alternatives to Incarceration office to inquire about your application status. Any unsolicited calls received from them on your behalf, will delay the timely process of your or another's application. Thank you for your assistance/cooperation. Alternatives to Incarceration staff will contact them if there are any questions concerning your application.

Transport - Effective Jan 18th, 2014

Alternatives to Incarceration will no longer transport you to your residence upon placement on the program. Please make arrangements to have bus fare placed on your books prior to your release, or keep enough money on your books for transportation. Upon your release, we will allow you to make a quick phone call to a family member or friend listed on your application, to arrange pick up on that day, if unable to reach them prior to release.

RTC Strip/Duce/Downtown Express:	2 hour bus pass is $6
	24 hour bus pass is $8
RTC Residential Route:	Single bus pass is $2
	2 hour bus pass is $3

Prices as of 12/26/13

I acknowledge that I have read the above notifications and warnings.

_____

Applicant Signature (sign on the line) Date

TAB 4

AMERICAN BAIL COALITION

Presentation to Nevada Supreme Court Committee on Pretrial Justice Reform

December 3, 2015

Jeff Clayton, M.S., J.D.
National Policy Director
American Bail Coalition

Who Are We, What Do We Do?

- American Bail Coalition, Surety Bail Insurance Companies
- 215 Licensed Surety Bail Agents in Nevada
- Speaking today also on behalf of the Surety Bail Agents of Nevada
- Work on bail and pretrial release issues in numerous jurisdictions
- Advocate for best practices in bail setting and regulation of bail agents and insurance companies to protect the public
- Jeff Clayton—background

Evidence-Based Practices and the "Scientific" Justice System

A philosophy shift from punishment to rehabilitation

"Using stuff that works?"

Will never replace human judgment, will only complement and inform it

Current National Picture

- Pretrial Justice Institute and the Equal Justice Under Law foundation are advocating to eliminate all financial conditions of bail and replace it with a release/no-release policies
- These release/no-release policies are being run in several state houses in 2016
- Reform in NJ is a partial model of what they want--the near elimination of financial conditions in favor of supervision

Current National Picture

- Increased use of risk assessments, which if used properly, will help judges be better informed prior to making a decision on bail
- Most jurisdictions have not taken the step of eliminating financial conditions or surety bonds
- Financial conditions should be integrated into the decision-making model just like any other condition
- Kentucky still has financial bail—just no surety bonds—majority of people post cash

False Assumptions in “Pretrial Justice”

- 60% of people in jail nationally are “innocent” and cannot afford their bail
- ABC has identified at least ten administrative or other legal reasons other than “affordability” of bail that keep people in jail
- Only a real jail study or studies can isolate the magnitude of the problem and what factors, financial or not, drive it
- That rich gangsters are posting $1,000,000 bonds with no money down or security and walking out of jail

False Assumptions in “Pretrial Justice”

- The concept that masses of people sit in jail for extended periods of time due to not being able to afford their financial bail is largely false (see materials, Los Angeles County study)

False Assumptions in “Pretrial Justice”

The following is a snapshot of **10,545** pretrial inmates in the LA County Jail and who are eligible for bail:

- **3,501** already sentenced for another crime – **NO BAIL**
- **2,066** with outstanding warrants – **NO BAIL**
- **2,014** with “no bail” designations – **NO BAIL**
- **1,229** with assaultive crimes – **NO BAIL**
- **386** who are classified as high security – **NO BAIL**

TOTAL ELIGIBLE FOR BAIL

1,367

(or 12% … NOT 70%)

ABC Has Proposed Solutions

- Kaleif Browder case started renewed conversation but focused only on $ and not other bail issues
- Set meaningful bail--$1 bail?
- Better review procedures to make sure review process from a bond schedule or initial setting is expedited
- Public-private partnerships—state pay or state contracted bail as an insurance product—lift the indigent up, not drag everyone down
- Diversion programs
- Accountable drug and alcohol treatment efforts

Reject the Money/No Money Dichotomy

- It is easy to say we don't want a "wealth-based" bail system
- We have a "wealth-based" society, perhaps we don't like that either
- The cost of bail is marginal compared to all of the other fines, fees, costs, restitution, surcharges, attorney fees, and supervision fees that offenders will be expected to pay
- Third-parties are providing an insurance benefit to the Courts and the defendant at their own expense

Reject the Money/No Money Dichotomy

- Financial conditions should have a role in the system—the use should fit within the framework and not be excluded simply because the proponents of some risk instruments designed them to eliminate financial conditions
- Financial conditions are a monetization of risk

Least Restrictive Form of Release

- The dated ABA standard assumes that monetary conditions are always the most restrictive
- For most people who can post cash bond or obtain a surety bond underwritten by a licensed insurer, a secured bond is typically the least restrictive form of release
- The dramatic expansion of GPS monitoring, blood monitoring, drug screening chemistry, SCRAM, etc. was not contemplated in the 1970s—the use of correctional technology has become extremely restrictive in terms of liberty and privacy

Least Restrictive Form of Release

- New D.C. bill would require defendants to waive right to be free from unreasonable searches and seizures
- The on-going cost of “non-financial” conditions should be considered
- **All types of bond and conditions of release should be on a level-playing field for judges to impose when appropriate**

Reject the Bail is Too High/Too Low Analysis

- Judge McLaughlin's letter (materials) from New York explains why the goal should be to support judicial discretion, which is going to get it "wrong" some percentage of the time and "right" some percentage of the time
- To say that bail is being set too "high" ignores the failures at the other end, when someone fails to appear or commits another crime that a higher bail may have prevented—the same line of logic can lead to the opposite conclusion much more easily, that every failure means bail was set too "low"

Reject the Bail is Too High/Too Low Analysis

- Taking a percentage of cases and saying these people cannot “afford” their bail ignores the decisions of judges in setting the initial bail and reviewing that bail with a factor of financial resources as a consideration

Risk Assessments – What They Do

- They tell us how likely someone is to “fail”
- Many don’t tell us what the “failure” is—i.e., a risk score does not tell you which risk we are talking about, i.e., new crime and/or FTA
- The new Arnold tool purports to predict new crimes and FTAs separately
- They give judges another tool to assess risk
- They can inform bail decisions to a certain extent

Risk Assessments – Limitations

- There is no “evidence-based” or scientifically validated way to *set bail or conditions of release*.
- Setting bail of is no more evidence-based with a risk assessment than it was before
- The risk assessment does not help address criminogenic factors that lead to failure—in other words, what is the scientific basis to say that setting greater conditions based on a numerical risk score will obviate risk? Risk of crime or risk of flight?

Risk Assessments – Limitations

- Over-supervision is detrimental to low level offenders
- How does a financial condition mitigate risk?
- How does supervision mitigate risk?
- How does electronic monitoring or uranalysis mitigate risk?

Risk Assessments – Drug and Alcohol Abuse

- No risk assessment contains history of use and abuse of alcohol, or contains consideration that the underlying charge may contain the use of alcohol or drugs (i.e., DUI, public consumption).
- There is no cogent explanation as to why this is excluded
- Perhaps because such a great portion of the underlying population has substance abuse issues, the risk assessment ignores it
- It probably will calculate into a decision, i.e., whether you want to screen for substance use

Risk Assessments – Judges Haven't Been Blind

- Nearly all validated risk assessments are based on prior criminality and failures to appear—history repeats itself
- The risk assessments mechanically weight the factors today without further consideration—you score risk points for a prior felony, but we do not ask what that felony was or what degree
- For example, Arnold Foundation categories—prior crimes, prior FTAs, violent crime or not, another pending case, whether previously served a jail or prison sentence. The only factor not under that umbrella is age.

Risk Assessments – Judges Haven't Been Blind

- Risk assessments INGORE STATUTORY FACTORS. What happens when judges consider the factors?

Risk Assessments – Demographic Factors

- The use of demographic factors for sentencing or setting of bail in the criminal justice system has been called into question by a prominent law professor (see materials).
- Many risk assessments use demographic or economic factors—e.g., age at first arrest, own or rent a home, income, etc.
- Demographic factors that drive negative results in the criminal justice system have been suggested as further institutionalizing barriers to equal treatment of oppressed and protected classes

Risk Assessments – Interviews

- Don’t use an assessment that requires an interview
- You will still have to verify the information
- Interviews slow down the process—people sit until the assessor has time
- Lack of a 24 hour a day process will really slow things down
- Risk of incrimination, *Brady* issues

Risk Assessments – Resource Considerations

- Unless risk assessments are computerized, staff will have to be hired to assess people
- Because we know risk assessments are intuitive, and we know which factors we need to focus on, we know what information we need to get
- It may be that creating new programs to do the assessments will stall out due to human resource issues—yet, making sure all of the data is readily available to judges and their staff at the touch of a button would go a long way

Risk Assessments – Validation

- Not validated to set bail
- Will never be validated to set bail, because it's a probability of failure based on certain factors but it doesn't validate the conditions that will obviate the risk
- Should it be treated any different than other scientific or expert testimony evidence?
- Should Courts approve an instrument?
- Who validates, and what is validation?
- What if a defendant challenges the validity of the instrument?

Evidenced Based Bail Setting – Advocacy Efforts

- We are advocating for research among national organizations to move forward to have a more evidence-based approach in terms of what conditions of release and type of bond will mitigate the risk presented
- This research has not been done
- ABC has been advocating for this, obviously with the assumption that the use of financial conditions and their impact, in addition to all other types of bond and condition of release, can be better understood
- We have also been advocating for system-wide benefit cost-analyses

Effectiveness of Surety Bonds

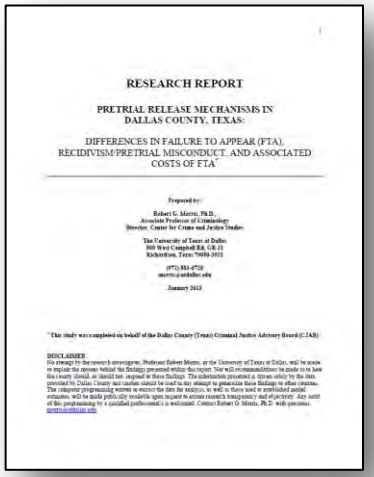
- Peer-reviewed academic studies back the effectiveness of surety bonds as the most effective form of release:


Bureau of Justice Statistics
Special Report

State Court Processing Statistics, 1990-2004

Pretrial Release of Felony Defendants in State Courts


THE FUGITIVE: EVIDENCE ON PUBLIC VERSUS PRIVATE LAW ENFORCEMENT FROM BAIL JUMPING*


RESEARCH REPORT

PRETRIAL RELEASE MECHANISMS IN DALLAS COUNTY, TEXAS:

DIFFERENCES IN FAILURE TO APPEAR (FTA), RECIDIVISM/PRETRIAL MISCONDUCT, AND ASSOCIATED COSTS OF FTA*

AMERICAN BAIL COALITION

Effectiveness of Surety Bonds

"Defendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time."

THE UNIVERSITY OF CHICAGO THE LAW SCHOOL

The Journal of LAW & ECONOMICS

Eric Helland, Claremont-McKenna College

Alexander Tabarrok, George Mason University

The Fugitive: Evidence on Public Versus Private Law Enforcement on Bail Jumping, 2004

AMERICAN BAIL COALITION

Effectiveness of Surety Bonds

"This analysis suggested that net of other effects (e.g., criminal history, age, indigence, etc.—see technical appendix), defendants released via commercial bonds were least likely to fail to appear in court compared to any other specific mechanism. This finding was consistent when assessed for all charge categories combined and when the data were stratified by felony and misdemeanor offenses, respectively."

Robert G. Morris, Ph.D.,
Associate Professor of Criminology, University of Texas at Dallas
Director, Center for Crime and Justice Studies

Effectiveness of Surety Bonds

"Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances."

U.S. DEPARTMENT OF JUSTICE

U.S. Department of Justice
Bureau of Justice Statistics
State Court Processing Statistics 1990-2004
Release of Felony Defendants in State Courts

Effectiveness of Surety Bonds

- No peer-reviewed studies that we are aware have concluded to the contrary—that other forms of release are more effective or more cost effective
- This does not mean everyone should be on a surety bond—we are here to help you find that mix
- Don’t assume that surety bonds are for the rich only—surety bail insurance is a privately paid insurance product typically paid by a third party that serves to help many indigent parties and other defendants provide security sufficient to allow for release from jail

Effectiveness of Surety Bonds: One Company

- Data was obtained from one long-time bail insurance member-company in Nevada
- The data set comprised 20 years worth of data
- From 1994-2014, 108,801 bonds were posted
- The Courts collected $5.4 million in per bond fees
- The State collected $1.1 million in premium tax
- The State collected $3.6 million in bond forfeitures paid

Effectiveness of Surety Bonds: One Company

- The success rate, based on total bond forfeitures paid as percent of total liability, was 98.4%
- The FTA rate over the 20 years was 11.5%
- The cure rate on the FTAs as a percent of liability was 92% (return to court, consents, exoneration of liability, etc.)
- The Courts and State were compensated for the economic costs of failures to appear where there was no cure

Bond Schedules

- Litigation being pursued to suggest they are unconstitutional—*Clanton, Buffin, Moss Point, etc.*
- Novel equal protection theory—if someone can afford their bond, then unfair for poor person to wait a day or two
- It is settled law for a generation that using bond schedules is constitutional as an interim, temporary measure to facilitate release from jail
- The key is time —if there is no meaningful and timely review where non-monetary alternatives are considered, then there are due process issues—Tuesday's gone.

Bond Schedules

- Best practices—set bail in all cases 24 hours a day. Not cheap, so keeping schedules around is typically needed

What do the Reforms Tell Us

- **The cost of reducing the use of surety bail is borne directly by local governments, the judiciary, and defendants**
- In New Jersey, the dramatic shift away from monetary bail to assessments and supervision is expected to cost around $100 million annually and have a $215 million negative economic impact (see Towson University study in materials)
- Throwing out the entire system due to a new philosophy that monetary bail is “unfair” is bad public policy—discovering the real issues and solving them with all partners at the table achieves accountability and progress

Jefferson County, CO – Where it all Began

- Getting rid of the bail schedule, going to assessments and supervision, and reducing monetary bail combined, during a time when crime was falling to:
  - Increase the average daily pretrial population and increased the average pretrial length of stay by 29%
  - Increase the number of people staying in more than one day by 141%
  - Increase the number of outstanding warrants by 42% in felonies and 34% in misdemeanors
  - Increase the % of the un-convicted population in the jail from 35% to 42%

Cost of Supervision and Monitoring

- It is not free—someone must pay
- Monthly tabs in many jurisdictions can be as high as $500 (see IBT Article re: Antonio Green case)
- Proponent companies tell local governments, hey it's free, the defendants will pick up the tab
- Even a $100 a month tab will add up to $1,000 over 10 months—that is a financial condition of bail, to be borne by a county government or a defendant

Cost of Supervision and Monitoring

- Continuous payments can ensnare defendants—miss a payment, what happens? Re-arrest?
- Who will pay for the indigent? Someone must pay
- Burden will fall mostly on local governments to try to supervise and pay for supervision and monitoring

Don’t Use Bail as a Collection Mechanism

- Stick to the purposes of bail
- Move away from cash-only bail
- Allow for Defendant choice, cash, property, surety
- Don’t use unsecured or 10% to the Court—turns bail into a collections issue, incentive to appear is low

Don’t Use Bail as a Collection Mechanism

“We have no doubt that the addition of any condition to an appearance bond to the effect that it shall be retained by the clerk to pay any fine that may subsequently be levied against the defendant after the criminal trial is over is for a purpose other than that for which bail is required to be given under the Eighth Amendment. Such provision is therefore ‘excessive’ and is in violation of the Constitution.”

U.S. v. Rose, 791 F.2d 1477, (11th Cir. 1986)

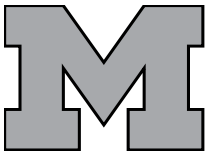
We Support Judicial Discretion

- Everyone loves judicial discretion…until they lose!
- We support judges making informed bail decisions—judges, not computers, should set bail
- We think surety bail should always be an option if it is the least-restrictive and most appropriate form of release
- Surety bail will prove its worth in a local jurisdiction or not

AMERICAN BAIL COALITION

We are here to help

Thank you for your time



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Evidence-Based Sentencing and the Scientific Rationalization of Discrimination

Sonja B. Starr

Forthcoming in Stanford L. Rev. 66 (2014)

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Evidence-Based Sentencing and the Scientific Rationalization of Discrimination

Sonja B. Starr*

Forthcoming, STANFORD LAW REVIEW, Vol. 66 (2014)

ABSTRACT

This paper critiques, on legal and empirical grounds, the growing trend of basing criminal sentences on actuarial recidivism risk prediction instruments that include demographic and socioeconomic variables. I argue that this practice violates the Equal Protection Clause and is bad policy: an explicit embrace of otherwise-condemned discrimination, sanitized by scientific language. To demonstrate that this practice should be subject to heightened constitutional scrutiny, I comprehensively review the relevant case law, much of which has been ignored by existing literature. To demonstrate that it cannot survive that scrutiny and is undesirable policy, I review the empirical evidence underlying the instruments. I show that they provide wildly imprecise individual risk predictions, that there is no compelling evidence that they outperform judges' informal predictions, that less discriminatory alternatives would likely perform as well, and that the instruments do not even address the right question: the effect of a given sentencing decision on recidivism risk. Finally, I also present new, suggestive empirical evidence, based on a randomized experiment using fictional cases, that these instruments should not be expected merely to substitute actuarial predictions for less scientific risk assessments, but instead to increase the weight given to recidivism risk versus other sentencing considerations.

* Professor of Law, University of Michigan. Thanks to Don Herzog, Ellen Katz, Richard Primus, and participants in Michigan Law's Faculty Scholarship Brownbag Lunch for their comments, and to Grady Bridges, Matthew Lanahan, and Jarred Klorfein for research assistance.

INTRODUCTION

> *"Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. ... In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations.…[T]he central aim of our entire judicial system [is that] all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court."*
>
> --Griffin v. Illinois, *351 U.S. 12, 16 (1956)*

Criminal justice reformers have long worked toward a system in which defendants' treatment does not depend on their socioeconomic status or demographics, but on their criminal conduct. How to achieve that objective is a complicated and disputed question. Many readers might assume, however, that there is at least a general consensus on some key "don'ts." For example, judges should not systematically sentence defendants more harshly because they are poor or uneducated, or more lightly because they are wealthy and educated. They should not follow a policy of increasing the sentences of male defendants, or reducing those of females, on the explicit basis of gender. They likewise should not increase a defendant's sentence specifically because she grew up without a stable, intact family, or because she lives in a disadvantaged and crime-ridden community.

It might surprise many readers, then, to learn that a growing number of U.S. jurisdictions are adopting policies that deliberately encourage judges to do all of these "don'ts." These jurisdictions are directing sentencing judges to explicitly consider socioeconomic variables, gender, age, and sometimes family or neighborhood characteristics—not just in special contexts in which one of those variables might be particularly relevant (for instance, ability to pay in cases involving fines), but routinely, in all cases. This is not a fringe development. At least eight states are already implementing some form of it. One state supreme court has already enthusiastically endorsed it.[1] And it now has been embraced by the American Law Institute in the draft of the newly revised Model Penal Code—a development that reflects its mainstream acceptance and, given the Code's influence, may soon augur much more widespread adoption.[2] There is a similar trend in Canada, the United Kingdom, and other foreign jurisdictions.[3] Meanwhile, the majority of states now similarly direct parole boards to take demographic and socioeconomic factors into account.

The trend is called "evidence-based sentencing" (hereinafter EBS). "Evidence," in this formulation, refers not to the evidence in the particular case, but to empirical research on factors predicting criminal recidivism. EBS seeks to help judges advance the crime-prevention objectives of punishment by equipping them with the tools of criminologists—recidivism risk prediction instruments grounded in regression models of past offenders' outcomes. The instruments give considerable weight to criminal history, which is already central to modern sentencing schemes. However, they also add something new: explicit inclusion of gender, age,

[1] Malenchik v. State, 928 N.E.2d 564 (Ind. 2010).
[2] Model Penal Code: Sentencing § 6B.09 (Discussion Draft No. 4, 2012) (hereinafter "Draft MPC").
[3] *See* James Bonta, Offender Risk Assessment and Sentencing, 49 CAN. J. CRIMINOLOGY & CRIM. JUST. 519, 519-20 (2007).

and socioeconomic factors such as employment and education (with socioeconomically disadvantaged, male, and young defendants receiving higher risk scores). Some instruments also include family background, neighborhood of residence, and/or mental or emotional disorders.

EBS has been widely hailed by judges, advocates, and scholars as representing hope for a new age of scientifically guided sentencing. The idea is to replace judges' "clinical" evaluations of defendants (that is, reliance on their own expertise) with "actuarial" risk prediction, which is purportedly more accurate. Incongruously, this trend is being pushed by progressive reform advocates, who hope it will reduce incarceration rates by enabling courts to identify low-risk offenders. In this Article, I argue that they are making a mistake. As currently practiced, EBS should be seen neither as progressive nor as especially scientific—and it is almost surely unconstitutional.

This Article sets forth a constitutional and policy case against this approach, based on analysis of both the relevant doctrine and the empirical research supporting EBS. I show that the current prediction instruments should be subject to heightened equal protection scrutiny, and that the science falls short of allowing them to survive that scrutiny. The concept of "evidence-based practice" is broad, and I do not mean to issue a sweeping indictment of all its many criminal justice applications. Indeed, I strongly endorse the general objective of informing criminal justice policy with data. Nor do I argue that actuarial prediction of recidivism is always inappropriate. My objection is specifically to the use of demographic, socioeconomic, and family status variables to determine whether and how long a defendant is incarcerated. I am concerned that a well-intentioned desire for data-driven decision-making is causing discrimination to be rationalized based on rather weak empirical evidence. I focus principally on the instruments' use in sentencing, but virtually the same case can be made against their use in parole decisions, which is now established practice in thirty states.

The technocratic framing of EBS should not obscure an inescapable truth: sentencing based on such instruments amounts to overt discrimination based on demographics and socioeconomic status. The instruments typically do not include race as a variable (even their most enthusiastic defenders have limits to their comfort with group-based punishment), but sentencing based on socioeconomic predictors will have a racially disparate impact as well. Equal treatment of all persons is a central normative objective of the criminal justice system, and EBS may have serious social consequences, contributing to the concentration of the criminal justice system's punitive impact among those who already disproportionately bear its brunt. Moreover, the expressive message of EBS—the justification of disparate treatment based on statistical generalizations about crime risk—is, when stripped of the anodyne scientific language, toxic. Group-based generalizations about dangerousness are not innocuous; they have an insidious history in our culture. And the express embrace of additional punishment for the poor conveys the message that the system is rigged.

The instruments' use of gender and socioeconomic variables should be subject to heightened constitutional scrutiny. Gender is the only equal protection issue the existing literature pays any attention to, but I show that the socioeconomic variables trigger similar scrutiny under a line of Supreme Court doctrine concerning indigent criminal defendants—doctrine that the EBS literature completely ignores. In fact, the Court has specifically (and unanimously) condemned the notion of treating poverty as a predictor of recidivism risk in sentencing, even if there is statistical evidence supporting the correlation. Finally, while other variables in the instruments

(such as age and marital status) are subject only to rational basis review under current doctrine, I also argue that they raise substantial normative concerns.

Contrary to the other commentators that have considered the gender discrimination issue, I do not think the EBS instruments can survive heightened scrutiny, nor are they justified as a policy matter. There are doubtless important and even compelling state interests at stake. But heightened scrutiny requires the state to prove a strong relationship to those interests, and the case law on wealth classifications in criminal justice also requires analysis of alternatives, as does sensible policymaking. With these principles in mind, I turn to the strength of the empirical evidence supporting EBS. It falls short for three principal reasons.

First, the instruments provide nothing close to precise predictions of individual recidivism risk. The underlying regression models estimate average recidivism rates for offenders sharing the defendant's characteristics. While some models have reasonably narrow confidence intervals for this predicted average, the uncertainty about what an *individual* offender will do is *much* greater. Individual recidivism outcomes vary for many reasons that are not captured by the models. While some uncertainty is inherent in predicting probabilistic future events, the risk prediction models also leave out many measurable variables that one might expect to be important—for instance, there are typically no variables relating to the crime of conviction or the case's facts. The individual prediction problem is constitutionally important because the Supreme Court's cases on gender and indigent defendants have consistently held that disparate treatment cannot be justified based on statistical generalizations about group tendencies, even if they are empirically supported. Instead, individuals must be treated as individuals.

Second, it is not even clear that including the constitutionally problematic variables can substantially improve risk prediction in the aggregate. A core EBS premise is that actuarial risk prediction consistently outperforms clinical predictions. I examine the literature on which that claim is based, and find it unsupportive of this claim. To be sure, meta-analyses of "clinical versus actuarial" comparisons in various fields have given an edge on average to the actuarial—but not a large edge, and not a consistent one. The specifics of the actuarial instrument matter—one cannot say that any regression model is good by definition. Only a few comparative studies actually concern recidivism, and those have had mixed results. If anything, the studies support actuarial instruments that are very different from the crude ones that are actually being used—suggesting less discriminatory alternatives that could more effectively serve the state's penological interests. Another alternative is simply to drop the constitutionally problematic variables, perhaps to be replaced with crime characteristics. The empirical research gives no reason to believe that including these variables offers any nontrivial predictive improvement.

Third, even if the instruments predicted individual recidivism perfectly, they do not even attempt to predict the thing that judges need to know to use recidivism information in a utilitarian sentencing calculus. What judges need to know is not just how "risky" the defendant is in some absolute sense, but rather how the sentencing decision will *affect* his recidivism risk. For example, if a judge is deciding between a one-year and a two-year prison sentence for a minor drug dealer, it is not very helpful to know that the defendant's characteristics predict a "high" recidivism risk, absent additional information that tells the judge how much the additional year in prison will reduce (or increase) that risk. Current risk prediction instruments do not provide that additional information. Future research might be able to fill that gap, but it will not be easy. Estimating the causal relationship between sentences and recidivism is challenging, in part because sentencing judges take recidivism risk into account, introducing reverse causality

concerns. Some researchers have used quasi-experimental methods to tease out these causal pathways, but so far their estimates of incarceration's effects have not been demographically and socioeconomically specific.

Finally, I consider two interrelated counterarguments that defend EBS essentially by saying that it doesn't do much. The first is the claim that the instruments are innocuous because they do not directly specify a resulting sentence. Rather, they merely provide information—and what kind of obscurant would prefer sentencing to be ill-informed? This argument is not persuasive. The EBS instruments are meant to be *used* by judges, and to the extent they are used, they will systematically, and by design, produce disparate sentences across groups. The fact that the instruments do not exclusively determine the sentence might help in a "narrow tailoring" inquiry, but it is not enough alone to establish their constitutionality, nor their desirability.

The second counterargument might be labeled the "So what else is new?" defense. Risk prediction has always been central to sentencing, implicating its incapacitation, rehabilitation, and specific deterrence objectives. EBS advocates thus often argue that judges will inevitably predict risk, and may well rely on demographic and socioeconomic factors, even if they do not say so expressly. The instruments, on this view, are merely there to improve this assessment's accuracy. I argue, however, that EBS is not likely *merely* to replace one form of risk prediction with another. Rather, it will probably place a thumb on the sentencing scale in favor of more judicial emphasis on recidivism prevention relative to other sentencing goals. In many contexts, judges and other decision-makers tend to defer to "expert" assessments, especially with respect to scientific methods that they do not really understand. Moreover, providing risk predictions may simply increase the salience of crime prevention in judges' minds.

On this point, I also provide some new empirical evidence, based on a small experimental study that presented subjects with two fact patterns involving slight variations on the same crime. The two defendants varied sharply on several dimensions considered by risk prediction instruments. All subjects were presented with both scenarios and asked to recommend sentences; the experimental variation was that half the subjects were also presented with actuarial risk prediction scores. The effects of providing the scores were statistically significant and large. Subjects who did not receive the scores tended to give higher sentences to the lower-risk defendant, apparently focusing on small differences in the fact pattern that rendered that defendant more morally culpable. This pattern reversed when subjects received the scores, suggesting that the scores encouraged them to emphasize recidivism risk over moral desert. These results are tentative; judges in real cases might act differently. But the experiment adds to the existing empirical evidence that decision-making is affected by quantification and claims of scientific rigor.

Part I of this Article introduces the EBS instruments, describes their rise, and reviews the literature. Part II sets forth the disparity concern and makes the case for heightened constitutional scrutiny, and Part III applies that scrutiny to the empirical evidence underlying EBS. Part IV considers the above-described counterarguments. Finally, I offer some conclusions. Ultimately, in my view, the equality concerns are so serious that aggravating sentences on the basis of demographics and poverty would be bad policy even if the instruments advanced the state's interests far more substantially than they do. Likewise, the Supreme Court's case law on statistical discrimination may simply preclude deeming people dangerous on the basis of gender or poverty even if those generalizations were sufficiently well-supported that doing so would advance important state interests. But the fact that the instruments, and the use

of the problematic variables therein, do *not* advance those interests strongly (if at all) means that there is no defense of them available. This approach does not satisfy heightened constitutional scrutiny, and courts and policymakers should not embrace it.

I. Actuarial Risk Prediction and the Movement Toward Evidence-Based Sentencing

"Evidence-based sentencing" (EBS) refers to the use of actuarial risk prediction instruments to guide the judge's sentencing decision. The instruments are based on past regression analyses of the relationships between various offender characteristics and recidivism rates. Criminologists have developed a wide range of such instruments.[4] All incorporate criminal history variables, such as number of past convictions, past incarceration sentences, and number of violent or drug convictions.[5] Surprisingly, almost none include the crime of conviction in the case at hand. A few include very basic information such as whether it was a drug crime or a violent crime; others include no crime information.[6]

Most of the instruments include gender, age, and employment status; many also include education, and some include composite socioeconomic variables like "financial status."[7] Although risk prediction instruments used by some parole boards included race until as late as the 1970s, the modern EBS instruments overwhelmingly do not. One exception is a "sentencing support" software program promoted by an Oregon state judge, Michael Marcus,[8] but this not been formally adopted by any state. There appears to be a general consensus that using race would be unconstitutional. In 2000, the Supreme Court granted certiorari in a capital case to consider whether "a defendant's race or ethnic background may ever be used as an aggravating circumstance"; the issue was not a judicial sentencing instrument, but problematic testimony by a prosecution expert.[9] Before oral argument, the State of Texas conceded error and granted a new sentencing hearing, mooting the case.[10]

Most instruments now in sentencing use are limited to fairly objective factors, such as demographics, employment status, and criminal history.[11] But others include much more abstract, conceptual variables, which are meant to be coded by experienced evaluators. For instance, the Indiana Supreme Court in 2010 upheld against a state law challenge, and endorsed enthusiastically, use in sentencing of the Level of Services Inventory-Revised (LSI-R), which is also used by at least eight states elsewhere in the corrections process.[12] In addition to objective factors, the instrument also requires "subjective evaluations on … performance and interactions at work, family and marital situation, accommodations stability and the level of crime in the neighborhood, participation in organized recreational activities and use of time, nature and extent

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[4] *See* J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 S.M.U. L. REV. 1329, 1399 (2011) (listing variables in 19 different instruments); Malenchik, 928 N.E.2d at 571-73.
[5] *See* Oleson, *supra*.
[6] *Id.*
[7] *Id.*
[8] *See* Draft MPC § 6B.09, cmt. (i) (discussing and criticizing this system); Michael H. Marcus, *Conversations on Evidence Based Sentencing*, 1 CHAP. J. CRIM. JUST. 61 (2009).
[9] See Saldano v. State, 70 S.W.3d 873, 875 (Tex. Crim. App. 2002) (describing the case's history); Monahan, *A Jurisprudence of Risk Assessment*, 92 VA. L. REV. 391, 392-93 (2006).
[10] Monahan, *supra*, at 393.
[11] Oleson, *supra*.
[12] *See* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 78-84 (2007) (describing the LSI-R's uses).

of social involvement with companions, extent of alcohol or drug problems, emotional/psychological status, and personal attitudes.[13]

The instruments are mechanical: each possible value of each variable corresponds to a particular increase or reduction in the risk estimate *in every case*. The variables' weights are not determined based on each case's circumstances—for instance, men will *always* receive higher risk scores than otherwise-identical women (because, averaged across all cases, men have higher recidivism rates), even if the context is one in which men and women tend to have similar recidivism risks or in which women have higher risks.[14] This is a feature of the simple underlying regression models, which generally have no interaction terms. Moreover, in practice the instruments use even simpler point systems, in which the "high risk" answer to a yes-or-no question results in a point or two being added to the defendant's score, based only quite loosely on the underlying regression.[15]

Demographic variables and socioeconomic variables receive substantial weight. For instance, in Missouri, presentence reports include a score for each defendant on a scale from -8 to 7, where "4-7 is rated 'good,' 2-3 is 'above average,' 0-1 is 'average', -1 to -2 is 'below average,' and -3 to -8 is 'poor.'"[16] Unlike most instruments in use, Missouri's does not include gender. However, an unemployed high school dropout will score three points worse than an employed high school graduate—potentially making the difference between "good" and "average," or between "average" and "poor."[17] Likewise, a defendant under age 22 will score three points worse than a defendant over 45.[18] By comparison, having previously served time in prison is worth one point; having four or more prior misdemeanor convictions that resulted in jail time adds one point (three or fewer adds none); having previously had parole or probation revoked is worth one point; and a prison escape is worth one point.[19] Meanwhile, current crime type and severity receive no weight.

Recidivism risk prediction instruments have been developed in various forms by criminologists over nearly a century,[20] and their use in parole determinations dates back decades,

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[13] Malenchik, 928 N.E.2d at 572.

[14] For instance, medical studies suggest that women are on average more vulnerable to addiction and relapse than men are, so it may be that for some drug crimes women are more likely to recidivate. *See, e.g.*, Jill B. Becker & Ming Hu, *Sex Differences in Drug Abuse*, 29 FRONT NEUROENDOCRINOL 36 (2008). Recidivism studies do not break down gender effects like this, however.

[15] The point additions are at best crude roundings of regression coefficients. Moreover, the instrument does not track the regression's functional form. The underlying studies typically use logistic regression models, in which the coefficients translate nonlinearly into changes in probability of recidivism. When the instruments translate the coefficients into fixed, additive increases on a point scale, they are "linearizing" the variables' effects, and the resulting instrument will be only loosely related to the underlying nonlinear model, especially (because of the probability curve's shape) for very high-risk or very low-risk cases.

[16] Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 113 (2006).

[17] *Id.* at 112-13.

[18] *Id.*

[19] *Id.* A defendant with *every possible* criminal history risk factor (four or more misdemeanors resulting in jail, two or more prior felonies, prior imprisonment, prior prison escape, convictions within five years, revocation of probation and parole, and past conviction on the same offense as the current charge) will score eight points higher than one with no criminal history--just two points more than the combined effect of age, employment status, and high school graduation. *Id.*

[20] *See* HARCOURT, *supra*, at 1-2, 39-92 (reviewing this history).

although it has expanded sharply beginning in the 1980s.[21] Their use in sentencing is newer, however, and other than the state-specific instruments, none were initially designed for use in sentencing. For instance, the LSI-R manual specifically states that it "was never designed to assist in establishing the just penalty," which did not discourage the Indiana Supreme Court from endorsing its use for that purpose.[22] The first state to incorporate such an instrument in sentencing was Virginia in 1994, but the trend has taken off nationwide much more recently. Judge Roger Warren, the President Emeritus of the National Center for State Courts, argues that two developments in 2007 catalyzed this acceleration: a formal resolution of the Conference of Chief Justices and the Conference of State Court Administrators[23] and a report by the NCSC, the Crime and Justice Institute, and the National Institute of Corrections.[24] Another factor may be the recent shift toward discretionary sentencing after *Blakely v. Washington* and *United States v. Booker*. Tight sentencing guidelines leave little room for considering the defendant's individual risk, but in discretionary systems, judges are expected to assess it.[25]

Whatever the reasons, in recent years increasing number of states have followed Virginia's lead.[26] In fact, Douglas Berman states that "[i]n some form, nearly *every* state in the nation has adopted, or at least been seriously considering how to incorporate, evidence-based research and alternatives to imprisonment into their sentencing policies and practices."[27] EBS has many enthusiastic advocates in academia,[28] the judiciary and sentencing commissions,[29] and think tanks and advocacy organizations.[30] The National Center on State Courts has advocated using risk instruments to guide decision-making at all process stages, including training prosecutors and defense counsel to identify high- and low-risk offenders and thereby shaping

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[21] *Id.* at 9, 77-80.

[22] Malenchik, 928 N.E.2d at 572-73.

[23] Conference of Chief Justices and Conference of State Court Administrators, Resolution 12 in Support of Sentencing Practices that Promote Public Safety and Reduce Recidivism, August 1, 2007; *see* Roger K. Warren, *Evidence-Based Setencing: Are We Up to the Task?*, 23 FED. SENT. R. 153, 153 (2010).

[24] Nat'l Inst. Of Corr. and Crime & Justice Inst, Evidence-Based Practice to Reduce Recidivism (2007).

[25] *See* Steven L. Chanenson, *The Next Era of Sentencing Reform*, 53 EMORY L.J. 377 (2005).

[26] Warren, *supra*, usefully reviews national and state policies promoting EBS.

[27] Douglas A. Berman, *Editor's Observations: Are Costs a Unique (and Uniquely Problematic) Kind of Sentencing Data?*, 24 FED. SENT. R. 159 (2012).

[28] *E.g.*, Jordan M. Hyatt, Mark H. Bergstrom, & Steven Chanenson, *Follow the Evidence: Integrate Risk Assessment into Sentencing*, 23 FED. SENT. R. 266 (2011); Lynn S. Branham, *Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing*, 24 FED. SENT. R. 169 (2012; Richard E. Redding, *Evidence-Based Sentencing: The* Science *of Sentencing Policy and Practice*, 1 CHAP. J. CRIM. JUST. 1, 1 & n.4 (reviewing articles praising EBS, and stating that failure to employ EBS "constitutes sentencing malpractice and professional incompetence").

[29] E.g., Marcus, *supra*; Warren, *supra*; Justice Michael Wolff (Chair, Missouri Sentencing Advisory Commission), *Evidence-Based Judicial Discretion: Promoting Public Safety through State Sentencing Reform*, 83 N.Y.U. L. Rev. 1389 (2008); Chief Justice William Ray Price, State of the Judiciary Address, Feb. 3, 2010, available at http://www.courts.mo.gov/page.jsp?id=36875; Mark H. Bergstrom (Pa. Commission on Sentencing) & Richard P. Kern (Va. Criminal Sentencing Commission), *A View from the Field: Practitioner's Response to "Actuarial Sentencing: An 'Unsettled' Proposition*, 25 FED. SENT. R. 185 (2013).

[30] *E.g.*, Pamela M. Casey, Roger K. Warren, & Jennifer K. Elek, USING OFFENDER RISK AND NEEDS INFORMATION AT SENTENCING 14 (Nat'l Ctr for State Courts 2011); PEW Ctr. on the States, Arming the Courts with Research: 10 Evidence-Based Sentencing Initiatives to Control Crime and Reduce Costs, 8 Pub. Safety Policy Brief 2-3 (2009); NAT'L CTR. FOR STATE COURTS, EVIDENCE-BASED SENTENCING TO IMPROVE PUBLIC SAFETY AND REDUCE RECIDIVISM: A MODEL CURRICULUM FOR JUDGES (2009); Matthew Kleiman, *Using Evidence-Based Practices in Sentencing Criminal Offenders*, in THE BOOK OF THE STATES (Council of State Gov'ts 2012).

plea-bargaining decisions.[31] Other academics have offered more cautious takes, but have ultimately offered qualified endorsements.[32]

The new Model Penal Code, currently undergoing its first revision since its adoption in 1962, embraces this new movement. This is a serious development, both because it reflects an emerging academic consensus and because of the MPC's influence. The original MPC was "one of the most successful law reform projects in American history," producing "revised, modernized penal codes in a substantial majority of the states."[33] Section 6B.09 of the new Code not only endorses use of "actuarial instruments or processes, supported by current and ongoing recidivism recidivism, that will estimate the relative risks that individual offenders pose to public safety," but also their formal incorporation into presumptive sentencing guidelines.[34] It also provides that when particularly low-risk offenders can be identified, otherwise-mandatory minimum sentences should be waived.[35] While parts of the revision are still being drafted, the American Law Institute has already approved Section 6B.09.[36]

The official Commentary to the MPC revision illustrates the core argument for EBS: recidivism risk prediction is inevitably part of sentencing, and should be guided by the best available scientific research:

> Responsible actors in every sentencing system—from prosecutors to judges to parole officials—make daily judgments about…the risks of recidivism posed by offenders. These judgments, pervasive as they are, are notoriously imperfect. They often derive from the intuitions and abilities of individual decisionmakers, who typically lack professional training in the sciences of human behavior. …. Actuarial—or statistical—predictions of risk, derived from objective criteria, have been found superior to clinical predictions built on the professional training, experience, and judgment of the persons making predictions.[37]

Most EBS advocates frame it as a strategy for reducing incarceration and its budgetary costs and social harms.[38] These advocates argue, or assume, that the prediction instruments will primarily allow judges to identify low-risk offenders whose sentences can be reduced, not high-risk offenders whose sentences must be increased. Some suggest that, absent scientific information on risk, judges probably already err on the side of longer sentences.[39] Others suggest that the instruments should categorically only be used in mitigation.[40]

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[31] Casey et al., *supra*, at 23-26.

[32] *E.g.*, Margareth Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAPMAN J. CRIM. JUST. 43 (2009).

[33] Gerald Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OH. ST. J. CRIM. L. 219, 220 (2003) (also observing that the Code's classroom use makes it "the document through which most American lawyers come to understand criminal law").

[34] Draft MPC § 6B.09 (2).

[35] *Id.* at § 6B.09 (2).

[36] *See id.* at 133.

[37] Draft MPC, § 6B.09(2), cmt. (a). *See also, e.g.*, Wolff, *supra*, at 1406 (emphasizing superiority of actuarial prediction).

[38] *E.g.*, Nat'l Ctr. for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing* 2-3 (2011); Price, *supra* (citing EBS as a way to "move from anger-based sentencing" toward reduced incarceration); Wolff, *supra*, at 1390; PEW Ctr. on the States, *supra*, at 1; Michael Marcus, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 751 (2009).

[39] *E.g.*, Bonta, *supra*, at 524.

[40] *E.g.*, Etienne, *supra*.

In this spirit, the draft MPC Commentary asserts that "Section 6B.09 takes an attitude of skepticism and restraint concerning the use of high-risk predictions as a basis of elongated prison terms, while advocating the use of low-risk predictions as grounds for diverting otherwise prison-bound offenders to less onerous penalties." However, despite this "attitude," the actual *content* of Section 6B.09 endorses incorporation of risk assessment procedures into sentencing guidelines, including for the purpose of increasing sentences. The Commentary expresses hope that moving risk instruments from parole (the MPC would abolish parole) to sentencing will effectively constrain their "incapacitative" use, because access to counsel and greater transparency at sentencing would allow the defendant a chance to argue his case.[41] But the Commentary never explains how these procedural protections will ameliorate the instruments' substantive consequences for defendants whose objective characteristics render them "high risk." Even the best counsel will have trouble contesting the defendant's age, gender, education level, employment status, and past criminal convictions.[42] Moreover, if state legislatures adopt Section 6B.09 but not the MPC's recommendations concerning abolition of parole, the claim that parole-stage use is worse would be irrelevant.

Although most of the EBS literature is positive, or even celebratory, a few scholars have criticized it. The most thorough critique of risk prediction in criminal justice more broadly has come from Bernard Harcourt in his book AGAINST PREDICTION.[43] Some of Harcourt's arguments center on law enforcement profiling, but others apply to sentencing and parole. In particular, he argues that prediction instruments contravene punishment theory, because punishment turns on *who the defendant is* (and what he is therefore expected to do in the future), rather than just what he has done.[44] Although Harcourt's book primarily focuses on actuarial risk prediction, his theoretical objection is applicable to clinical prediction too—he seeks to "make criminal justice determinations blind to predictions of future dangerousness."[45] Likewise, advocates of purely retributive punishment have always held that a defendant's future risk is morally irrelevant to the state's justification for punishment.[46] Indeed, beyond mere irrelevance, there may be direct conflict (raising practical dilemmas for defense counsel): some factors that heighten a defendant's predicted recidivism risk, from young age to mental illness to socioeconomic disadvantage, are frequently considered *mitigating* factors from a retributive perspective.[47]

Other commentary on EBS has raised similar theoretical objections.[48] John Monahan, while advocating actuarial prediction in other contexts (such as civil commitment), has argued

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[41] *Id.*

[42] Because the MPC draft advocates *mandatory* sentencing guidelines, it points out that the Sixth Amendment would require aggravating factors (but not mitigating factors) to be found by juries. *Id.* cmt. (e). This constraint, if anything, seems likely to discourage states from including difficult-to-prove dynamic factors like "antisocial attitudes" in the instruments. For factors like gender, age, and employment, the jury trial requirement seems essentially irrelevant.

[43] HARCOURT, *supra* note 12.

[44] *Id.* at 31-34, 188-89. Another of Harcourt's arguments is discussed below in Part III.C.

[45] *Id.* at 5; *see id.* at 237-38 (arguing that clinical judgment is just as vulnerable to his critique); Yoav Sapir, *Against Prevention? A Response to Harcourt's* Against Prediction *on Actuarial and Clinical Predictions and the Faults of Incapacitation*, 33 LAW & SOC. INQUIRY 253, 258-61 (2008) (arguing that the problem with the instruments is really a broader problem with incapacitation as a punishment objective, including via clinical judgment).

[46] *E.g.*, Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARVARD L. REV. 1429 (2001).

[47] *E.g.*, Graham v. Florida, 560 U.S. 48 (2010) (explaining mitigating role of young age).

[48] *See* Oleson, *supra*, at 1388-92 (reviewing literature).

against the current instruments' use in sentencing.[49] His view is that, while recidivism risk may be a legitimate sentencing consideration, blameworthiness is nonetheless the central question, and thus the only risk factors that should be considered are those that *also* bear on the defendant's moral culpability: past and present criminal conduct.[50] Some critics protest the probabilistic nature of risk prediction, ensuring "false positives" when those deemed high-risk do not, in fact, recidivate.[51] Others draw an unfavorable analogy to the science fiction movie "Minority Report," in which the government punishes "pre-crime," suggesting that even if the future could be known with certainty, punishing people for future acts is fundamentally unfair.[52] Many commentators raise such criticisms but do not treat them as dispositive, but merely as cautionary notes.[53] For others, like Harcourt, they are more fundamental flaws.

I do not seek to answer foundational sentencing-philosophy questions here. I accept EBS advocates' premise that recidivism prevention will inevitably play at least *some* role in the sentencing process in many cases (although I argue below that adoption of actuarial instruments will probably increase this role). The Supreme Court has affirmed the relevance of recidivism risk to sentencing, for example permitting judges to hear expert testimony concerning the defendant's dangerousness.[54]

Instead, this Article's central question is about discrimination and disparity: whether risk prediction instruments that classify defendants by demographic, socioeconomic, and family characteristics can be constitutionally or normatively justified. One could, after all, predict risk in other ways—for instance, based only on past or present criminal behavior, or based on individual assessment of a defendant's conduct, mental states, and attitudes. Current literature's treatment of the disparity concern is surprisingly limited; the MPC Commentary, for instance, barely mentions it. Among scholars who do raise the issue, most treat it as a policy concern, rather than (also) a constitutional one. For example, Harcourt, addressing the instruments' use in early release decisions, has argued that "risk is a proxy for race," observing that the instruments give heavy weight to criminal history, which is highly correlated with race.[55] He argues that this strategy will "unquestionably aggravate the already intolerable racial imbalance in our prison populations."[56] Kelly Hannah-Moffat has similarly critiqued the criminal history variables on grounds of racially disparate impact, and further emphasizes that criminal history may be influenced by past discriminatory decision-making.[57]

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[49] In the civil commitment literature, scholars have focused on whether expert testimony predicting dangerousness is admissible evidence, rather than on the constitutionality or desirability of a particular judicial decision-making process. *E.g.*, Alexander Scherr, Daubert *and Danger: The 'Fit' of Expert Predictions in Civil Commitments*, 55 HASTINGS L.J. 1, 5-28 (2003) (reviewing case law and literature). I do not focus on the evidence law issues here.

[50] Monahan, *supra*, at 427-28.

[51] The MPC Commentary raises, but ultimately is unswayed by, this objection; see *infra* note 62 and accompanying text.

[52] *E.g.*, Oleson, *supra*, at 1390; Etienne, *supra*, at 59; Peter Moskos, Book Review, *Against Prediction*, 113 AM. J. SOCIOLOGY 1475, 1477 (2008).

[53] *E.g.*, Oleson, *supra*, at 1397-98 (concluding simply that EBS "raises excruciatingly difficult questions" and that "judges and jurists must determine" how to answer them).

[54] *Barefoot v. Estelle*, 463 U.S. 880 (1983); *see also Jurek v. Texas*, 428 U.S. 262 (1976) (holding that "prediction of future criminal conduct is an essential element in many" criminal justice-related decisions).

[55] Bernard Harcourt, *Risk as a Proxy for Race*, CRIM. & PUBLIC POL'Y (forthcoming), draft available at http://www.law.uchicago.edu/files/file/535-323-bh-race.pdf.

[56] *Id.*

[57] Kelly Hannah-Moffat, *Actuarial Sentencing: An 'Unsettled' Proposition*, at 17, available at http://www.albany.edu/scj/documents/Hannah-Moffatt_RiskAssessment.pdf.

The existing constitutional analyses, meanwhile, have focused on gender (and the hypothetical use of race), and have been limited in their doctrinal analysis.[58] The most extensive such analysis, by J.C. Oleson, concludes that the instruments survive even strict scrutiny.[59] Similarly, Monahan, while opposing use of demographic variables in sentencing on punishment-theory grounds, defends the constitutionality of their use in civil commitment, arguing that only race and gender raise constitutional issues at all, and that gender survives intermediate scrutiny because the gender differences are real and the state interests are substantial.[60]

In my view, the existing literature has seriously understated both the breadth and the gravity of the constitutional concern. There is a strong case that most or all of the risk prediction instruments now in use are unconstitutional, and current literature has not made that case or even seriously examined it. I seek to fill that gap, comprehensively analyzing the relevant case law and empirical research. I show both that the use of gender cannot be defended on the statistical bases that other authors have offered and that the problem goes well beyond gender—the socioeconomic variables, at least, should also receive heightened constitutional scrutiny. And if such scrutiny is applied, the empirical evidence is not currently strong enough to sustain the instruments, and it likely never will be.

In the criminological literature on the instruments, there is considerable debate over issues of reliability, validity, and precision. Current EBS scholarship often notes these concerns but ultimately advocates the instruments' use anyway.[61] The MPC Commentary is a striking example. It states that "error rates when projecting that a particular person will engage in serious criminality in the future are notoriously high" and that "most projections of future violence are wrong in significant numbers of cases," and yet concludes:

> Although the problem of false positives is an enormous concern—almost paralyzing in its human costs—it cannot rule out, on moral or policy grounds, all use of projections of high risk in the sentencing process. If prediction technology shown to be reasonably accurate is not employed, and crime-preventive terms of confinement are not imposed, the justice system knowingly permits victimizations in the community that could have been avoided.[62]

In my view, for all their apparent agonizing, the MPC drafters and other EBS advocates are missing the legal import of the methodological concerns: If the instruments don't work well, their use in sentencing is almost surely unconstitutional, and terribly unwise as well. As I show in Part II, the Supreme Court has warned against disparate treatment based on generalizations about (at least) gender and poverty, *even if* the generalizations have statistical support. If the statistical support is shoddy, there is simply no defending them.

It is curious that the EBS literature has not taken the constitutional concern more seriously. EBS scholars have occasionally asserted that actuarial prediction is obviously

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[58] *E.g.*, Christopher Slobogin, *Risk Assessment and Risk Management in Juvenile Justice*, 27-WTR CRIM. JUST. 10, 13-14 (2013); Pari McGarraugh, Note, *Up or Out: Why "Sufficiently Reliable" Statistical Risk Assessment is Appropriate at Sentencing and Inappropriate at* Parole, 97 Minn. L. Rev. 1079, 1102 (2013).

[59] Oleson, *supra*, at 1388-92; *see also* Slobogin, *supra*, at 13-14 (briefly stating that gender discrimination probably survives intermediate scrutiny).

[60] Monahan, *supra*, at 429-432.

[61] *E.g.*, Slobogin, *supra*, at 16-17; McGarraugh, *supra*, at 1105-07; *see also* Hannah-Moffat, *supra* (raising various concerns but reaching an ambivalent conclusion: "Arguably, we should pause to reflect on the complexities of risk-needs assessments and concordant calls for and against evidence-based risk jurisprudence.").

[62] MPC Draft §6B.09, cmt. (e).

constitutional because the Supreme Court has approved, against a due process challenge, admission of even-less-reliable expert *clinical* predictions of risk in sentencing proceedings.[63] This assertion is wrong. The equal protection issue is not presented in those cases, and in general is not presented by individualized clinical assessments of risk *per se*; it is presented by punishment of group membership, which is explicit in the actuarial instruments. And even assuming actuarial predictions are more accurate than clinical ones, a question to which I return in Part III, the fact that evidence is reliable enough to be admissible does not mean that it establishes a strong enough relationship to an important government interest to withstand heightened scrutiny.[64] In the next Part, I show that such scrutiny applies.

II. The Disparate Treatment Concern

The most distinctive feature of EBS is that it formally incorporates discrimination based on socioeconomic status and demographic categories into sentencing. In this Part, I set forth the basic constitutional and policy objections to this practice. I begin with the constitutionality of gender-based sentencing in Section A (setting aside race because the current instruments do not include it).[65] Although it is uncontroversial that gender classifications are subject to heightened scrutiny, I examine the gender case law in some detail because it illuminates a core feature of the Supreme Court's equal protection jurisprudence that will make it very hard for EBS to *survive* heightened scrutiny: otherwise-unconstitutional discrimination cannot be justified by statistical generalizations about groups, even if the generalizations have empirical support. In Section B, I show that that the constitutional concern goes beyond gender: a form of heightened scrutiny (and a similar prohibition on group generalizations) also applies to socioeconomic discrimination in the criminal justice context. And in Section C, I articulate reasons policymakers should take the disparity concern seriously even if courts were to sustain EBS against constitutional challenges. This Part does not *complete* either the constitutional or the normative analysis; rather, it establishes the seriousness of the disparity concern and the resulting need at least for a very strong empirical justification for EBS. In Part III, I address whether such a justification exists.

Note that I frame my constitutional argument within existing doctrine, and thus do not argue for heightened scrutiny of certain other variables in the model—for instance, age and marital status are routine government classifications that are subject to rational basis review. There is, however, a plausible broader argument for strict scrutiny of group-based sentencing discrimination more generally, grounded in the "fundamental rights" branch of equal protection jurisprudence rather than the "suspect classifications" branch. Incarceration, after all, profoundly interferes with virtually every right the Supreme Court has deemed fundamental, and EBS makes these rights interferences turn on identity rather than criminal conduct. Although I would be happy to see the Supreme Court adopt such an approach, it is presently foreclosed to lower courts by language the Court used in a case called *Chapman v. United States*, and I do not focus

[63] *E.g.*, Slobogin, *supra*, at 15; Steven J. Morse, *Mental Disorders and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 944 (2011); *see* Barefoot v. Estelle, 463 U.S. 880 (1983).

[64] In *Barefoot*, the Court made clear that the defects in evidence would have to be extreme before their admission would be barred by the Due Process Clause on the grounds of sheer unreliability. 463 U.S. at 898-99.

[65] The instruments do include socioeconomic variables that are highly correlated with race, a point I return to in § C, but they would be hard to challenge constitutionally on that basis. The Supreme Court has consistently held that absent a racially disparate purpose, policies that are facially neutral as to race cannot be challenged merely on the grounds of a racially disparate impact. *E.g.*, Washington v. Davis, 426 U.S. 229 (1976).

on it.[66] Certain variables used in some models might also merit new recognition as quasi-suspect—particularly variables relating to an offender's family background or family members' criminal history, which are closely analogous to illegitimacy, a quasi-suspect classification—but again, I do not rely on this possibility.[67] The policy critique in Section C thus applies more broadly, to more variables, than the constitutional arguments in Sections A and B do.

A. Gender Classifications and the Problem with Statistical Discrimination

Virtually every risk prediction instrument in use incorporates gender. Because the coefficient on gender is the same for all defendants, every single male defendant will, due to gender alone, be assigned a higher risk score than an otherwise-identical woman. Gender classifications are subject to heightened constitutional scrutiny, requiring an "exceedingly

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[66] *Chapman v. United States*, 500 U.S. 453, 464-65 (1991). In *Chapman*, the defendant challenged the U.S. Sentencing Guidelines' method of calculating LSD weight, which included the carrier medium; the claim was that this method created unfair distinctions between people who carried the same amount of actual LSD. The Court rejected the notion that fundamental rights analysis should apply to sentencing distinctions within the statutory sentencing range, reasoning that once convicted, the offender no longer has a fundamental right to any sentence below the statutory maximum. Note that this holding does not preclude a challenge to a sentencing decision based on the nature of the classification; it speaks only to the "fundamental rights" branch. As I show below, both gender and poverty-based discrimination have triggered successful challenges to sentences within the statutory range.

Although *Chapman*'s holding is not entirely surprising (the Court in general is quite reluctant to apply constitutional scrutiny to sentences, *see* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 Cal. L. Rev. 47, 49 (2011), and presumably worried that doing so in that case would require the extension of strict scrutiny to virtually every sentencing distinction), its reasoning, in my view, fails to take seriously the tremendous stakes of sentencing choices within statutory ranges. Those ranges are often very broad (say, zero to 20 years), and it is hard to imagine any government decision that would have a more drastic impact on a defendant's exercise of fundamental liberties than the choice between, say, 5 and 20 years' incarceration. Moreover, the Court's characterization of the right at issue was unduly narrow; the question is not whether the defendant had a right to a sentence below the statutory maximum. Rather, underlying, clearly established fundamental rights are being taken away (including the defendant's most basic physical liberty, which is directly and deliberately retracted by the incarceration decision, plus iadditional rights as procreation, communication, and voting). *Cf.* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (critiquing the Court's past, overly narrow characterization of the right to sexual intimacy as a "right to homosexual sodomy").

The *outcome* in *Chapman* is perfectly defensible, but it could have been reached with a different rationale. The drug-weighting rule was a classification of *criminal conduct*, not persons, and thus (absent evidence of some discriminatory motive) raised no equal protection concern at all; all persons are prospectively subject to the same weighting rules, and have an equal chance to conduct their activities to avoid the rule. Applying fundamental rights analysis to EBS thus would not imply that routine sentencing distinctions between crimes are also subject to strict scrutiny. One could likewise defend sentencing distinctions based on criminal history as also being conduct-based and universally applicable—all persons who commit crimes are subjecting themselves to potential higher sentences for subsequent crimes. But when the state systematically gives different sentences to different groups of people for the same crime, with the same past criminal conduct, the Constitution *should* demand a compelling justification.

[67] Such variables are outside the defendant's control, unchangeable, generally unrelated to legitimate state policy, and often—especially in the case of familial incarceration or time in foster care—the basis for considerable social stigma and disadvantage. *See* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions for People With Criminal Records*, 7 J. L. Society 18, 51 (2005) (reviewing case law and identifying factors that often trigger heightened scruting); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999) (reviewing literature on effects of parental incarceration); United States v. Sprei, 145 F.3d 528, 535 (2d Cir. 1998) (describing stigma and reduced marital prospects as an "inevitable result" of a parent's incarceration); Daniel Pollack et. al., *Foster Care as a Mitigating Circumstance in Criminal Proceedings*, 22 TEMP. POL. & CIV. RTS. L. REV. 43, 59 (2012) (quoting Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE CHILD. 75, 85 (2004)).

persuasive justification"—that is, the state must prove "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[68] Given this well-established doctrine, one might have thought that gender's inclusion in the instruments would have occasioned considerable concern and debate. And yet most scholarship ignores this concern, or else briefly asserts that the state's interests are important.[69] The draft Model Penal Code recommends excluding race, and the Commentary notes that sentencing based on race would be unconstitutional.[70] And yet the MPC drafters recommend including gender, and offer no commentary defending this on constitutional grounds, as though its constitutionality is self-evident.[71]

In the rare cases in which the issue has been presented, modern courts have consistently held (outside the EBS context) that it is unconstitutional to base sentences on gender.[72] There is, to be sure, considerable statistical research suggesting that judges (and prosecutors) *do* on average treat women defendants more leniently than men.[73] But it is virtually unheard of for modern judges to *say* that they are taking gender into account,[74] and demonstrating gender bias would usually be challenging. Before the past few decades, explicit consideration of gender as well as race was common, but few today defend that practice.[75] The U.S. Sentencing Guidelines, for example, expressly forbid the consideration of both race and sex.[76] Outside the literature on EBS, scholars have likewise mostly treated the gender gap as "unwarranted" sentencing disparity.[77]

Given this widespread consensus against sentencing based on gender, there is a certain surreal quality to the EBS literature's mostly untroubled embrace of it. The justification offered (if any) is that women in fact pose substantially lower recidivism risk than men do.[78] Some scholars add that to fail to account for this fact is unfair to women, essentially punishing them for men's recidivism risk.[79] More generally (referring to "gender, ethnicity, age, and disability"),

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[68] *United States v. Virginia*, 518 U.S. 515 (1996).

[69] *E.g.*, Slobogin, *supra*, at 14. McGarraugh, *supra* at 1102, states that gender should be removed from the instruments to preserve their constitutionality, but does not develop the legal reasoning for this point.

[70] Draft MPC, *supra*, Sec 6B.09 cmt. (i).

[71] *Id.*

[72] Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 137 (2010); *United States v. Maples*, 501 F.2d 985, 989 (4th Cir. 1974); *Williams v. Currie*, 103 F. Supp. 2d 858, 868 (M.D.N.C. 2000).

[73] *E.g.*, Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases* (under review) (2013) (finding large gender gaps at multiple procedural stages that are unexplained by observable variables, and also reviewing other studies).

[74] Hessick, *supra*, at 128.

[75] *Id.* at 129-36.

[76] U.S.S.G. Sec 5H1.10.

[77] *E.g.*, Oren Gazal-Ayal, A Global Perspective on Sentencing Reforms, 76 LAW & CONTEMP. PROBS. I, iii-iv (2013); Mona Lynch, Expanding the Empirical Picture of Sentencing: An Invitation, 23 FED. SENT. R. 313 (2011). Some scholars criticize increasing female incarceration rates, but do not generally argue that women should receive lower sentences based on gender per se. Rather, they argue that the system should take more account of certain mitigating factors that are more often present in female defendants' cases. E.g., Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER RACE & JUST. 277, 291-93 (2002); Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and their Children*, 11 STAN. L. & POL'Y REV. 133 (1999).

[78] *E.g.*, Monahan, *supra*, at 431.

[79] *See* Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER, RACE, & JUSTICE 73, 82 (2010).

Judge Michael Marcus states: "We are not treating like offenders alike if we insist on ignoring factors that make them quite unalike in risk."[80]

But this argument, which embraces a concept of "actuarial fairness,"[81] stands on unsound constitutional footing. The Supreme Court has consistently rejected defenses of gender classifications that are grounded in statistical generalizations about groups—even those with empirical support. In *Craig v. Boren*, for instance, the Court considered a challenge to a law subjecting men to a higher drinking age for certain alcoholic beverages than women. The state had defended the law with statistical evidence, including a study showing that young men were arrested for drunk driving at more than ten times the rate of young women (2% versus 0.18%). The Court noted observed that "prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this." That is, what is prohibited is not *just* "outdated misconceptions" and merely "hypothesized" gender differences.[82] What is prohibited is inferring an individual tendency from group statistics. Note that the government's argument in *Craig* could easily have been framed in "actuarial fairness" terms: arguably it would have been unfair to bar young women from drinking based on a drunk driving risk that came almost entirely from males. But the Court's approach to equal protection means that individuals are neither entitled to a favorable statistical generalization based on gender, nor subject to unfavorable ones.

Examples of this principle abound. For instance, the Court has repeatedly held that government cannot base benefits policies on the assumption that wives are financially dependent on their husbands—even though, when the cases were decided in the 1970s, that presumption was usually correct.[83] The Court explained that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do" support their families.[84] Likewise, the Court has struck down gender-based peremptory challenges in jury selection, holding that the state cannot make assumptions about jurors based on gender, "even when some statistical support can be conjured up."[85] And in *United States v. Virginia*, the Court ordered the Virginia Military Institute to admit women, rejecting its arguments about "typically male or typically female 'tendencies.'" The Court observed: "The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. … It may be assumed, for purposes of this decision, that *most* women would not choose VMI's adversative method." But, the Court emphasized, the point is not what *most* women would choose. "[W]e have cautioned reviewing courts to take a hard look at generalizations or 'tendencies' of the kind pressed by Virginia… [T]he State's great goal [of educating soldiers] is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the State's premier 'citizen soldier' corps."[86]

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[80] Marcus, *supra*, at 769.

[81] This is a concept that has traditionally (although subject to some limitations) dominated insurance law—the idea is that it is fair for insurers to tailor rates to the risks posed by particular groups, and unfair to expect groups to cross-subsidize one another's risks. *See, e.g.*, Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1597-1600 (2011).

[82] *See* Monahan, *supra*, at 432-433 (defending gender-based risk prediction for civil commitment).

[83] Frontiero v. Richardson, 411 U.S 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

[84] Wiesenfeld, 420 U.S. at 645.

[85] J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140 n.11 (1994).

[86] In *City of Los Angeles v. Manhart*, 432 U.S. 702 (1978), the Court similarly struck down, on Title VII grounds, a requirement that female employees pay higher pension plan premiums because of their higher actuarial life expectancy. The Court stated:

In short, the Supreme Court has squarely rejected "statistical discrimination"—use of group tendencies as a proxy for individual characteristics—as a permissible justification for otherwise constitutionally forbidden discrimination. Economists often defend statistical discrimination as efficient, arguing that if a decision-maker lacks detailed information about an individual, relying on group-based averages (or even mere stereotypes, if the stereotypes have a grain of truth to them) will produce better decisions in the aggregate. But the Supreme Court has held that this defense of gender and race discrimination offends a core value embodied by the equal protection clause: that people have a right to be treated as individuals.

Individualism, indeed, is at the very heart of the Supreme Court's equal protection case law.[87] Many scholars have criticized this characteristic, arguing that it renders the Court's jurisprudence overly formalistic and too inattentive to substantive inequalities. On this view, the primary purpose of the Equal Protection Clause is to dismantle group-based subordination, not to ensure that government will treat individuals in ways that are blind to group identity; the latter approach may actually undermine the former if it prevents government from recognizing and acting to rectify societally entrenched inequalities.[88] I am sympathetic to this view myself, in fact, but I frame this Article within the approach that dominates current doctrine. In any event, an antisubordinationist approach to equal protection law would hardly be friendlier to EBS, an approach that amplifies inequality in the criminal justice system's impact by inflicting additional criminal punishment on the poor and, via disparate impact, on people of color. In Section D, I explore further EBS's social and distributive impacts, and explain why (even though men, in general, are not a subordinated class) its inclusion of gender can be expected to exacerbate this social impact on disadvantaged groups.

Thus, although gender discrimination is not wholly constitutionally forbidden, EBS proponents are going to face tough sledding if their defense of it depends on statistical generalizations about men and women. And it does—EBS is *all about* generalizing based on statistical averages, and its advocates defend it on the basis that the averages are right. At least in the gender context, that probably will not convince courts. The statistical relationship would at the very least have to be so strong that courts could deem the resulting *individual* predictions noticeably more sound than those the Supreme Court has rejected in the past, and could accordingly hold that an "exceedingly persuasive justification" for the classification was present. But this requirement sets a high bar—in *United States v. Virginia*, for instance, the Court's only example of sex differences that the government *could* (within constraints) consider was the irreducible *physical* differences between men and women.[89]

Beyond gender, the Court's emphasis on individualism and rejection of statistical discrimination should inform our thinking about the constitutionality of other variables as well.

> This case … involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men….It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives.….. [Title VII] precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. … Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

Id. at 707-08; *see* Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 620 (1990) (O'Connor, J., dissenting) (citing this passage to inform the interpretation of the Equal Protection Clause).

[87] *See* Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 553 (2002).

[88] *See id.* at 554-59; Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9-10 (2004) (reviewing antisubordinationist scholarship).

[89] 518 U.S. at 533.

To be sure, it is not *always* forbidden for the government to rely on statistical generalizations; it would be hard to imagine government functioning if it did not, since it would have to tailor every action it takes to every individual. Government sometimes has to draw clear lines that may overgeneralize—for instance, the state sets a maximum blood-alcohol content for driving, rather than requiring each individual's fitness to drive to be individually assessed. Frederick Schauer has made this point forcefully, offering a fairly broad defense of reliance on statistically supported generalizations.[90] But as Schauer emphasizes, this practice properly has limits—certain kinds of generalizations (including those based on gender) are particularly socially harmful, or expressively invidious, even if they have statistical support.[91] The practice of applying more demanding equal protection scrutiny to some government classifications than to others is grounded in similar reasoning.

Note that the problem with EBS could be framed either as excess generalization (failure to treat people as individuals whose risk varies for reasons particular to them) or as *insufficient* generalization (failure to treat all those with the same criminal conduct the same way). Schauer, for instance, defended the then-mandatory U.S. Sentencing Guidelines, and particularly their bar on demographic and socioeconomic considerations, along the latter lines: "Ignoring real differences in sentencing -- sentencing socially beneficial heart surgeons to the same period of imprisonment for murder as socially parasitic career criminals -- may well serve the larger purpose of explaining that at a moment of enormous significance … we are all in this together."[92] In my view, the problem with EBS cannot be simply described in terms of generality versus particularity; the problem is not that the instruments generalize, but that they employ particular kinds of generalizations that are insidious, in a context that has huge consequences for individuals and communities.

B. Wealth-Related Classifications in the Criminal Justice System

The constitutional problem with EBS goes beyond gender. In this Section, I show that current doctrine also supports application of heightened scrutiny to variables related to socioeconomic status, such as employment status, education, or income. The Supreme Court's case law in *other* contexts has consistently held that similar wealth-related classifications are not constitutionally suspect,[93] and perhaps this is why EBS scholars have completely ignored the potential constitutional concerns with these variables. But this case law is not dispositive in the sentencing context. Many criminal defendants have challenged policies and practices that effectively discriminate against the indigent, including discrimination in punishment. These defendants have often succeeded, and the Supreme Court and lower courts have applied to their claims a special form of heightened constitutional scrutiny, citing intertwined equal protection and due process considerations.

The treatment of indigent criminal defendants has for more than a half-century been a central focus of the Supreme Court's criminal procedure jurisprudence. Indeed, the Court has often used very strong language concerning the importance of eradicating wealth-related

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[90] FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES (2003).
[91] *Id.* at 38-41.
[92] *Id.* at 261-62. Although I am uncomfortable with group-based sentencing distinctions, I do not favor mandatory sentencing, because offenses are often defined too broadly to capture real differences in criminal conduct and culpability. Also, mandatory sentencing laws generally do not eliminate individualization of punishment, but shift the power to individualize toward prosecutors (a possibility Schauer acknowledges, *id.* at 256).
[93] *E.g.*, Maher v. Roe, 432 U.S. 464, 471 (1977).

disparities in criminal justice; in *Griffin v. Illinois*, for instance, it called this objective "the central aim of our entire judicial system."[94] *Griffin* struck down the requirement that defendants pay court costs before receiving a trial transcript, which they need to prepare an appeal. The Court held that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," and that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[95]

Numerous other cases also stand for the principle that both equal protection and due process concerns require that indigent criminal defendants not be subject to special burdens. Principally, these cases have focused on access to the criminal process: "the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[96] Notably, these cases have applied heightened scrutiny even when the wealth-based classification did not deprive the defendant of something to which he otherwise would have had a substantive right—the cases relating to appeal procedures, for instance, reiterated the then-established principle that a State need not provide an appeal as of right at all. Rather, *Griffin* and its progeny involved a special "equality principle" motivated by "the evil [of] discrimination against the indigent."[97] For this reason, a challenge to EBS need not establish that the defendant has some free-standing constitutional entitlement to a lower sentence than he received.

For our purposes, the most on-point Supreme Court case is *Bearden v. Georgia*, in which the district court had revoked the probation of an indigent defendant who had been unable to pay his court-ordered restitution.[98] The Court unanimously reversed, holding that incarcerating a defendant merely because he was unable to pay amounted to unconstitutional wealth-based discrimination.[99] Importantly, the Court in *Bearden* squarely rejected the state's argument that poverty was a recidivism risk factor that justified additional incapacitation:

> [T]he State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future. …[T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.[100]

The Court's resistance to "lumping [the defendant] together with other poor persons" is very similar to its reasoning concerning statistical discrimination in the gender cases. The Court

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[94] 351 U.S. 12, 16 (1956).

[95] *Id.* at 19. *Accord* Mayer v. City of Chicago, 404 U.S. 189 (1971).

[96] Ake v. Oklahoma, 470 U.S. 68, 76 (1985); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (citing the goal of achieving a justice system in which, regardless of finances, "every defendant stands equal before the law").

[97] Lewis v. Casey, 518 U.S. 343, 369-72 & nn. 2-3 (1996) (Thomas, J., concurring) (reviewing case law); *see* Douglas v. California, 372 U.S. 353, 355-57 (1963); *United States v. MacCollom*, 426 U.S. 317, 331 (1976) (Brennan, J., dissenting) (referring to the "*Griffin* equality principle").

[98] 461 U.S. 660 (1983).

[99] *Id. Bearden* built on *Williams v. Illinois*, 399 U.S. 235 (1970), in which the Court had similarly reversed a revocation of probation for failure to pay restitution. In *Williams*, the resulting incarceration sentence exceeded the statutory maximum for the crime, and the Court stated in dictum that absent that problem, no constitutional concern would have been raised. *Id.* at 243 In *Bearden*, however, the incarceration sentence did *not* exceed the statutory maximum, and the Court nonetheless held it unconstitutional, apparently rejecting the *Williams* dictum.

[100] 461 U.S. at 671.

observed that the state had cited "several empirical studies suggesting a correlation between poverty and crime," but it was not persuaded by this appeal to a statistical generalization.[101]

Bearden does not establish that financial background is *always* irrelevant to sentencing. Although the Court decisively rejected the use of poverty to predict crime risk, it took more seriously a different defense of the provocation revocation. The Court emphasized one reason it may be permissible to consider ability to pay (and related factors such as employment history) when choosing between incarceration and restitution sentences:

> The State, of course, has a fundamental interest in appropriately punishing persons--rich and poor--who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus…the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.[102]

That is, the State may consider financial factors as necessary to ensure the poor do not *avoid* punishment—as they would if sentenced only to pay a fine or restitution that they then cannot pay. But with EBS, poverty is not being considered to *enable equal punishment* of rich and poor, but to trigger extra, unequal punishment.[103] The Court further held that even when probation revocation is necessary to ensure that the poor do not avoid punishment, it is only permitted after an inquiry to determine if there are viable alternatives, such as "a reduced fine or alternate public service…Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay."[104]

This requirement that less restrictive alternatives be considered is a hallmark of strict scrutiny. However, the Court resisted expressly categorizing its analysis within any particular tier of scrutiny. Indeed, reviewing the case law on indigent criminal defendants, the Court expressed ambivalence as to whether the key constitutional provision was really the Equal Protection Clause at all, as opposed to the Due Process Clause. As the Court explained, these constitutional concerns are intertwined in these cases, and in any event,

> "[w]hether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose ....'"[105]

This language suggests an unconventional, perhaps somewhat flexible balancing test: a stronger legislative purpose and connection to that purpose might be required depending on the individual

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[101] *Id.* at 671 n.11.

[102] *Id.* at 669-70.

[103] *See also* Williams v. Illinois, 388 U.S. at 244 (stating that ability to pay can be considered to avoid "inverse discrimination"); United States v. Altamirano, 11 F.3d 52, 53 (5th Cir. 1993) (discussing the circumstances in which courts can consider indigency). A defendant, indeed, is constitutionally entitled to a judicial inquiry into her ability to pay a fine. *See, e.g.*, Powers v. Hamilton County Public Defender Comm'n, 501 F.3d 592, 608 (6th Cir. 2007).

[104] 461 U.S. at 671-72. Similarly, Justice White wrote that because "poverty does not insulate those who break the law from punishment," the poor may be imprisoned if they cannot pay fines, but only "if the sentencing court makes a good-faith effort to impose a jail sentence that in terms of the state's sentencing objectives will be roughly equivalent to the fine and restitution that the defendant failed to pay." That is, the magnitude of the punishment must be the same, even if the means is not. Bearden, 461 U.S. at 675 (White, J., concurring in the judgment).

[105] 461 U.S. at 666-67; *see Evitts v. Lucey*, 469 U.S. 387 (1985) (discussing the interrelationship between due process and equal protection concerns in these cases).

interest at stake and the extent to which it is effected. But in requiring a "careful inquiry" into each factor, including the existence of alternatives, it is clear that the Court means to require *some* form of heightened scrutiny, considerably more assertive than mere rational basis review.

Although *Bearden* involved revocation of probation, lower courts have treated it as a constraint on initial sentencing decisions. For instance, the Ninth Circuit has cited *Bearden* to reverse a district court's decision to treat inability to pay restitution as an aggravating sentencing factor, explaining that "the court improperly injected socioeconomic status into the sentencing calculus" and that "the authority forbidding such an approach is abundant and unambiguous."[106] Conversely, citing the same disparity concern, the Ninth Circuit has also reversed (as "unreasonable" under *United States v. Gall*) a decision to *reduce* a defendant's sentence due to ability to pay restitution, holding: "Rewarding defendants who are able to make restitution in large lump sums…perpetuates class and wealth distinctions that have no place in criminal sentencing."[107] Even before *Bearden*, several circuits had already held that equal protection entitles an indigent defendant who was unable to make bail to credit against the eventual sentence for time served, to avoid impermissible wealth-based distinctions in sentencing.[108]

The Supreme Court and lower courts have recognized a divergence between the Supreme Court's treatment of indigent criminal defendants and its normally deferential review of wealth-based classifications: "legislation which has a disparate impact on the indigent defendant should be subject to a more searching scrutiny than requiring a mere rational relationship."[109] The Supreme Court itself has repeatedly noted this divergence. In *United States v. Kerr*, a district court reasoned that special scrutiny is justified by a combination of the serious stakes and the nature of the class: "At stake here is not mere economic or social welfare regulations but deprivation of a man's liberty. The courts 'will squint hard at any legislation that deprives an individual of his liberty—his right to remain free.' Moreover, the indigent, though not a suspect class, have suffered unfair persecution."[110]

Outside the context of inability to pay fines and restitution, there is relatively little case law focusing on use of wealth classifications to determine substantive sentencing outcomes. This dearth should not be taken to suggest judicial approval—the issue likely rarely arises because the practice is rare. The criminal justice system has been rife with procedural obstacles to equal treatment of the indigent, and there are no doubt many subtle or *de facto* ways in which

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[106] United States v. Burgum, 633 F.3d 810, 816 (9th Cir. 2011); *accord* United States v. Parks, 89 F.3d 570, 572 (1996) ("[The defendant] may be receiving an additional eight months on this sentence due to poverty. Such a result is surely anathema to the Constitution."); *see also* United States v. Ellis, 907 F.2d 12, 13 (1st Cir. 1990) (stating that "the government cannot keep a person in prison solely because of indigency"); *but see* State v. Todd, 147 Idaho 321, 323 (2009) (upholding inability to pay as an aggravating factor).

[107] United States v. Bragg, 582 F.3d 965, 970 (9th Cir. 2009).

[108] *See, e.g.*, King v. Wyrick, 516 F.3d 321, 323 (8th Cir. 1975); *Ham v. North Carolina*, 471 F.2d 406, 407, 408 (4th Cir.1973); *Johnson v. Prast*, 548 F.2d 699, 703 (7th Cir.1977); *but see* Vasquez v. Cooper, 862 F.2d 250 (10th Cir. 1988) (finding no constitutional violation because the court considered inability to pay when setting bail).

[109] *U.S. v. Luster*, 889 F.2d 1523 (6th Cir. 1989); *see also* Maher v. Roe, 432 U.S. 464, 471 n.6 (1977); Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 461 n.*(1988) (rejecting heightened scrutiny in a non-criminal case because "the criminal-sentencing decision at issue in *Bearden* is not analogous to the user fee … before us"); Dickerson v. Latessa, 872 F.2d 1116, 1119-1120 (1st Cir. 1989) (observing that classifications implicating appeal rights receive heightened scrutiny only if they are wealth-based); United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986) (Kennedy, J.) (same); *United States v. Kerr*, 686 F. Supp. 1174 (W.D. Pa. 1988).

[110] Kerr, 686 F. Supp. at 1178 (quoting Williams v. Illinois, 399 U.S. at 263 (Harlan, J., concurring) and citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)).

poverty might influence the sentence. But the practice of actually treating poverty as an aggravating factor in sentencing has not been prevalent (before EBS) and has been considered illegitimate. For instance, the formerly mandatory U.S. Sentencing Guidelines forbid consideration of socioeconomic status.[111] It is true that, now that the guidelines are merely advisory, federal courts do occasionally refer to education or employment when discussing the offender's circumstances (as do state courts—in contrast to gender, which is essentially never cited).[112] Such cases might well also be constitutionally problematic, unless such factors are used in service of the "equal punishment" principle discussed above; I do not focus here on the factors that can be considered in individualized judicial assessments of offenders. But at least such cases do not necessarily reflect a generalization that unemployed or uneducated people are categorically more dangerous, in the mechanical way that the EBS instruments do. Instead, the court can assess what each factor means in the context of a particular case—considering, for instance, whether the offender is making an effort to find employment or otherwise pursue rehabilitation, rather than simply blindly adding a given number of points based on current employment status or past educational attainment.

The federal Guidelines do include an enhancement for offenders with a "criminal livelihood,"[113] and defendants have occasionally challenged that enhancement as disparately affecting the poor, because the same criminal revenue would constitute a larger share of a low-income person's livelihood. Soon after the guideline's adoption, a least one district court held (citing *Bearden*) that, to avoid this potential constitutional concern, it should be interpreted to focus on the absolute amount of criminal income, rather than the share of total income, and the Sentencing Commission amended the guideline to come closer to this view.[114] After the amendment, the Sixth Circuit upheld the new guideline against a similar challenge, holding that although *Bearden* required heightened scrutiny of sentencing burdens on the poor, the amended guideline appropriately targeted "professional criminals" who have "chosen crime as a livelihood" and that any disproportionate effect on the poor did not reflect disparate treatment, but rather was "an incidental effect of the statute's objective."[115]

This rationale, however, cannot be applied to EBS, in which poverty indicators are themselves treated as recidivism risk factors—exactly the statistical generalization that the Supreme Court squarely condemned in *Bearden.* As the district court put it in *Kerr*, even though *Bearden* recognized "a correlation between poverty and crime,…a person cannot be punished solely for his poverty. As a matter of constitutional belief, the presumption that the indigent will act criminally 'is too precarious for a rule of law.'"[116]

It is difficult to see how the socioeconomic variables in EBS can avoid *Bearden*-like heightened scrutiny. Unemployment and education, the most common such variables, cannot

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[111] U.S.S.G. 5H1.10; *see also* Joan Petersilia & Susan Turner, *Guideline-Based Justice: Prediction and Racial Minorities*, 9 CRIME & JUST. 151, 153-154, 160 (1987) (describing sentencing reformers' objective of eliminating role of "status" factors like employment).

[112] *E.g.*, United States v. Trimble, 2013 WL 1235510 (11th Cir. 2013).

[113] U.S.S.G. 4B1.3.

[114] United States v. Rivera, 694 F.Supp. 1105 (S.D.N.Y.1988); *see* United States v. Luster, 889 F.2d 1523 (6th Cir. 1989) (describing the amendment). The amended guideline's quantitative inquiry concerns only the amount of criminal income; there is also a qualitative inquiry into whether crime was the defendant's "primary occupation."

[115] Luster, 889 F.2d at 1530.

[116] 686 F. Supp. at 1179. Cf. *Edwards v. California*, 314 U.S. 160, 177 (striking down a vagrancy law and holding that it could not be "seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence'. Poverty and immorality are not synonymous.").

meaningfully be distinguished from the ability to pay, nor can composite variables like "financial status." All are proxies for poverty, and the case law in the *Bearden-Griffin* line makes interchangeable references to "wealth," "poverty," "class," and so forth without fine distinctions. For instance, the Court has always treated "ability to pay" as being equivalent to poverty, even though the two are not identical—ability to pay also depends on what one's other expenses are, whether one can borrow money from someone, and so forth. *Bearden* directly addresses, and limits, the circumstances under which courts can consider "employment history and financial resources," specifically rejecting the consideration of such factors as recidivism predictors.[117] Indeed, the argument the Court was rejecting in that passage turned fundamentally on employment status; the empirical studies that Georgia had cited in *Bearden* to support its recidivism-risk argument were mainly studies of the relationship between unemployment and recidivism, and the state emphasized that the defendant's recent job loss made him a higher recidivism risk.[118] Meanwhile, the point of including education in the recidivism instrument is that it is a proxy for the defendant's future prospects for employment and legitimate earnings; it would be hard to defend the use of this factor using logic that clearly distinguished it from past, present, or future poverty. Neighborhood characteristics could potentially also be considered socioeconomic variables, since they are also very closely related to poverty, although this example is more disputable because these variables operate at a geographic level and do not draw distinctions among persons within the neighborhood.[119]

While there are limits to the courts' efforts to protect indigent defendants, those limits have been found in cases testing what affirmative assistance the state must provide in order to level the criminal justice playing field. EBS, in contrast is a deliberate effort to *unlevel* that field. As with gender, its defenders will be fighting an uphill battle to overcome heightened scrutiny, because if, as *Bearden* holds, one cannot impute individual risk based on the average risk posed by poor defendants, the rationale for EBS disappears.

C. The Social Harm of Demographic and Socioeconomic Sentencing Discrimination

EBS's use of demographic, socioeconomic, and family-related characteristics is also highly troubling on public policy grounds. As noted above, EBS advocates frequently emphasize its potential to help reduce incarceration rates.[120] But what they do not typically emphasize is that the mass incarceration problem in the United States is drastically disparate in its distribution. This unequal distribution is a core driver of its adverse social consequences, because it leaves certain neighborhoods and subpopulations decimated. Black men, for instance, are 52 times as likely to be incarcerated as white women are.[121] Young black men are especially at risk: one in nine black men under 35 are currently behind bars,[122] and one in three will be at some point in

[117] 461 U.S. at 671.
[118] Brief of the Respondent, *Bearden v. Georgia*, 1982 U.S. Sup. Ct. Briefs LEXIS 438, at 32-35.
[119] Given fairly high levels of residential segregation, *see generally* U.S. Census Bureau, Racial and Ethnic Residential Segregation in the United States: 1980-2000, available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf, neighborhood might also be a racial proxy, but challengers would likely have trouble proving a racially discriminatory purpose.
[120] *See supra* note 38 and accompanying text.
[121] *See* HEATHER C. WEST, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES, 21 tbl.18 (2010).
[122] PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008), *available at* http://www.pewstates.org/research/reports/one-in-100-85899374411.

their lives.[123] And the concentration of incarceration's effects is even more dramatic when one takes into account socioeconomic and neighborhood-level predictors. High school dropouts, for example, are 47 times as likely to be incarcerated as college graduates are, and young black male dropouts are incarcerated at a rate of approximately 22% at any given time.[124] An ample literature documents these disparities and their effects on communities.[125]

The EBS instruments produce higher risk estimates, other things equal, for the same subgroups that are already disproportionately incarcerated, and so it is reasonable to predict that EBS will exacerbate these disparities. Although we do not know whether EBS will reduce incarceration on balance, the most intuitive expectation is that it will increase incarceration for some people (those deemed high-risk) and reduce it for others (those deemed low-risk). If so, it will further concentrate mass incarceration's impact demographically.

This is likely to include concentrating its racial impact. I have ignored race in my constitutional analysis, because the instruments do not include it. But the socioeconomic, family, and neighborhood variables that they do include are highly correlated with race, as is criminal history, so they are likely to have a racially disparate impact.[126] Although the courts have not recognized equal protection claims grounded in disparate impact, policymakers should care about the consequences of their policies, and not just about the facial distinctions that they draw. Ample literature documents mass incarceration's severe consequences for African-American communities in particular. If EBS exacerbates this problem, it would be particularly hard to defend it as a progressive strategy for responding to the mass incarceration crisis.

The demographic concentration problem is one reason to worry about the gender and age variables, in addition to socioeconomic status. In other contexts, discrimination based on young age is often treated as not particularly morally troublesome. Young age is not a significant social disadvantage, nor is it even really a discrete group trait; everyone has it and then loses it. Likewise, many advocates no doubt worry less about gender discrimination that adversely affects men because men, taken as a whole, have dominant political and economic power. But the likely impact of EBS is not centered on "men taken as a whole," nor on young people generally. Rather, it will principally affect a subgroup of young men—those involved in the criminal justice system, mostly poor men of color—who are highly disadvantaged. The age and gender criteria exacerbate the extent to which incarceration's impact targets a particular slice of disadvantaged communities, effectively resulting in a substantial part of a generation of men being absent from communities and exacerbating the socially distortive effects of mass incarceration. A broad literature explores the effects of high, demographically concentrated incarceration rates on everything from marriage rates to overall community cohesion.[127]

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[123] THOMAS BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (2003).

[124] Center for Labor Market Studies, *The Consequences of Dropping Out of School* (2009), available at http://hdl.handle.net/2047/d20000596; *see also* Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, DAEDALUS (Summer 2010) (discussing neighborhood effects).

[125] *E.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2011); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Patillo et al. eds., 2004).

[126] *See* Harcourt, *supra* note 55 (arguing that "prior criminal history has become a proxy for race").

[127] Todd R. Clear, *supra*, at 97; William A. Darity, Jr. & Samuel L. Myers, Jr., *Family Structure and the Marginalization of Black Men: Policy Implications*, *in* THE DECLINE IN MARRIAGE OF AFRICAN AMERICANS 263,

Another serious disadvantage is the expressive message sent by state endorsement of sentencing based on group traits. Consider specifically the traits associated with socioeconomic disadvantage. Though many Americans no doubt already suspect that the criminal justice system is biased against the poor, EBS ends any doubt on the matter. It involves the state telling judges explicitly that poor people should get longer sentences because they are poor—and, conversely, that socioeconomic privilege should translate into leniency. That is a message that, I suspect, many state actors would find embarrassing to defend in public. Doing so would require pointing to a justification that hardly improves matters: that the poor are dangerous. Generalizing about groups based on crime risk is a practice with a pernicious social history.[128] Dressing up that generalization in scientific language may have succeeded in forestalling public criticism, but mostly because few Americans understand these instruments or even are aware of them. If the instruments were better understood (and as EBS expands, perhaps they will be), they would send a clear message to disadvantaged groups: the system really is rigged. Further, if that message undermines the criminal justice system's legitimacy in disadvantaged communities, it could undermine EBS's crime prevention aims.[129]

Some EBS advocates propose that it should be used only to *mitigate* sentences, and such proposals have, at first glance, a seductive appeal—reducing incarceration rates is an important objective.[130] But there is no persuasive reason to believe access to risk predictions would tend to reduce sentences rather than increasing them (or doing both in different cases). Some advocates blame a retributivist approach to sentencing for the rise in incarceration, and suggest that EBS would help to make sentencing more moderate by encouraging a practical focus on crime prevention instead.[131] This line of argument is curious, however, because much of the political "tough on crime" movement over the past several decades has in fact been accompanied by public safety language, responding to the public's (oft-exaggerated) perceptions of crime risk.[132]

One could attempt to force unidirectional use of risk assessments, but it may be difficult. If judges are given the risk assessments before they choose the sentence, even if they are told to only use them for mitigation, it is difficult to expect them to completely ignore high-risk assessments.[133] And even if the risk score is not provided until an initial sentence is chosen, judges who know that subsequent mitigation will be available if it turns out that the defendant is

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286 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995); Bruce Western et al., *Incarceration and the Bonds Between Parents in Fragile Families*, *in* IMPRISONING AMERICA, *supra*, at 21-45; Elizabeth I. Johnson & Jane Waldfogel, *Children of Incarcerated Parents*, in IMPRISONING AMERICA, *supra*, at 98; James P. Lynch & William J. Sabol, *Effects of Incarceration on Informal Social Control in Communities*, *in* IMPRISONING AMERICA, *supra*, at 135-164.

[128] For a recent, prominent reflection on the way such generalizations about black men have affected African-American communities, *see* Barack Obama, Remarks by the President on Trayvon Martin (July 19, 2013), available at http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin.

[129] *See* William Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1825-30 (1998) (discussing the effects of community perceptions of unfairness on law compliance).

[130] *E.g.*, Etienne, *supra*; J. Richard Couzens, Evidence-Based Practices: Reducing Recidivism to Increase Public Safety: A Cooperative Effort by Courts and Probation 10 (June 27, 2011), available at http://www.courts.ca.gov/documents/EVIDENCE-BASED-PRACTICES-Summary-6-27-11.pdf; Kleiman, *supra*, at 301 (explaining that Virginia's EBS program diverts 25% of nonviolent prison-bound offenders to probation).

[131] Marcus, *supra*, at 751.

[132] Rachel Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278-81 (2005).

[133] Analogously, limiting instructions to juries—instructions to consider evidence for one purpose but not another—are "notoriously ineffective" and "may be counterproductive because they call jurors' attention to the evidence that is supposed to be ignored." Prescott & Starr, *supra*, at 323 (citing studies).

low risk might err on the side of higher preliminary sentences. Likewise, the risk scores could affect the parties' strategies; in particular, prosecutors might push for longer sentences for higher-risk offenders. Even if the scores are withheld at first from the parties, given that the instruments are quite simple, one would expect the parties to calculate the scores themselves and plan accordingly, and not to wait for the official report.

But let us hypothesize that it could be guaranteed that risk scores would only reduce sentences. Would such an approach be justified? I am loath to resist strategies for reducing unnecessary incarceration. But the key question here is not whether low-risk defendants should be diverted from incarceration—it is whether those low-risk diversion candidates should be identified based on constitutionally problematic demographic and socioeconomic characteristics (instead of past or present criminal conduct or other personal, behavioral assessments).

I conclude that such an approach raises the same problems as does EBS generally. As a constitutional matter, policies that benefit only the lowest-risk offenders may actually be more objectionable because they are less flexible and narrowly tailored—more like quotas than "plus factors." Those with sufficiently unfavorable demographic and socioeconomic characteristics will never qualify as "low risk," no matter how favorable their other characteristics. Consider the Missouri instrument described in Part I. A 20-year-old high school dropout with no job loses six points for those characteristics alone, and can never score higher than 1 on the scale ("average" risk), even if he has no criminal history and no other risk factors and has committed a relatively minor offense. Other instruments that consider gender and a wider variety of socioeconomic and family traits could be even more strongly driven by those factors.[134]

Special exceptions for the privileged cut against the foundational principle that the justice system should treat everyone equally. Moreover, one likely driver of the growth of incarceration is that the relatively privileged majority of the population has been spared its brunt.[135] Those who are primarily incarcerated—poor young men of color—are not politically well represented, and most other citizens have little reason to worry about the growth of incarceration. Progressives should hesitate before endorsing policies that give them another reason not to worry, even if those policies will have the immediate effect of somewhat restraining that growth.

Merely raising the potential policy concerns associated with discrimination and disparity does not necessarily end the argument, just as the constitutional inquiry is not ended by establishing that EBS merits heightened constitutional scrutiny. One must consider how strongly EBS advances competing state interests. In the next Part, then, I turn to the question whether the studies support EBS advocates' optimism.

III. Assessing the Evidence for Evidence-Based Sentencing

Protecting society from crime while avoiding excessive incarceration is no doubt an important interest, even a "compelling" one. But the Constitution and good policy also require

[134] The mitigation-only approach also would not deprive defendants of standing to challenge EBS; a defendant who would have received diversion to probation had the risk instrument not considered his gender, for instance, is harmed by that consideration. The Supreme Court has often considered equal protection challenges in which the plaintiff claims she was denied a government benefit (such as university admission) on the basis of some improper consideration. *E.g.*, Fisher, __ S.Ct. at __.

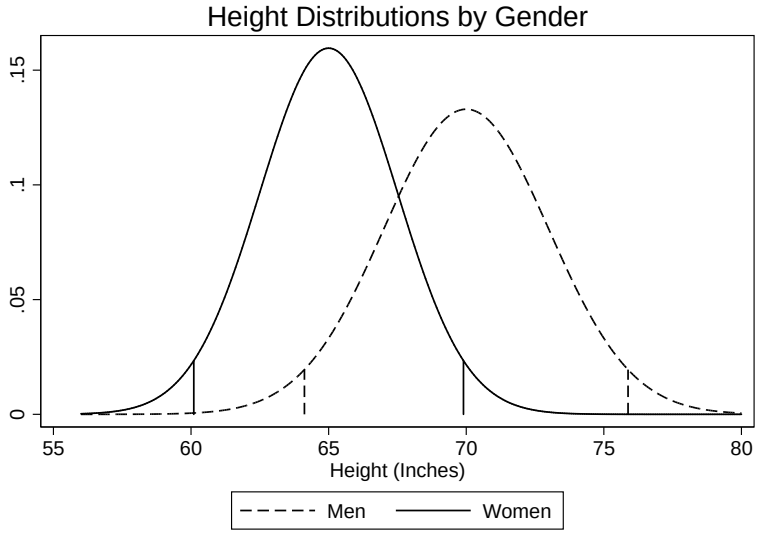
[135] James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1001 (2010); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008).

assessing the strength of the relationship between EBS and that interest. When heightened scrutiny applies, it is the state's burden to provide convincing evidence establishing that relationship. In this Part, I show that the current empirical evidence does not suffice.

A. Precision, Group Averages, and Individual Predictions

The instruments' first serious limitation is that they do not provide anything even approaching a precise prediction of an individual's recidivism probability. At best, what they predict with reasonable precision is the *average* recidivism rate for all offenders who share with the defendant whichever characteristics are included as variables in the model. If the model is well specified and based on a sample that is representative of the population to which the results are extrapolated, then it might perform this task well. But that does not necessarily make it particularly useful for individual predictions. Individual vary much more than groups do, and even a relatively precisely estimated model will often not do well at predicting individual outcomes in particular cases.[136] Social scientists sometimes refer to the broader ranges attached to individual predictions as "prediction intervals" (or sometimes as "forecast" uncertainty or "confidence intervals for a forecast") to distinguish them from the "confidence intervals" that are estimated for the group mean or for the effect of a given variable.

To illustrate this point, let's start with an example that involves predicting a continuous outcome rather than a binary future event. To simplify, we will consider only one explanatory variable (sex) and one normally distributed outcome variable (height), which are quite strongly related. The height distributions of the U.S. male and female populations look approximately like Figure 1 below, which is based on average heights of 70 inches for males (standard deviation 3 inches) and 65 inches for females (standard deviation 2.5 inches).



But suppose one did not know the true population distributions, and one had to estimate them by taking a random sample. If one takes a large enough sample, it is easy to obtain quite precise estimates of the average male height and the average female height (as well as the average additional height associated with being male, which is just the difference between the

[136] *See* David J. Cooke & Christine Michie, *Limits of Diagnostic Precision and Predictive Utility in the Individual Case*, 34 LAW & HUM. BEHAV. 259, 259 (2010) ("It is a statistical truism that the mean of a distribution tells us about everyone, yet no one.").

group means). This point is illustrated in Table 1. I created simulated data for a "true population" of men and women that has the height distributions shown in Figure 1. Then I drew from that population random samples with sample sizes 20, 200, and 400, regressed height on gender within each sample, and recorded the predicted mean heights for men and women and the confidence intervals for those means.

Table 1. Precision of Predicted Means versus Individual Forecasts: An Illustration

Sample Size	Male Height in Inches			Female Height in Inches		
	Mean (& Forecast)	95% Conf. Int. for the Mean	95% Pred. Int. for Indiv. Forecast	Mean (& Forecast)	95% Conf. Int. for the Mean	95% Pred. Int. for Indiv. Forecast
20	69.8	[68.2, 71.4]	[64.4, 75.1]	64.8	[63.2, 66.4]	[59.4, 70.1]
200	69.8	[69.3, 70.4]	[64.3, 75.4]	64.6	[64.0, 65.1]	[59.0, 70.1]
400	70.0	[69.6, 70.4]	[64.6, 75.4]	64.9	[64.5, 65.3]	[59.5, 70.3]
Samples are drawn from a simulated "true population" with population means and standard deviations of 70.0 (3.0) for men and 65.0 (2.5) for women.						

Notice that even the smallest sample quite closely approximates the true population means of 70 and 65 inches, while the largest sample comes even closer. Exactly how close each sample comes involves chance (different random samples of the same sizes would have different means), but in general chance plays a smaller role the larger the sample is; as the sample grows the estimates should converge on the true population values. This expectation is captured in the estimation of confidence intervals for the mean, which get narrower as the sample gets larger. Confidence intervals are a way of accounting for chance in sampling. For the 400-person sample, one can express 95% condidence in quite a precise estimate: for males, between 69.6 inches and 70.4 inches, and for females, between 64.5 inches and 65.3 inches.[137] If you keep drawing more and more 400-person samples, they don't tend to differ very much; with that sample size, you will generally do quite a good job approximating the underlying population, which is why the confidence interval is narrow. Meanwhile, the 20-person sample gives you wider 95% confidence intervals, each spanning more than three inches—a much rougher estimate.

But what if you wanted to use your 400-person sample not to estimate the averages for the population, but to predict the height of just the next random woman you meet? Your single best guess—the one that is statistically expected to err by the lowest margin—would be the group mean from your sample, which is 64.9. But you wouldn't be *nearly* as confident in that prediction as you would in the prediction for the group mean. In fact, within that sample, only 13.5% of women have heights that are between 64.5 inches and 65.3 inches, which was your 95% confidence interval for the group mean. If you wanted to give an individual forecast for that next woman that you could be 95% confident in, it would have to be much less precise—you could predict that she would be somewhere between 59.5 inches and 70.3 inches, the 95% prediction interval for the individual forecast that is shown in Table 1. That's a range of nearly

[137] To describe something as a 95% confidence interval for an estimated group mean is to express confidence that 95% of the time, when one draws a random sample and uses the same estimation procedure, the interval one estimates will contain the true group mean for the underlying population.

eleven inches—in other words, you don't know much at all about how tall to expect the next woman to be.[138]

One could make the example much more complicated, with multiple variables and more irregular distributions of outcomes, but the prediction interval for an individual forecast is always wider than the confidence interval for the mean—generally *much* wider.[139] Note that while the confidence intervals for the means gets much narrower as the sample gets larger, the prediction interval does not. The underlying uncertainty that it reflects is not mainly the possibility of having gotten an unusual sample; it's the variability in the underlying population that we saw in Figure 1. One *could* narrow the prediction interval by adding variables to the regression that help to explain this underlying variability—for example, the heights of the individual's parents.

The same basic intuition also applies to models of binary outcomes, like whether a defendant will recidivate—the expected outcome for an individual is much less certain than the expected rate for a group. Some of the recidivism risk prediction instruments include confidence intervals for the probabilities they predict. Indeed, some scholars have urged that confidence intervals should always be provided (rather than mere point estimates) so that judges can get an idea of how precise the instruments are.[140] But given that judges are using the instruments for the purpose of predicting a specific individual's probability of recidivism, providing them a confidence interval for the *group* recidivism rate might even be more misleading than not providing any at all. For instance, if judges are told "The estimated probability that Defendant X will recidivate is 30%, and the 95% confidence interval for that prediction is 25% to 35%," that may well sound to the judge like a reasonably precise individual prediction, but it is not. It is merely a reasonably precise estimate of an average recidivism rate.[141] If the underlying study has a large sample size, such a prediction could be very precise even if the model's variables do not capture much of the variation in individual probabilities at all.

With binary outcomes, though, while the confidence interval for the mean may be misleading, the "prediction interval" is not a very useful alternative way of expressing the precision of an individual forecast, because it does not tell you anything that was not already

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[138] Note that the estimated uncertainties in Table 1 are based on a regression of height on gender using standard Stata postestimation prediction commands. By construction, the uncertainties are the same for men and women. Another way to estimate a 95% prediction interval for the height of the next woman you meet would be to just ignore the men and give the range within which the middle 95% of the women in your sample fall. Because female height has a slightly narrower distribution, your interval would then be a bit narrower (about 10 inches), but this method would produce a wider interval for the next male's height (about 12 inches). These ranges are marked on Figure 1.

[139] *See* Cooke & Michie, *supra*, at 271 (illustrating this point using simulated data on violence risk among psychiatric patients, and showing how measurement error for subjective criteria amplifies the uncertainty of individual predictions).

[140] *E.g.*, McGarraugh, *supra*, at 1095-96.

[141] This problem has some similarities to the broader problem of assessing scientific evidence of causation in legal contexts, in which "the law is interested not simply in whether a particular variable causes a particular effect [in general], but, ultimately, in whether a particular variable did cause the effect [in the specific case]." David L. Faigman, *A Preliminary Exploration of the Problem of Reasoning from General Scientific Data to Individualized Legal Decision-Making*, 75 BROOK. L. REV. 1115, 1119 (2010). But this issue is not identical, and my objection here is not that the models cannot establish "individual-level causation," McGarraugh, *supra*, at 1101. The models are predictive, and make no causal claims, so their advocates cannot be accused of confusing correlation with causation. And they aim to predict future probabilistic events, not to prove what caused a particular past event. When one's goal is merely to predict, correlations can be useful, even if the causal pathway is uncertain. For instance, how one voted in the 2012 presidential election is no doubt a very strong predictor of how one will vote in 2016—information campaign strategists can use even if the former does not cause the latter.

made clear by the point estimate itself. Unless the predicted probability is extremely low or extremely high, a 95% confidence interval for an individual prediction will by nature always run from 0 to 1.[142] Recidivism is rarely nearly certain or nearly impossible. So even a good recidivism prediction model could produce prediction intervals of [0,1] for essentially *every* defendant: that is, the only prediction that can be made with 95% confidence about any given individual is that she will either recidivate or not. This fact does not reflect poorly on the design of the prediction instruments or the quality of the underlying research. It reflects the inherent uncertainty of this predictive task and the binary nature of the outcome.

In order to assess how well a model predicts recidivism risk for individuals, some other metric is necessary.[143] There is no single, agreed-upon method for assessing the individual predictive accuracy of a binary model, but there are several possibilities. One common metric used in the recidivism prediction literature is called the "area under the curve" (AUC) approach.[144] This method pairs each person who ended up recidivating with a random person who did not; the score is the fraction of these pairs in which the recidivist had been given the higher predicted risk score. A perfect, omniscient model would rank all eventual recidivists higher than all eventual non-recidivists, and the AUC score would be a 1, while coin flips would on average produce a score of 0.5. The best published scores for recidivism prediction instruments appear to be around 0.75, and these are rich models that include various dynamic risk factors, including detailed psychological assessments, rather than the simple point systems based on objective factors.[145] Many studies have reported AUC scores closer to 0.65.[146] By comparison, a prominent meta-analysis of studies of psychologists' clinical (non-actuarial) predictions of violence found a mean AUC score of 0.73, which the author characterized as a "modest, better than chance level of accuracy."[147] As another point of comparison, if one turns height into a binary variable called "tall" (which denotes being above the median height of the sample), our basic, one-variable model does much better at predicting who will be tall than any

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[142] *See* R. Karl Hanson & Philip D. Howard, *Individual Confidence Intervals Do Not Inform Decision-Makers about the Accuracy of Risk Assessment Evaluations*, 34 L. & HUM. BEHAV. 275, 276 (2010)

[143] *See* Hanson & Howard, *supra*, at 276. Stephen D. Hart et al., *Precision of Actuarial Risk Assessment Instruments*, 174 BRIT. J. PSYCHIATRY s60 (2007), offer an alternative way of calculating a prediction interval for an individual. They use a traditional method for estimating the confidence interval for a probability prediction given a point estimate for the probability and a sample size, and calculate it for each risk-level category in two common violence prediction instruments, using a sample size of 1. *See* E.B. Wilson, *Probable Inference, The Law of Succession, and Statistical Inference*, 22 J. AM. STAT. ASSOC. 209 (1927). The intervals Hart et al. calculate do not always run from 0 to 1, but they are always very wide, ranging between 79 and 89 percentage points in width. The authors conclude that it is "impossible to make accurate predictions about individuals using these tests."

Hart et al. interpret their intervals as follows: "Given an individual with an ARAI score in this particular category, we can state with 95% certainty that the probability he will recidivate lies between the upper and lower limit.'" This is a slightly odd interpretation, given that, as the authors state, Wilson's confidence intervals are normally interpreted as expressing an interval within which one is confident that the *actual observed rate* for the new sample (not the *ex ante* probability) will fall. The actual observed binary outcome for one individual always must be 0 or 1, however, so I agree with Hanson and Howard, *supra*, that the prediction interval for all but the extreme cases should be 0, 1 (rather than, say, .10 to .94). But either way, it is wide.

[144] *See* Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. CONSULTING & CLINICAL PSYCH. 783 (1994) (describing the method as well as competing approaches).

[145] *See* Mairead Dolan & Michael Doyle, *Violence Risk Prediction*, 177 BRIT. J. PSYCH. 303, 305-07 (2000); AOUSC, *supra*, at 9.

[146] Dolan & Doyle, *supra*, at 305-07.

[147] Mossman, *supra*, at 788.

actuarial model does at predicting who will recidivate—it has an AUC score of 0.825.[148] This is despite the fact that, as we saw, that model gives only rather wide bounds for individual predictions of height—gender is actually quite a strong predictor of height (most men are taller than most women), but it still leaves considerable individual variation unexplained.[149]

Another simple measure of prediction accuracy is the linear correlation between the predicted probabilities and the actual outcomes for offenders; this measure will be 0 if the instrument explains nothing more than chance and 1 if it predicts perfectly.[150] In 1994, a prominent meta-analysis of studies comparing several actuarial recidivism prediction instruments found that the LSI-R (the instrument that the Indiana Supreme Court upheld) had the highest reported correlation with outcomes, at 0.35.[151] By comparison, the gender-only model of the binary "tall" variable has a correlation coefficient of 0.65 (in the same sample used above).

All in all, these metrics suggest that the prediction models do have individual predictive value, but they do not make a resounding case for them. Again, this should not be seen as an indictment of the quality of the science—it is just that even given all the best insights of decades of criminological and psychological research, recidivism remains an extremely difficult outcome to predict at an individual level, much more difficult than height. The models improve considerably on chance, which for some policy purposes (or for the purpose of mental health treatment decisions, which is what many of the models were originally developed for) is no doubt quite valuable. But to justify group-based discrimination in sentencing, both the Constitution and good policy require a much more demanding standard for predictive accuracy. Moreover, note that the accuracy measures discussed here assess the *total* predictive power of each recidivism model, combining all its variables, and are thus overly generous for the purpose of assessing whether particular variables should be included in the model. The marginal predictive power added by just the constitutionally problematic variables is even less, as discussed in the next Section.

The basic difference between individual and group predictions has been pointed out by some scholars in the empirical literature surrounding the risk prediction instruments.[152] But it is lost in much of the EBS legal and policy literature, and more importantly, it may be lost on judges and prosecutors, who may have an inflated understanding of the estimates' precision. Hannah-Moffat explored this issue by interviewing lawyers and probation officers in Canada,

[148] This is estimated in the same 400-person sample used above, pairing each "tall" person with one "short" person, scoring the prediction as correct (i.e., 1) if the tall person was male (i.e., predicted to be taller) and the short person was female, incorrect in the reverse case (0), and as 0.5 if the two had the same gender (i.e., predicted to have the same height), following the standard tie-breaking procedure used to calculate AUC scores. Conversely, if one pairs 200 random women with one random man each (eliminating the possibility of "tied" gender), the man is taller 89% of the time—much better than the chance level of 50%.

[149] Note that a 95% prediction interval for an individual forecast of the binary variable "tall" would run from 0 to 1 for both men and women—one could not be anywhere close to 95% confident that any given woman would be short, or that any given man would be tall. In the sample, 17.5% of women and 82.5% of men were "tall."

[150] The square of this correlation coefficient is one variant on the "fit" measure "pseudo R-squared." This and several other variants could be used to assess a model's ability to explain individual variation, although none should be interpreted as a measure of the overall quality of the model. For a concise summary, see Institute for Digital Research & Education, *FAQ: What are pseudo R-squareds?*, http://www.ats.ucla.edu/stat/mult_pkg/faq/general/Psuedo_RSquareds.htm.

[151] Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Recidivism: What Works!*, 34 CRIMINOLOGY 575, tbl. 4 (1994).

[152] *See, e.g.*, Hart et al., *supra*; Cooke & Michie, *supra*.

where risk instruments are common. She found that even if caveats about the difference between group and individual predictions are provided, the message often does not get through:

> [F]ew understand and appropriately interpret probability scores. Despite receiving training on these tools and their interpretation, practitioners tended to struggle with the meaning of the risk score….Rather than understanding that an individual who obtains a high risk score *shares characteristics* of an aggregate group of high-risk offenders, the individual is likely to become *known* as a high-risk offender. Instead of being understood as correlations, risk scores are misconstrued in court submissions, pre-sentence reports, and the range of institutional file narratives that ascribe the characteristics of a risk category to the individual.[153]

Advocates of actuarial methods, in this and other contexts, have often sharply criticized the claim that it is not safe to draw conclusions about individuals based on group averages. Mark Cunningham and Thomas Reedy argue that the "distinction between individualized as opposed to group methods is a false dichotomy," contending, essentially, that truly individualized methods do not exist; the discipline of psychology, and its sub-discipline of violence prediction, draws its fundamental scientific character from its willingness to draw insights from data collected on groups and apply them to individuals.[154] Likewise, EBS advocate Richard Redding quotes Paul Meehl, an early pioneer in actuarial prediction in psychology: "If a clinician says 'This case is different' or 'It's not like the ones in your [actuarial] table,'…the obvious question is 'Why should we care whether you think this one is different or whether you are surer?"[155] Jennifer Skeem and John Monahan, quoting Grove and Meehl, argue:

> Our view is that group data can be, and in many cases empirically are, highly informative when making decisions about individual cases….[C]onsider the revolver analogy of Grove and Meehl:
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> > …Two revolvers are placed on the table, and you are informed that one of them has five live rounds with one empty chamber, the other has five empty chambers and one live cartridge, and you are required to play Russian roulette….Would you seriously think 'Well, it doesn't make any difference what the odds are. Inasmuch as I'm only going to do this once, there is no aggregate involved, so I might as well pick either one of these two revolvers; it doesn't matter which?"[156]

These responses strike me as off base. I do not argue, nor could anybody, that group averages have nothing to do with individual behavior. Of course group averages will *on average* predict outcomes for the individuals in the group—that much is a tautology—and thus provide some information that could guide individual decision-making. But that does not always mean that the group average tells us *much* about what to expect for any given individual. One does not have to be naïve to think that an individual case may be different from the average if it's a situation in which individual outcomes in fact vary widely. The question is how much individual variation there is in a given population, and how much of that variation the variables in the

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[153] Hannah-Moffat, *supra*, at 12-13.

[154] Mark D. Cunningham & Thomas J. Reidy, *Violence Risk Assessment at Federal Capital Sentencing*, 29 CRIM. JUST. & BEHAV. 512, 517 (2002); *accord* Jessica M. Tanner, *"Continuing Threat" to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings*, 17 CAP. DEF. J. 381, 402-05 (2005).

[155] Redding, *supra*, at 12 n.52 (quoting Paul E. Meehl, CLINICAL VERSUS STATISTICAL PREDICTION (1954)).

[156] Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, U. Va. School of Law Public Law and Legal Theory Research Paper No. 2011-13, 9-10.

model explain. In the recidivism context (unlike, for instance, the Russian roulette context), the variables included in the instruments leave most of the variation unexplained.[157]

One could defend the instruments on the ground that the precision of individual predictions does not matter from an efficiency perspective. If the group average estimates are good, then the model will, averaged across cases, improve judges' predictions of recidivism, leading more efficient use overall of the state's incarceration resources to prevent crime.

There are two main problems with this response. First, it almost certainly does not suffice for constitutional purposes, at least with respect to any variable triggering heightened scrutiny. The argument amounts to the claim that it doesn't matter whether an instrument has any meaningful predictive power for individuals, so long as the group generalizations have some truth to them. But this is exactly the kind of statistical discrimination defense that the Supreme Court has repeatedly rejected. This point is one reason the Russian roulette analogy is inapt. I would, of course, choose the gun with just one bullet. And if the same dictator forced me to choose between driving on a highway on which 2% of the drivers were drunk and one in which 0.18% of the drivers were drunk, I would choose 0.18% every time. But just that disparity did not suffice, in *Craig v. Boren*, to justify a gender-discriminatory alcohol law. When demographic and socioeconomic characteristics are used to justify the state's serious adverse treatment of individuals, the Constitution requires more than a statistical generalization. Nobody would worry that choosing the gun with one bullet is unfair or harmful to the gun with five. But it is not harmless to base an individual's incarceration on a statistical inference that, based on his poverty or gender, treats him as the human equivalent of a loaded gun.

Second, the "efficient discrimination" argument is not even necessarily correct in terms of efficiency. It is not true that any model with *any* improved predictive power over chance will provide efficiency gains, because EBS isn't replacing chance. If the actuarial instruments don't capture much of the individual variation in recidivism probability, then there is certainly a possibility that the thing EBS is meant to displace—judges' "clinical" prediction of risk—might actually be more efficient because it captures more of that variation. This point is explored further in the next Section.

B. Do the Instruments Outperform Clinical Prediction and Other Alternatives?

The *Bearden* test requires assessment of whether other available and nondiscriminatory (or less discriminatory) alternatives could accomplish the state's penological objectives. Here, I consider two such alternatives: actuarial methods that *do not* rely on constitutionally troubling variables; and judges' exercise of their professional judgment ("clinical" prediction). Even if analysis of alternatives were not constitutionally required, if EBS does not improve at least on the clinical method that it seeks to replace, it does not substantially advance the state's penological interests, and is also undesirable on policy grounds.

EBS advocates have concluded that it is superior to available alternatives, but they have had to stretch the existing evidence quite far to support this claim. J.C. Oleson, for instance, argues that even inclusion of race would be constitutionally permissible, and concludes that it is

[157] In the Russian roulette hypothetical, the decision-maker is given the only variable that matters. The number of bullets quite strongly predicts the individual's probability of dying; it would explain most of the individual variation, with the remaining variation being pure chance. The recidivism models are not in the same ballpark.

"straightforward" to show that no less restrictive means is available.[158] To support this conclusion, he cites just a single study from 1987, by Joan Petersilia and Susan Turner, for the proposition that "omitting race-correlated factors from a model to predict recidivism reduced the accuracy of the model by five to twelve percentage points." Even taking this at face value, it hardly seems obvious that a statistical advantage this modest would justify explicit sentencing discrimination based on race; the Supreme Court has rejected gender discrimination based on stronger statistical evidence than that. And given the Supreme Court's disparate impact jurisprudence, it is odd to justify including race itself based on the predictive power of *race-correlated* factors from the model.

More importantly for present purposes, the Petersilia and Turner study actually suggests that demographic and socioeconomic factors could be excluded from risk prediction instruments without losing any significant predictive value. The "race-correlated factors" in their study *included criminal history and crime characteristics,* which accounted for *all* the additional explanatory value provide by correlates of race (and which no sentencing scheme ignores).[159] Once those factors were already included, adding "demographic" and "other" variables—which included employment, education, marital status, substance abuse, and mental health variables—did not significantly improve the model's predictive power. This is presumably because conduct is generally a better predictor of future conduct than static characteristics are, a point other studies corroborate. For instance, Douglas Mossman's 1994 meta-analysis of studies concerning violence prediction found that "the average accuracy of predictions based on past behavior is higher" than either mental health professionals' clinical judgments or actuarial instruments.[160]

More recent studies of risk prediction instruments have typically not broken down the extent to which adding socioeconomic and demographic variables improves the overall predictive power of the model (a distinct question from the *coefficients* on those variables). But Peterilia's and Turner's results, at least, suggest that a viable alternative is to base actuarial prediction only on crime characteristics and criminal history. Of course, existing sentencing schemes already incorporate those variables, so perhaps providing judges with risk predictions based on them would be redundant. It would be more sensible to have the sentencing commission or legislature incorporate the instruments' insights when determining sentencing ranges. But the fact that an instrument like this might not be terribly useful to judges does not mean that the instruments with the additional variables are *more* useful; the Petersilia and Turner study, at least, suggests that they are not.

Even setting aside the possibility of using *different* actuarial instruments, what about the basic question whether the instruments outperform clinical prediction? It is gospel in the EBS literature that they do. But while scores of studies have found that actuarial prediction methods outperform clinical judgment, this finding is not universal, the average accuracy edge is not drastic, and the vast majority of studies are from wholly different contexts (such as medical diagnosis or business failure prediction). In one widely cited meta-analysis, Grove et al. evaluated all the studies addressing the actuarial versus clinical comparison that were published

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[158] Oleson, *supra*, at 1386; *see id.* at 1387 (also concluding that "[o]nce the constitutional door is open to race, all other sentencing factors can pass through: gender, age, marital status, education, class, and so forth.").

[159] Petersilia & Turner, *supra*, at 171 (showing, in the table for "All Convicted Defendants," that 57% of outcomes could be accurately predicted by chance, 60% when racially noncorrelated factors were added, 67% when crime characteristics were added, 70% when criminal history variables were added, and still 70% when demographic and "other" variables were added).

[160] Mossman, *supra*, at 789-90.

between 1945 and 1994 and that met certain quality criteria; just five criminal recidivism studies made the cut, plus 131 other studies.[161] Overall, actuarial prediction performed on average about 10% better, but the authors warned: "However, our results qualify overbroad statements in the literature opining that such superiority is completely uniform; it is not. In half of the studies we analyzed, the clinical method is approximately as good as mechanical prediction, and in a few scattered instances, the clinical method was notably more accurate."[162]

If the actuarial advantage does not exist in half of studied contexts, then it is obvious that the specifics matter. And the EBS literature often cites research on far more complicated instruments than the simple ones (like Missouri's, described above) that states actually use. Take, for instance, a study by Grant Harris, Marie Rice, and Catherine Cormier testing an instrument called the Violence Risk Appraisal Guide, which has been cited by EBS advocates.[163] The VRAG consists of twelve variables, the first and most heavily weighted of which is itself a composite of twenty variables: "conning, lying, manipulation, callousness, lack of remorse, proneness to boredom, shallow affect, irresponsibility, impulsivity, poor behavior controls, criminal versatility, juvenile delinquency, sexual promiscuity, and parasitic lifestyle."[164] Assessing these factors requires an elaborate psychological profile, which in the study was carried out by groups of mental health clinicians who "knew the patients well."[165] Nothing like this is typically involved in EBS. Even in the case of sentencing instruments that try to use somewhat nuanced personality characteristics, like the LSI-R, it is not at all obvious that a probation officer filling out a presentence report can carry out a comparable analysis. The VRAG's success simply says nothing about the potential success of a totally different instrument and assessment process. Moreover, the comparability of the populations is also dubious; the VRAG studies involved Canadian psychiatric patients.[166]

Indeed, the past success of instruments that rely on elaborate personality profiles may, if anything, suggest a *disadvantage* of the EBS instruments. The studies show that ideally, after a trained clinician collects all the relevant information and makes the numerous required qualitative assessments, her ultimate predictions will be better informed if she then uses an actuarial model to tell her how much weight to give each factor. This result is unsurprising. But it is a far cry from saying that a different actuarial model that relies on far less overall information (completely ignoring all of the qualitative personality factors) will outperform the judgment of a judge who has had a chance to assess the individual defendant and the complete facts of the case. The relevant comparison, in short, is not just between actuarial versus clinical weighting of variables. It is between actuarial weighting of a few variables versus clinical weighting of a much wider range of variables.[167] It is possible that the actuarial instruments would win that comparison, but we cannot conclude that based on existing research.

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[161] W.M. Grove et al, *Clinical vs. Mechanical Prediction: A Meta-analysis*, 12 PSYCH. ASSESSMENT 19, 22-24 (2000) (listing studies.

[162] *Id.* at 22-24.

[163] Grant T. Harris et al., *Prospective Replication of the "Violence Risk Appraisal Guide" in Predicting Violent Recidivism Among Forensic Patients*, 26 LAW & HUM. BEHAV. 377 (2002); *see* Wolff, *supra*, at n.73.

[164] Harris et al., *supra*, at 378.

[165] *Id.* at 379.

[166] *Id.* at 381.

[167] Psychologist Stephen Hart states that similar simplified instruments for predicting sexual violence arguably do not deserve even the label "evidence-based" because "scientific and professional literature would not consider [it] informed, guided, or structured since they only include a relatively small set of risk factors." Stephen D. Hart, *Evidence-Based Assessment of Risk for Sexual Violence*, 1 CHAPMAN J. CRIM. JUST. 143, 155, 164 (2009).

A review of each of the five older recidivism studies that Grove et al. included in their meta-analysis likewise does not produce any meaningful support for the modern EBS instruments. Two of the five studies found no discernable advantage for actuarial prediction.[168] Glaeser (1955), one of two studies that found a substantial advantage, involves an archaic prediction instrument in which the most strongly predictive variable was the offender's (clinically assessed) "social development pattern": "Respected Citizen," "Inadequate," "Fairly Conventional," "Ne'er-Do-Well," "Floater," "Dissipated," and "Socially Maladjusted."[169] It also involved very few clinical decisionmakers (four psychiatrists and four sociologists who worked in a parole system in the 1940s), so one possible explanation for the results is that a couple of these people might have not have been terribly good at their jobs.[170] A study by Wormith and Goldstone (1984) evaluates an instrument with more objective criteria and also found that it predicted recidivism better than did the parole board's actual (clinical) decisions. But the study relied on a small Canadian sample that the authors warned "should not be construed as being representative of incarcerated offenders either nationally or internationally."[171] The authors also warned that their measures of clinical and actuarial judgment were not really fairly comparable, in that the "clinical prediction" was not actually a risk prediction at all (instead, it was a binary parole decision), whereas the actuarial prediction was.[172] Finally, a study by Sacks (1974) includes a brief analysis of the clinical versus actuarial comparison, but the comparison it draws is nonsensical (the clinical measure is a parole decision, but only those granted parole are included in the sample) and the purported actuarial advantage is in any case small and not tested for significance.[173]

Nor are more recently published studies more compelling. Oleson et al. (2011) purport to compare the accuracy of clinical and actuarial judgment in federal probation officers' assessment of a probationer's recidivism risk.[174] The study included over a thousand decision-makers (but only one individual's case) and used a modern instrument recently developed by the Administrative Office of the U.S. Courts, called the Federal Post-Conviction Risk Assessment

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[168] Terrill L. Holland et al., *Comparison and Combination of Statistical and Clinical Predictions of Recidivism Among Adult Offenders*, 68 J. APPLIED PSYCH. 203 (1983) (finding that individual decisionmakers better predict violent recidivism, but actuarial prediction better predicts some measures of overall recidivism); James Smith & Richard I. Lanyon, *Prediction of Juvenile Probation Violators*, 32 J. CONSULTING & CLINICAL PSYCH. 54 (1968) (finding that a juvenile recidivism base expectancy table was slightly more accurate than the predictions of two clinical assessors, but was less accurate than simply predicting that everyone would recidivate would have been).

[169] Daniel Glaser, *The Efficacy of Alternative Approaches to Parole Prediction*, 20 AM. SOC. REV. 283, 285(1955).

[170] *Id.* Problems like this recur in other actuarial versus clinical studies as well—they state a sample size consisting of the number of subjects, and calculate statistical significance as though all of the observations were independent. This approach is misleading because there are usually a far smaller number of clinical decision-makers involved in the study (standard errors should instead be calculated with clustering on the decision-maker).

[171] J. Stephen Wormith & Colin S. Goldstone, *The Clinical and Statistical Prediction of Recidivism*, 11 CRIM. JUST. & BEHAV. 3 (1984).

[172] *Id.* at 20. A general issue with studies that compare real-world "clinical" parole decisions to recidivism risk prediction instruments is that the predictive value of a *prediction* is being compared to that of a *decision*. Wormith et al. explain that it is unsurprising that the parole decision does not predict recidivism as well as an actuarial prediction does, because the parole decision might be affected by factors unrelated to risk prediction, and by the desire to err on the side of caution. *Id.*

[173] Howard R. Sacks, *Promises, Performances, and Principles: An Empirical Study of Parole Decisionmaking in Connecticut*, 9 CONN. L. REV. 347, 402-403 (1977).

[174] J.C. Oleson et al., *Training to See Risk: Measuring the Accuracy of Clinical and Actuarial Risk Assessments Among Federal Probation Officers*, 75-SEP FED. PROBATION 52 (2011).

(PCRA).[175] The researchers asked officers to watch a video about an individual and predict his risk, and then to redo the exercise after being given the individual's PCRA score and training in the PCRA method. The researchers concluded that the officers were "more accurate" when they had the PCRA.[176] But their only evidence for that claim is that officers' risk scores after being given the PCRA and instructed on its implementation were *more consistent with the PCRA.* That is, in a study purporting to assess whether the PCRA improved prediction accuracy, the researchers assumed the PCRA was perfectly accurate; there was no other measure of what the "accurate" score was.[177]

In sum, the shibboleth that "actuarial prediction outperforms clinical prediction" is—like the actuarial risk predictions themselves—a generalization that is not true in every case. Its accuracy depends on the outcome being evaluated, the actuarial prediction instrument, the clinical predictors' skills, the information on which each is based, and the sample. There is little evidence that the recidivism risk prediction instruments offer any discernable advantage over the status quo, and even if they did, that does not mean particular contested variables need to be included in the model. Alternative models might work as well or better.

C. Do the Risk Prediction Instruments Address the Right Question?

Even if the instruments *could* identify high-risk offenders, does that mean that using them would substantially advance the state's interests? EBS's advocates have typically taken this for granted, but the answer may well be no. The instruments tell us, at best, who is at the highest risk of recidivism. They do not tell us whose risk of recidivism will be the *most reduced* by incarceration. The two questions are not the same, and only the latter directly pertains to the state's penological interests.

At the outset, let's precisely identify the state interest that EBS is designed to serve. Its advocates generally refer either to crime prevention, reduction of incarceration, or both. These can be seen as two sides of the same coin: EBS is meant to help the state balance these interests, which are at least potentially in tension. I agree that this objective is compelling. Crime inflicts great harm on society, and so does excessive incarceration. Striking an appropriate balance between these concerns is an enormous and vital challenge.[178]

But that does not necessarily mean actuarial prediction of recidivism—even if it were perfect—substantially advances that interest. Suppose a judge is considering whether to sentence a defendant to five years in prison versus three. Assuming that the costs of incarceration are the same across defendants,[179] the question is whether the additional two years' incarceration will reduce enough crime to justify those costs. The EBS prediction instruments do not seek to answer that question. Their predictions are not conditional on the sentence. The

[175] This instrument includes qualitative and dynamic factors plus objective factors like age and education. It is in use for planning probation supervision and treatment interventions, not sentencing. Admin. Office of the U.S. Courts, Office of Probation and Pretrial Services, *An Overview of the Federal Post Conviction Assessment* 1 (Sept. 2011).

[176] Oleson et al, *supra*, at 54-55.

[177] The AOUSC's other validation studies for the PCRA did not compare its effectiveness to clinical prediction, and did not find anything close to *perfect* accuracy. AOUSC, *supra*, at 9.

[178] One could frame the state interest as being about the efficient use of finite incarceration resources to maximize crime prevention effects. Unless states have reached their prison capacities and cannot expand, though, I assume that the incarceration rate isn't fixed, so sentencing judges don't think about incarcerating one defendant as trading off with incarceration of another. Instead, they think about whether that particular sentence is worth its costs.

[179] This assumption may not be true. Some defendants have families that are affected, for instance.

samples in the underlying studies include people given all kinds of sentences. They measure recidivism within a particular period, measured from the time of release or (for probationers) from sentencing, but there are no variables relating to the sentence in the regressions. The judge accordingly cannot use the instrument to answer the question "How much crime should I expect this defendant to commit if I incarcerate her for five years?", or three years, or any other potential length. The judge only knows how "risky" she is in the abstract.[180]

This point has been ignored by the EBS literature. Bernard Harcourt, however, makes a similar point about the general deterrence consequences of police profiling and criminal history-based sentencing enhancements.[181] Some have argued that it is efficient for police to focus on groups that commit crimes at greater rates because it concentrates the deterrent effect of policing on the more dangerous groups. Harcourt responds that the fact that members of a particular group commit more crimes on average does not mean that that group is more readily deterred by policing. In fact, high-risk, socially disadvantaged groups may be less willing to cooperate with police, or less deterred by the marginal increase in detection risk, meaning that policing in their communities may actually deter *fewer* crimes than policing in other communities. The relevant question, Harcourt argues, is not rate of crime commission; it is "elasticity" to policing.[182]

Harcourt's argument focuses on general deterrence effects on community crime rates, but a similar problem arises when one considers the effects of marginal changes in incarceration specifically on the defendant's own future crime risk—that is, the very thing that the risk prediction instruments are ostensibly there to help judges minimize. If we are going to base incarceration length on group averages with the objective of reducing crime, then surely the relevant group characteristic is how much incarcerating its members reduces crime—its elasticity to incarceration. And that question is not the same as the question of recidivism probability. There is no particular reason to believe that groups that recidivate at higher rates are also more responsive to incarceration. EBS advocates presumably think that point is intuitive: lock up the people who are the riskiest, and you will be preventing more crimes. But that intuition oversimplifies the relationship between incarceration and recidivism.

Incarceration's effect on an individual's subsequent offending has two components. First, there is an *incapacitation effect*: while behind bars, he cannot commit crimes that he would have committed outside.[183] If the incapacitation effect were the *only* effect that incarceration has on subsequent crime, then it would be logical to assume that the state's incarceration resources are best targeted at the highest-risk offenders. But the situation is not that simple, because of the second component: the effect on the defendant's *post-release* crimes. I will refer to this as the "specific deterrence" effect, but it is really more complicated—it includes on the one hand specific deterrence (fear of reincarceration) plus any rehabilitative effect of prison programming, and on the other hand potentially criminogenic effects of incarceration (interfering with

[180] A related concern is that the length of incarceration may be a confounding variable in the underlying predictive model. If the people who have one set of characteristics tend to get longer sentences than those with other characteristics, then the comparison of their recidivism rates could be apples-to-oranges, because one group's rate is the average after, say, an average of 3 years of incarceration and the other group's rate is the average after 5. We thus don't even know from the models who is the riskiest *today*, much less who is the riskiest X or Y number of years from now.

[181] HARCOURT, *supra* note 12, at 122-36.

[182] *Id.*; Bernard E. Harcourt, *A Reader's Companion to* Against Prediction, 33 LAW & SOCIAL INQUIRY 265, 269 (2008).

[183] This incapacitation effect should be discounted for crime in prison, a complication I will bracket for simplicity.

subsequent employability, building criminal networks, and so forth). There is no intuitive reason to assume that the specific deterrence effect is determined by, or even correlated with, the defendant's recidivism risk level. It is very possible that higher-risk defendants (or some of them, anyway) might be more *inelastic* to specific deterrence and rehabilitation, and might be more vulnerable to the possible criminogenic effects of incarceration. If so, lengthening high-risk offenders' sentences might be more likely to increase the risk they pose after they get out, or at least to lower that risk less than locking up some low-risk offenders might.

If so, this disadvantage has to be weighed against the incapacitation advantage. Implicitly, the current EBS instruments (by ignoring the elasticity question) embrace the premise that only incapacitation matters, but this is not obvious. Most incarceration sentences are fairly short: in 2006, the median prison sentence in state courts was 1.7 years (and that is excluding jail sentences, which are shorter).[184] Moreover, EBS advocates often emphasize its value in determining whether a person should be incarcerated at all, versus probation; presumably, in cases on the incarceration margin, the incarceration sentence being considered is quite short. So, suppose a judge is considering whether to incarcerate a person for one year, versus zero. In that case the potential incapacitation effect lasts a year—a one-year slice of the defendant's offending is taken away. But all the other effects of the judge's choice may last, at least to some degree, the rest of the defendant's lifetime after that year.

There is simply no reason to assume the incapacitation effect is the most important factor, much less the only important factor—and if it is not, then the correspondence between risk prediction and crime-elasticity prediction may well be wholly lost. And this complication arises even if one assumes the relevant state interest only relates to reducing the *defendant's* crime risk. If we also consider effects on *other* individuals' crime commission, there are many more factors to consider, none of which have any intuitive connection to recidivism risk scores: general deterrence, expressive effects on social norms, future crime risk from the defendant's family members, substitution effects in criminal markets, and so forth.

While much of the current EBS literature totally ignores the question of responsiveness of recidivism risk to incarceration, some advocates have taken the general position that incarceration *increases* recidivism risk, citing as evidence simply the fact that persons released from prison recidivate at higher rates than probationers.[185] But this reasoning relies on an apples-to-oranges comparison. It is unsurprising that prisoners recidivate more often than probationers, because prisoners are usually more serious offenders with more prior criminal history. Also, the claim that incarceration generally increases recidivism would make the entire premise of EBS dubious: unless one is considering a life sentence, why identify the most dangerous criminals in order to incarcerate them if incarceration will only make them *more* dangerous? Risk prevention is only a plausible justification for incarceration if the sign on incarceration's effects goes the other way for at least some offenders—and a truly useful risk prediction instrument would try to identify who those offenders are.

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[184] Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistics* tbl. 1.3 (2009), http://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

[185] *E.g.*, McGarraugh, *supra* , at 1107; Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 594 (2009); Michael A. Wolff, *Lock 'Em Up and Throw Away the Key? Cutting Recidivism by Analyzing Sentencing Outcomes*, 20 FED. SENT. R. 320, 320 (2008).

Drawing solid causal inferences in this area is difficult. Some studies have used regression or matching methods to compare recidivism rates after controlling for observed characteristics like crime type and criminal history. [186] But while this approach is better than a raw comparison of means, it still does not produce strong causal identification. Causal inference based on regression depends on the assumption that all the important potentially confounding variables have been observed and controlled for. This assumption is often not valid, so one has to be very cautious not to interpret regression results to mean more than they do.

A particular concern arises when the treatment variable of interest (here, incarceration) might itself be influenced by a decision-maker's anticipation of the outcome of interest (here, recidivism). Measuring a statistical association between the two variables provides no way to disentangle which component comes from incarceration causing recidivism, which from anticipated recidivism risk causing incarceration, and which from other confounding variables that affect both sentencing decisions and recidivism outcomes. Regression does not solve the reverse causality problem unless the control variables in the regression account for *all* the reasons that a judge might think a defendant poses a higher risk. As we have seen already, though, even the best recidivism models do not even come close to accounting for all of the sources of individual variation in risk. They surely do not account for all of the sources of variation in judicial anticipation of risk, either—for instance, judges' appraisal of the detailed facts of the case or defendants' courtroom demeanor.

Some recidivism studies have used more rigorous quasi-experimental methods to assess causation, seeking to exploit an exogenous source of variation in incarceration length—that is, a source of variation that is not itself affected by anticipated recidivism risk or by any of the other various factors that affect recidivism risk. [187] Several studies take advantage of the random assignment of judges or public defenders. The intuition is that getting randomly assigned to a particularly harsh judge, or to a less capable public defender, will tend to increase a defendant's sentence in a way unrelated to the defendant's characteristics—thus, while the sentence is not entirely random, it has an effectively random component. Instrumental variables methods are used to estimate the effect of this exogenous increase in sentences on subsequent recidivism. Other studies take advantage of legal reforms that introduce sentencing variation.[188]

These studies have fairly consistently found that increased sentence length on average reduces subsequent offending, although the effect seems to be nonlinear—the marginal effect of increasing sentence lengths declines and eventually disappears as sentence lengths get longer.[189] Thus, specific deterrence lengths on average cut in the same direction as incapacitation effects do.[190] Reported incapacitation effects typically appear larger,[191] but the results of the two types of studies are hard compare. Incapacitation studies generally estimate the number of crimes

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[186] *See, e.g.*, Oregon Dep't of Corrections, *The Effectiveness of Community-Based Sanctions in Reducing Recidivism* 18-19 (Sept. 2002).

[187] For a useful recent review of this literature, see David A. Abrams, *The Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 929-36 (2013).

[188] *E.g.*, Shawn D. Bushway & Emily G. Owens, *Framing Punishment: A New Look at Incarceration and Deterrence* (Jan. 2010) (unpublished manuscript), www.human.cornell.edu/pam/people/upload/Framing-Jan-2010.pdf; Ilyana Kuziemko, *Going Off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime* 13-22 (Nat'l Bureau of Econ. Research, Working Paper No. 13380, 2007), available at http://www.nber.org/papers/w13380.pdf?

[189] *See* Abrams, *supra*, at 936.

[190] *Id.* at 936-39 (reviewing incapacitation studies)..

[191] *Id.*

avoided during each "person-year" of incarceration,[192] measuring incapacitation's full effect, whereas specific deterrence studies of subsequent recidivism do not estimate the full specific deterrence effect (that is, the change in crime commission over the defendant's whole remaining lifetime). Instead, such studies mostly have quite short follow-up periods, and generally measure not number of crimes committed but recidivism "survival," i.e., whether an offender makes it through the study period without being rearrested or reconvicted, and if not, how long he lasts.[193] Moreover, incapacitation studies sometimes use reported crime as their measure,[194] whereas recidivism studies use the more underinclusive measures of rearrest or reconviction.

Regardless, what the existing research on causal effects has *not* done is to estimate either specific deterrence or incapacitation elasticities that are conditional on the kinds of characteristics that are included in the EBS risk prediction instruments. Instead, the research has focused on estimating the causal relationship between incarceration and crime at a more general level, perhaps subdivided by broad crime category or by deciles of the sentencing-severity distribution, but not by detailed socioeconomic, demographic, and family characteristics. One Urban Institute study, by Avi Bhati, does estimate incapacitation elasticities that are gender, race, and state-specific, but not specific deterrence elasticities, and not broken down by socioeconomic status. It finds no major differences in the total number of crimes averted by either gender or race.[195] Notably, variations by state were far more dramatic, suggesting the need to worry about another problem with the risk prediction instruments: extrapolation from the sample on which they were developed to different offender pools in different jurisdictions. A study by Ilyana Kuziemko on specific deterrence effects finds that incarceration length increases have a "much stronger deterrent effect for older offenders than younger ones, for whom time served actually weakly increases recidivism." That is, young age—one of the most heavily weighted predictors of increased recidivism risk in the current instruments—actually appears to correspond to a lower effectiveness of incarceration length increases in deterring post-release recidivism. This suggests that the EBS instruments are weighing this factor in the wrong direction.

Perhaps future research will improve matters. To effectively inform the state's pursuit of its penological objectives, the research underlying future instruments would have to satisfy the following criteria:

(1) the use of valid causal identification methods, e.g., exploiting random assignment of judges;

(2) application of those methods to obtain estimates for incarceration's effects that are interacted with the variables that the state seeks to include in the instrument;

(3) accounting for nonlinear effects of incarceration length (e.g., the effect of a tenth year of incarceration is probably not the same as the effect of a first);

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[192] *E.g.*, Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?* 28 (Oct. 2010) (unpublished manuscript), http://ist-socrates.berkeley.edu/~ruckerj/johnson_raphael_crimeincarcJLE.pdf.

[193] *E.g.*, Kuziemko, *supra*, at 22.

[194] *E.g.*, Johnson & Raphael, *supra*, at 24

[195] *E.g.*, Avi Bhati, *An Information Theoretic Method for Estimating the Number of Crimes Averted by Incapacitation*, Urban Institute Research Report 24 tbl. 2 (July 2007) (showing estimated male elasticities that were slightly greater in most states, but not in every state and by very small margins). Expressed as a *percentage* reduction in crime rate, rather than an absolute number of crimes averted, females were actually more responsive to incarceration in every state studied. *Id.* at 27 tbl. 4.3.

(4) long enough follow-up periods to allow researchers to meaningfully approximate the change in an individual's lifetime recidivism risk;[196]

(5) incorporation of both incapacitation and specific deterrence effects, with comparable outcome measures;

(6) testing of the instrument within the jurisdiction in which it will be used, on a representative sample; and

(7) evidence of substantial *additional* explanatory power for each constitutionally problematic variable that the state seeks to include.

The current instruments do not do anything like this, and I am not optimistic that this research challenge will be overcome soon. And even it is, the above-discussed problems concerning the uncertainty of *individual* predictions would still apply to the prediction of individual elasticities.

Finally, it might also be objected that it would be unfair to treat an individual's greater expected responsiveness to incarceration as the basis for incarcerating her for longer—offenders might be penalized for *not* being incorrigible. I am sympathetic to this objection. But once sentencing is based on predicting future actions on the basis of demographic and socioeconomic considerations, "fairness" is no longer a decisive sentencing criterion anyway. I do not really advocate it, but at least an elasticity-prediction sentencing instrument would be connected to the state's penological interests. The current instruments are not.

IV. Will Risk Prediction Instruments Really Change Sentencing Practice?

Advocates of EBS sometimes defend it against disparity and retributive justice objects by arguing that it will not really change very much at all. These "defenses" come in two forms. The first is to observe the risk prediction instruments don't directly determine the sentence--they merely provide information to judges. The second defense is that minimization of the defendant's future crime risk already plays an important role in sentencing, so perhaps EBS merely replaces judges' individual judgments of that risk with more accurate actuarial predictions. I address these points in Sections A and B, respectively.

A. Does EBS Merely Provide Information?

One response to disparity concerns is to defend the instruments as innocuous insofar as they only provide information, rather than completely controlling the sentence.[197] The judge can take or leave the information, supplement it with her own clinical assessments of risk, and weigh other, non-recidivism-related factors. As a constitutional defense of EBS, this point could be framed in two ways. The strong form of the argument would assert that the state's adoption of

[196] Collecting data on an offender's entire life is unrealistic, but follow-up periods substantially longer than the typical one or two years are needed. Most people eventually desist from crime, and people who have not recidivated for 7 or 8 years (after release, if they were incarcerated) have quite low subsequent recidivism rates. *E.g.*, Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006). Thus, to study the effect of a first year of incarceration (versus none), eight or ten years of outcome data would probably be fine. The study should simply estimate total crime by each individual over a fixed period of time beginning at sentencing, conditional on (among other things) the share of that time that is spent in prison—that measure would incorporate both incapacitation and specific deterrence effects.

[197] *E.g.*, Malenchik v. State, 928 N.E.2d 564, 573 (Ind. 2010); David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1456 (2011); Kleiman, *supra*, at 301.

the risk prediction instrument does not itself amount to disparate "treatment" at all. Rather, it merely provides social scientific information to a government decision-maker, and surely the Constitution does not require sentencing judges to be ill-informed.

The problem with this framing, however, is that the point of evidence-based sentencing is for the sentence to be *based* on the statistical "evidence," at least in part. The risk score is not calculated for academic purposes. Even if the instrument itself is "only information," the sentencing process that incorporates it is not. Sentencing law already tells judges to consider recidivism risk,[198]and the instrument tells the judge how to calculate that risk. Inescapably, unless judges completely ignore the instruments (rendering them pointless), some defendants will receive longer sentences than they would have but for their group characteristics, such as youth, male gender, or poverty. And that, indeed, is the whole point: if the state did not want unemployed people to be, on average, given longer sentences than otherwise-identical employed people, why put unemployment in the risk prediction instrument? Moreover, arguably even the information provision itself is constitutionally troubling: it represents state endorsement of statistical generalizations like those that, in the gender and poverty contexts, the Supreme Court has condemned.

To be sure, for any individual defendant, each factor included in the risk prediction models is not the *only* determinant of the sentence—it is merely one determinant of the risk score. If a court were looking for ways to distinguish *Bearden*, it could seize on this difference. That case involved revocation of probation, and the Court emphasized that because the trial court had initially chosen probation, it was clear that "the State is seeking here to use as the *sole* justification for imprisonment the poverty of a probationer."[199] This distinction is unpersuasive, however. Anything treated as a sentencing factor will at least sometimes solely trigger a change in the sentence relative to what it would otherwise have been. To give a simple illustration, if a sentence is based on crime severity plus gender, and these factors together produce a 10-year sentence for a male when an otherwise identical woman would have received seven years, male gender is not solely responsible for the sentence; crime severity establishes the baseline of seven years. But male gender is solely responsible for the extra three years.

If this point is slightly more obscured in EBS cases than in *Bearden* itself, it is only because judges won't routinely state what alternative sentence they would have given if the defendant had had different characteristics. In *Bearden* the dispositive role of poverty could not be hidden because of the posture of the case: the defendant had been sentenced to probation and restitution until he failed to pay. But surely if a court's decision-making is unconstitutional in substance, it cannot become constitutional through obscurity of reasoning. In any event, here the use of the discriminatory factor is not obscure, even if its specific consequence for any given defendant is not transparent. A defendant subjected to an unconstitutional decision-making process should be entitled to resentencing.[200] Notably, the Supreme Court has often applied heightened constitutional scrutiny to the mere *consideration* of constitutionally suspect factors. In *Fisher v. University of Texas at Austin*, for instance, the Supreme Court applied strict scrutiny to the use of race as one of many factors in university admissions—indeed, as Justice Ginsburg

[198] *E.g.*, 18 U.S.C. 3553(a).
[199] *Bearden*, 461 U.S. at 671.
[200] *See* Chapman v. California, 386 U.S. 18 (1967).

characterized it in dissent, as a "factor of a factor of a factor of a factor" that very likely was not the reason that the plaintiff in the case was denied admission.[201]

The claim that "it's just information" thus should not enable EBS to *avoid* heightened equal protection scrutiny. A weaker, and more persuasive, version of this claim is that it should make it easier for EBS to *survive* such scrutiny under a "narrow tailoring" requirement. Analogously, in the affirmative action cases, the Court has held that race may be used as a "plus factor" (if there is no race-neutral alternative that will suffice), but it has squarely rejected the use of racial quotas.[202] But the fact that the risk prediction instruments do not completely displace all other sentencing factors is a point in its favor when assessing narrow tailoring, but it is hardly dispositive, as *Fisher* suggests. One must also consider the extent to which they advance the state's interests as well as the availability of alternatives.

Moreover, although *Fisher* made narrow tailoring somewhat challenging to demonstrate even in the affirmative action context, it should be even harder to show in the EBS context. Educational affirmative action involves a state interest that is itself defined in race-conscious terms: student body diversity, of which "racial or ethnic origin" is an "important element," although not the only one.[203] It is more than plausible that considering race as one admissions factor is narrowly tailored to the objective of ensuring racial diversity, and that no totally race-blind alternative will suffice to achieve that objective. In the EBS context, however, the state's penological interests are not defined in group-conscious terms, and the problematic classifications in the instruments are not so closely linked to those interests.

B. Does EBS Merely Replace One Form of Risk Prediction With Another?

Another response to the disparity concern (and to the retributivist objection raised by other critics) is to say that none of this is new: risk prediction is already part of sentencing.[204] If judges are *not* given statistical risk predictions, many will predict risk on their own, perhaps relying implicitly on many of the same factors that the statistical instruments use, such as gender, age, and poverty; actuarial instruments will merely allow them to do so more accurately.[205] One could take this argument further: Conceivably, judges' current clinical assessments could *overweight* some of those variables relative to the weights assigned by the actuarial instruments.[206] These possibilities not been empirically tested and cannot be ruled out.

As a constitutional matter, this "substitution" defense is not very persuasive. It is not likely that courts would uphold an across-the-board state policy explicitly endorsing an otherwise impermissible sentencing criterion on the rationale that the same variables *might* sometimes

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[201] Fisher v. University of Texas at Austin, 570 U.S.__, ___ (2013) (Ginsburg, J., dissenting).

[202] *Fisher*, 570 U.S. at __.

[203] *Id.* at __.

[204] *See, e.g.*, 18 U.S.C. 3553.

[205] *See, e.g.*, Oleson, *supra*, at 1373; Patton, *supra*, at 1456; Jennifer Skeem, *Risk Technology in Sentencing: Testing the Promises and Perils*, 30 JUSTICE Q. 297 (2013); Bergstrom & Kern, *supra*, at 2; Commentary to Draft MPC § 6B.09; *Michael H. Marcus, MPC--The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 757 (2009); Branham, *supra*, at 169.

[206] This is perhaps a particularly realistic possibility with respect to race, because of its absence from the instruments: if judges currently implicitly take race into account in predicting recidivism risk, it is possible that giving them a statistical prediction that is not race-specific could cause them to stop doing so. Thus, even if EBS increases the weight given to socioeconomic variables that are correlated with race, it could reduce the weight given to race itself, offsetting or even reversing its expected effect on racial disparity.

already have been used *sub rosa*. In general, the difficulty of eradicating subtle unconstitutional discrimination does not justify codifying or formally endorsing it.

Moreover, the "substitution" defense depends on a questionable empirical premise. Do the EBS instruments really merely substitute one form of risk prediction for another? Or does providing judges with statistical estimates of recidivism risk increase the salience of recidivism prevention in their decision-making vis-à-vis other punishment objectives? Notably, some EBS advocates affirmatively express the hope that EBS will lead to an expanded emphasis on recidivism prevention.[207] If it does, it will almost surely increase the role of the individual demographic and socioeconomic characteristics used in the EBS instruments. Those characteristics are not relevant to retributive motivations for punishment (or may even cut the other direction).

There are logical reasons to suspect that EBS might increase the emphasis judges place on risk prediction. Most judges no doubt recognize that predicting recidivism risk is difficult, and that difficulty might well lead many of them to discount this factor. If such a judge is presented with a quantified risk assessment framed as scientifically established, they may well give it more weight.[208] In many other legal, policy, and other decision-making contexts, scholars have observed that judges and other decision-makers often defer to scientific models that they do not really understand, and to "expert" viewpoints.[209] Moreover, sentencing is high-stakes, complex decision-making that many judges describe as weighing heavily on their emotions,[210] rendering the use of a simple, seemingly objective algorithm potentially appealing.[211] For elected judges, research has shown that political considerations influence sentences,[212] and reliance on risk predictions might provide political cover for release decisions while making it

[207] *E.g.*, Hyatt, Bergstrom, & Chanenson, *supra*, at 266.

[208] *See* Hannah-Moffat, *supra*, at 7 ("Risk scores impart a moral certainty and legitimacy into the classifications that they produce, 'allowing people to accept them as normative classifications and therefore as scripts for action."); Harcourt, *supra*, at 273 (describing the "pull of prediction").

[209] *E.g.*, Janine Pearson, *Construing* Crane: *Examining How State Courts Have Applied its Lack-of-Control Standard*, 160 U. PA. L. REV. 1527, 1550-53 (2012) (discussing jury overreliance on expert testimony of dangerousness in civil commitment hearings); Michael H. Shapiro, *Updating Constitutional Doctrine: An Extended Response to the Critique of Compulsory Vaccination*, 12 YALE J. HEALTH POL'Y, L. & ETHICS 87, 128-29 (discussing the problem of judicial overreliance on expert claims of causation); Kathryn M. Campbell, *Expert Estimates from 'Social' Scientists*, 16 CAN. CRIM. L. REV. 13 (2011); Robert L. Kane, *Creating Practice Guidelines: The Dangers of Over-Reliance on Expert Judgment*, 23 J.L. MED. & ETHICS 62, 63 (1995); Robert E. Schween & Steven P. Larson, 32 ROCKY MTN. MINERAL L. INST. PROC. 22 (1986) (describing courts' and policymakers tendency to overrely on models and perceived expertise in the environmental context); Case, *Problems in Judicial Review Arising From the Use of Computer Models and Other Quantitative Methodologies in Environmental Decision Making*, 10 B.C. L. REV. 251, 256 (1982) (same).

[210] *See* Oleson, *supra*, at 1330 & n.2 (citing sources); D. Brock Hornby, *Speaking in Sentences*, 14 Green Bag 2d 147, 157 (2011); Judge Robert Pratt, *The Implications of* Padilla v. Kentucky *on Practice in United States District Courts*, 31 ST. LOUIS UNIV. PUBLIC L. REV. 169, 169 (2011) ("Sentencing is unquestionably the most difficult job of any district court judge."); Judge Thomas M. Hardiman, *Foreword*, 49 DUQ. L. REV. 637, 637 (2011) ("Any preconceived notions that a judge may have about sentencing upon taking the bench are quickly dwarfed by the awesome responsibility it entails.").

[211] This point may help to explain the continuing heavy weight federal judges give to the sentencing guidelines that they are not required to follow.

[212] Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004) (finding that judges increase sentences as elections approach).

politically difficult to release offenders rated as high-risk.[213] Prosecutors might similarly feel political pressure to push for harsh sentences for offenders rated high-risk, but free to offer better deals to those rated low-risk.[214]

To be sure, some of the research on clinical versus actuarial prediction has suggested that clinicians may resist reliance on actuarial instruments, but that research comes from medical and mental health diagnosis settings in which the clinician may be much more confident in their professional diagnostic skills than judges are in their ability to foresee a defendant's future.[215] Even if a particular judge does not really trust the instrument, its prediction might influence her thinking through anchoring.[216] And presenting the judge with a risk prediction instrument may simply remind her that risk is a central basis on which the state expects her to base punishment.

All of this is speculative; no empirical research documents how risk prediction instruments affect judges' weighting of recidivism risk versus other factors. To provide some suggestive evidence informing the question, I carried out a small experimental study, with 83 law students as subjects. All subjects were given the same fact patterns describing two criminal defendants and told to recommend a sentence for each. The key experimental variation was that for half the subjects, the descriptions also included a paragraph with the defendant's score on a Recidivism Risk Prediction Instrument (RRPI) and a brief explanation of what the RRPI was.

The cases involved the same conviction (grand larceny of $100,000 worth of jewelry) and the same minimal criminal history (one misdemeanor underage-drinking conviction). Both defendants were male, and no race was mentioned. Beyond that, their characteristics varied sharply. Robert was a middle-aged, married, college-educated executive in a jewelry store chain, and was motivated to steal from the chain's stores by concern about the cost of his daughters' college education. William was a 21-year-old, single, unemployed, alcoholic high school dropout with incarcerated siblings, recently evicted from his parents' home, who was visiting a mall looking for retail work when he saw a jewelry display case open and spontaneously grabbed a bunch of items. These fact patterns allowed some possible distinctions between the defendants' criminal conduct. William's crime was spontaneous, while Robert's involved an extended course of conduct, elaborate deceptive behavior (replacement of the jewels with fakes), and arguably more victims (buyers of the fakes). These distinctions allowed subjects primarily motivated by retribution to have a possible basis for distinguishing the two—likely in William's favor—whereas those inclined to rely on a defendant's characteristics to assess future dangerousness would likely give William a longer sentence.[217] Subjects were given a wide statutory sentencing range (zero to 20 years) and not told what punishment theories to prioritize.

All subjects were given all these underlying facts; the difference was whether they were also translated into an RRPI score. Robert's probability of recidivism was rated "low risk" while William's was "moderate-to-high risk." Although the RRPI is fictional, these ratings realistically approximate the difference that one would see using real instruments. For instance, on the Missouri instrument's -8 to 7 scale, Robert would have a perfect score of 7, while William

[213] Hannah-Moffat, *supra*, at 30 ("The use of risk scores can have considerable cache[t] with 'elected' judges and prosecutors who must defend their decisions to an electorate concerned with security.").
[214] *Id.*
[215] *E.g.*, Atul Gawande, THE CHECKLIST MANIFESTO (2009).
[216] *See* Prescott & Starr, *supra*, at 325-30 (reviewing anchoring research); Cass R. Sunstein et. al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1170 (2002).
[217] Students' comments after completing the exercise supported this interpretation.

would score -1 ("below average"). Subjects considered the scenarios in a prescribed, randomized order.

The results in Table 2 suggest that the RRPI score sharply affected the relative sentences some subjects gave to Robert and William. Among the 43 students who were not given the RRPI score, 17 gave Robert (the "low-risk" defendant) the higher sentence, 13 gave them the same sentence, and 13 gave William the higher sentence. Among the 40 students who received the RRPI score, only 8 gave Robert the higher sentence, 9 gave them the same sentence, and 23 gave William the higher sentence.

Table 2: An Experiment: Risk Prediction Instruments and Relative Sentence Outcomes

	(1) Robert Higher	(2) William Higher	(3) Which Higher? (William, Same, Robert)	(4) Sentence
	(Probit)	(Probit)	(Ordered Probit)	(OLS)
RRPI	-0.603*	0.710*	0.662**	-0.871
	(0.305)	(0.284)	(0.257)	(0.733)
William				-0.711
				(0.473)
william*RRPI				1.67*
				(0.61)

Cols. 1 & 2 show probit regressions of indicators for giving the "low-risk" or "high-risk" defendant, respectively, a higher sentence. Col. 3 shows an ordered probit regression of a variable valued at 2 if the high-risk defendant's sentence was higher, 1 if they received the same sentence, and 0 if the low-risk defendant's sentence was higher. Col. 4 is an OLS regression with sentence in years as the outcome. An indicator for which case the subjects considered first was also included. Standard errors in parentheses. *p<0.05, **p<0.01

I assessed the size and statistical significance of this shift toward higher sentences for William in several ways, using different definitions of the outcome variable. First, I used probit regressions to estimate the change in the probabilities that Robert would be given a higher sentence (Col. 1) or that William would (Col. 2.). These two are not just mirror-image inquiries, since there is a third option of giving both the same sentence. I next used an ordinal probit regression to assess change in the relative probability of each of these three possible outcomes (Col. 3). Next, I used the recommended sentence, in years, as the outcome variable, an approach that takes into account the magnitude and not just the direction of the sentencing distinctions (Col. 4). The results are statistically significant, and fairly sizeable, in all specifications. The use of the RRPI instrument is associated with an increase in William's sentence, relative to Robert's, of about 1.67 years (that is, 20 months), or about one-third of the overall average sentence (5 years). The average sentence given to William was about 0.8 years higher in the RRPI condition; the average sentence given to Robert was about 0.9 years lower.[218]

A reasonable interpretation of these results is that receiving the RRPI score caused at least some subjects to emphasize recidivism risk more, relative to other sentencing considerations, than they would have otherwise. Moreover, the instrument's apparent effect on sentences was not unidirectional—the instrument's estimated effect on the difference between

[218] Subjects who were given William's case first gave significantly higher sentences to both defendants than those who were given Robert's case first. But order did not significantly affect the *relative* sentences given nor the effect of the RRPI.

the two defendants reflected a combination of an increase in the high-risk defendant's sentence and a reduction in the low-risk defendant's sentence.

These results provide a piece of suggestive evidence that quantified risk assessments might affect the weight placed on different sentencing considerations. However, the study is small, and moreover, although much experimental research on decision-making uses student subjects, one has to be cautious in extrapolating the results of such studies to "real world" settings. A real criminal case is not a four-paragraph vignette, and judges are not law students—their experience and expertise may make them less suggestible. Still, it cannot be assumed that judges are wholly resistant to attempts to influence their sentencing decision-making. After all, judges tend to defer to non-binding sentencing guidelines, and research from other legal settings suggests that courts tend to defer to scientific expertise.[219] While it remains an unsettled question, for now there is no empirical evidence pointing the other way, and little reason to believe that EBS will *merely* substitute one form of risk prediction for another.

CONCLUSION

The inclusion of demographic and socioeconomic variables in risk prediction instruments that are used to shape incarceration sentences is normatively troubling and, at least with respect to gender and socioeconomic variables, very likely unconstitutional. As the EBS movement charges full steam ahead, advocates have minimized the first concern and almost wholly ignored the second. This is a mistake. To be sure, EBS has an understandable appeal to those seeking a politically palatable way to cut back on the United States' sprawling system of mass incarceration. It is difficult to persuade policymakers to reduce incarceration at the cost of increased crime, and EBS offers a technocratic solution to this normative dilemma: just identify the people who can be released without increasing crime. But this identification is not that easy, and moreover, there is no reason to assume, and no good way to ensure, that EBS will only lead to sentences being reduced. Even if it does, there is something troubling, at best, about using group identity and socioeconomic privilege as a basis for reducing defendants' sentences.

Note that while I have focused on sentencing, essentially the same arguments apply to use of actuarial instruments in - decisions, which is now routine in thirty states, including almost all of those that have not abolished discretionary parole.[220] This practice has been given little attention by legal scholars or the public,[221] and has rarely been challenged in court, perhaps because of the absence of counsel in parole proceedings or because parole decision-making is not very transparent. Many prisoners may not even know of the existence of the risk prediction instruments, much less understand how they work or their constitutional infirmities.[222] But while risk prediction unquestionably is properly central to the parole decision,[223] the use of

[219] *See supra* note 209.

[220] HARCOURT, *supra*, at 78-80.

[221] Scholarly criticism has focused on procedural concerns—mainly on the prisoner's lack of counsel at parole hearings. For this reason, the MPC claims to "'domesticate[]' the use of risk assessments by repositioning them in the open forum of the courtroom"—that is, by using them in sentencing instead of in parole (which the MPC seeks to abolish entirely). Draft MPC § 6B.09 cmt. (a). *See also* McGarraugh, *supra* (advocating barring the instruments at parole but using them in sentencing).

[222] In some states, the basis for the parole decision is confidential by law, so the parole board may refuse the prisoner's request to see the risk assessment. McGarraugh, *supra*, at 1079 & n.5.

[223] Indeed, risk is arguably the *only* legitimate parole consideration, because considerations such as retributive justice or general deterrence have already been considered by the sentencing judge. The only reason to leave the

demographic and socioeconomic variables to predict risk raises the same disparate treatment concerns that EBS does.[224] Moreover, the parole context may offer additional available alternatives to the constitutionally objectionable variables. For instance, rather than basing parole decisions on a prisoner's prior education or employment, one could consider his efforts while in prison to improve his future prospects, such as participation in job training or education programs. Such factors would speak to the prisoner's individual efforts to achieve rehabilitation, rather than to his socioeconomic background.

In contrast, it is easier to defend the use of risk prediction instruments in assignment of prisoners, probationers, and parolees to correctional and reentry programming (*e.g.*, job training), and to shape conditions of supervised release (*e.g.*, drug tests).[225] In this context, risk assessment is often combined with instruments assessing "criminological needs" and predicting "responsivity" to various such interventions. The empirical merits of such instruments are beyond this paper's scope, though I note that the responsivity instruments at least address the right question: what can be gained by treating an offender in a certain way? In any event, such uses of actuarial instruments raise less serious constitutional and policy concerns. To be sure, supervision conditions may be burdensome, especially if they affect the likelihood that probation or parole will be revoked, and programming decisions can affect access to valuable services. Still, the stakes are not as high as they are in sentencing, and therefore there is less reason to apply heightened scrutiny to socioeconomic classifications and other traits that are not treated as suspect outside the criminal justice context. Distributing access to correctional programming based on risk, needs, and responsivity assessments is not particularly different from distributing access to non-correctional social services and government benefits to those populations who most need them, which is a routine government function, subject to rational basis review unless suspect or quasi-suspect classifications are involved.

In sentencing, however, the defendant's most fundamental liberties and interests are at stake, as are the interests of families and communities. EBS advocates have not made a persuasive case that this crucial decision should turn on a defendant's gender, poverty, or other group characteristics. The risk prediction instruments offer little meaningful guidance as to each individual's recidivism risk, and they do not even attempt to offer guidance as to the way in which sentencing choices affect that risk. The instruments, and the problematic variables, advance the state's penological interests weakly if at all, and there are alternatives available. Risk prediction is here to stay as part of sentencing, and perhaps actuarial instruments can play a legitimate role. But they should not include these problematic variables, which do not offer much additional predictive value once crime characteristics and criminal history are taken into account. The current instruments simply do not justify the cost of state endorsement of express discrimination in sentencing.

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sentence indeterminate is to account for the fact that recidivism risk may evolve over time; those who believe risk prediction is an improper basis for punishment should simply oppose indeterminate sentencing. *See, e.g.*, Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Sentencing*, 48 SAN DIEGO L. REV. 1127, 1128-30 (2011).

[224] Note that while the Supreme Court once labeled parole an "act of grace," the deprivation of which a prisoner could not contest, this theory is now considered "long-discredited." Samson v. California, 547 U.S. 843, 864 n.5 (2006). States have no obligation to provide a system of parole, but once they do, its operation is constrained by the Constitution. Board of Pardons v. Allen, 482 U.S. 369, 378 (1987); Morrissey v. Brewer, 408 U.S. 471, 482 (1982).

[225] *See* Nat'l Ctr for State Cts, *supra*, at 16-20; Warren, *supra*; Melissa Aubin, *The District of Oregon Reentry Court: An Evidence-Based Model*, 22 Fed. Sent. R. 39 (2009) (discussing evidence-based practices in federal "reentry courts").

AMERICAN BAIL COALITION
Justice for All

EVALUATION OF THE BAIL REFORM EFFORTS IN JEFFERSON COUNTY, COLORADO

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October, 2015

I. Summary of Project and Reform Efforts

On September 15, 2015, Jefferson County, Colorado issued a report on the so-called Jefferson County Bail Project, and what the County called the "residual efforts" of changing bail practices that resulted from the project and continue to be used in practice today. The project was started in January, 2010 by first eliminating the bond schedule, moving to greater supervision by a county-run pretrial services agency as an alternative to financial conditions, expanding the use of personal recognizance releases, and using a risk assessment instrument to guide bail-setting decisions. The American Bail Coalition obtained a series of documents, available upon request, from the County in order to evaluate whether the project and subsequent efforts were successful.

Although the County blames the lack of success of the project on the lack of stakeholder buy-in, the major elements of reforms that are being considered nationally were in fact implemented, and therefore what occurred as a result of such reforms warrants attention as to the results. In addition, the architects of the Jefferson County bail project have trumpeted the success of the project and used the success of the project as one of the key reforms informing the bail reform bill in Colorado in 2013, HB 13-1236, which was a move in part to reduce reliance on financial bail conditions in place of recognizance release and supervision based on the results of risk assessments. The same parties now continue their efforts nationally, selling the results of this suburban county west of Denver as a success story that should be modeled nationally.

II. The Statistical Measures Demonstrate a Lack of Success

The table below is a compilation of jail statistics in trend from 2008 to 2014 that were provided by the Jefferson County Sheriffs' Office. The table shows that by all indicators, the program did not achieve the desired results of fewer people incarcerated on a pretrial basis, shorter jail stays, and greater releases. Every percentage change indicator from 2008 to 2014 increased.

JEFFERSON COUNTY, COLORADO: Statistics on the Jefferson County Bail Reform Project Impact, 2008-2014
(source: Jefferson County, Colorado Sheriff's Office)

	2008	2009	2010	2011	2012	2013	2014	% Change
AVG DAILY PRETRIAL POPULATION	445	423	371	407	427	442	478	**7.42%**
AVG LENGTH OF JAIL STAY	23.59	24.46	25.27	24.71	25.32	25.89	24.96	**5.81%**
AVG LENGTH OF PRETRIAL JAIL STAY	6.53	7.65	8.24	6.81	8.23	8.06	8.44	**29.25%**
INMATES WITH PRETRIAL SERVICES BOND CONDITIONS	1929	1915	1470	2026	2333	2198	2271	**17.73%**
RELEASED WITHIN 1 DAY IN JAIL	1695	1637	1267	1756	1968	1807	1709	**0.83%**
NUMBER RELEASED MORE THAN 1 DAY IN JAIL	234	278	203	270	365	391	562	**140.17%**
AVERAGE NUMBER OF DAYS MORE THAN 1 DAY	3.19	3.9	4.87	5.47	3.89	4.1	3.33	**4.39%**

The data shows longer pretrial jail stays, greater pretrial populations, and a dramatic increase in the numbers of defendants who spend more than one day in jail: a 140% increase.

In the report of September 15, 2015 provided by the pretrial program suggested high appearance rates while on supervision, and yet data received from the Colorado State Court Administrator's Office clearly indicates that the package of reforms in combination exacerbated the problem and led to more warrants for failing to appear. The data shows that from 2010 to 2014 warrants issued for failing to appear in felony cases in Jefferson County increased by 42.2%, and in misdemeanor cases by 34.0%.

In addition, it is also important to keep in mind that crime dropped during the same time period when these numbers related to the pretrial population actually increased. The table below contains the number of criminal cases filed in Jefferson County from 2008 to 2014.

Criminal Case Filings, Jefferson County Colorado, Fiscal Year 2008-2014
Source, Annual Report, State Court Administrator's Office

	2008	2009	2010	2011	2012	2013	2014	% Change 2008 to 2014
Felony	3580	3686	3499	3640	3395	3423	3475	-2.93%
Misdemeanor	7506	7634	6671	6618	6740	6038	6102	-18.71%

This drop in crime is clearly reflected in the convicted population statistics, unlike the pretrial population statistics. Data from the Jefferson County Sheriffs' Office show that the convicted population in the jail declined by 19.4% between 2008 and 2014. Yet, the pretrial population continued to increase despite the decreasing arrests. In fact, the percentage of those in the jail who were not convicted increased by 20%, going from 35% in 2008 to 42% in 2014.

It is also important to consider that the amount of surety bail liability in Jefferson County also decreased by 28% during the period of 2009 to 2014.

III. Conclusion

Despite claims that the Jefferson County Bail Reform Project, which informed changes in Colorado law and is being used as a national example of the success in bail reform efforts, the statistics do not in any way back that up. The move away from surety to bail to risk assessments, cash and recognizance bail, and greater supervision drove the pretrial population up and expanded the length of jail stays all during a period when the rates of crime dropped.

The JFA Institute
Denver, CO/Malibu, CA/Washington, D.C.

Conducting Justice and Corrections Research for Effective Policy Making

Evaluation of the Current and Future Los Angeles County Jail Population

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About the JFA Institute

Founded in 2003, the JFA Institute is a multi-disciplinary research center whose mission is to conduct theoretical and applied research on the causes of crime and the justice system's responses to crime and offenders. It receives diverse funding from federal, state, and local governmental agencies, as well as from foundations interested in developing and evaluating innovative crime prevention, law enforcement, sentencing and correctional policies and programs designed to reduce crime and to improve the quality of the adult and juvenile justice systems. We disseminate our studies and policy recommendations through research reports, criminal justice and criminology periodicals, books, and seminars.

Since the recent creation of the new JFA organization in 2003, we have become actively involved in conducting research and providing technical assistance to state and local agencies in several states. Our major clients include the National Institute of Corrections, National Institute of Justice, Bureau of Justice Assistance, and over 20 states and local public correctional and law enforcement agencies.

JFA is currently conducting similar jail studies for the New York City Department of Corrections, Orleans Parish Prison, Maricopa County (Phoenix), Baltimore City Detention System, Santa Cruz County, and San Francisco County.

Project Summary

Population, Crime and Arrest Trends

1. There has been a dramatic decline in the County's crime rate since 2000 and it is projected that the crime rate will continue to remain low.
2. The number of adults being arrested for felonies has declined, but the number being arrested for a misdemeanor level crime has not. The major reason why the misdemeanor arrest numbers have not declined is large increases for people arrested for possession of marijuana, violation of city ordinances and Failure to Appear (FTA) violations.
3. Collectively, the county's demographic, crime and arrest trends suggest no increases in the Los Angeles County Jail bookings.
4. While the County population will continue to increase, it will become an older population and have a smaller proportion of the at-risk population.

County Jail Trends

Bookings

5. There were approximately 400,000 admissions to the LASD's jail and field stations in 2011. Of this number about 143,000 were actually admitted to the jail custody division. Due to multiple bookings within a year, there were about 118,000 people booked into the custody division.
6. Consistent with the demographic, crime and arrest trends there has been a decline in bookings. Specifically, in 1990 there were 260,765 bookings. In 2000 it was 162,406. In 2011 it had dropped to 142,862.

Jail Population

7. Consistent with the decline in bookings, the jail population had significantly declined from a peak in 1990 of 22,000 to slightly under 15,000 by September 2011.
8. The decline in the jail population has served to lower the county's jail incarceration rate to 152 per 100,000 population which is well below the state rate of 189 per 100,000.
9. Jail population is largely composed of three separate legal statuses; pretrial (45%), sentenced with a pending charge (18%), sentenced (37%). The majority (78%)of the jail population is either charged or sentenced for a felony level crime.
10. About half of the pretrial inmates are charged with a violent or sex crime. Conversely only 25% of the sentenced population has been convicted of a violent or sex crime.
11. There is a very large medium custody population (about 70%) which is atypical of most California jail systems. The Northpointe Institute's classification system – in particular the re-classification system- is not being used properly which is causing some level of over-classification.

Length of Stay

12. The length of stay (LOS) has not been declining, remaining at the 40 day range. This number is significantly higher than the state average LOS of 17 days.
13. The longer LOS is related to a lack of pretrial release program, delays in court processing of criminal cases, and the sentence lengths being imposed by the court.
14. About 1/3rd of all bookings are released within three days – nearly 40 % are released within 7 days. Those who are not released within 7 days will remain in custody an average of 87 days.
15. Most (about 2/3rds) of the inmates are being released to community and/or under the supervision of probation and state parole.
16. There is a large number of inmates being released to ICE. These ICE inmates occupy about 2,100 beds on any given day in the jail.

Projected Jail Population Projections

17. Had AB 109 not passed, the current jail population would have likely remained at the 14,500 – 15,000 level.
18. With the passage of AB 109, the sentenced population will increase by about 7,000 over the next two years and then stabilize.
19. AB 109 will also serve to reduce the technical parole population and the CDCR inmate population waiting to be transferred to state prison.
20. The overall jail population will reach nearly 20,000 by the end of this year and peak at 21,000 by the end of 2013.

Recommended Alternatives to the Projected Population and Capacity Options

21. The projected 21,000 inmate population can be safely reduced by about 3,000 inmates by implementing the proposed LASD pretrial supervision and a re-entry program for sentenced inmates using the innovative EBI programs.

22. The bed capacity of the entire system can be increased by about 1,500 beds by modifying the NCCF facility and assuming the management of the several CDCR Los Angeles County conservation camps.

23. If the above two recommendations are implemented, the Central Jail can be closed within two years and the LASD would still have sufficient bed space. At a minimum it is feasible to move all men out of Central jail by end of 2013. But this assumes the proposed LASD pretrial and re-entry programs are implemented.

24. Other bed capacity options such as constructing a new female facility at the PCD and/or re-purpose the use of the Mira Loma facility collectively show

that should be more than sufficient bed capacity to manage the long-term projected jail population without the need for the Central Jail facility.

Other Issues

25. The Northpointe re-classification custody system needs to be adjusted to reduce the current level of over-classification of males and female inmates.

26. The COMPAS risk assessment instrument needs to be validated on a sample of released inmates. This is especially the case for the FTA risk instrument.

27. Since the LASD plans to expand the application of the EBI education programs, it would be appropriate at this time to begin a formal impact evaluation. Such a study can and should be done in tandem with the revalidation study of the COMPAS instrument.

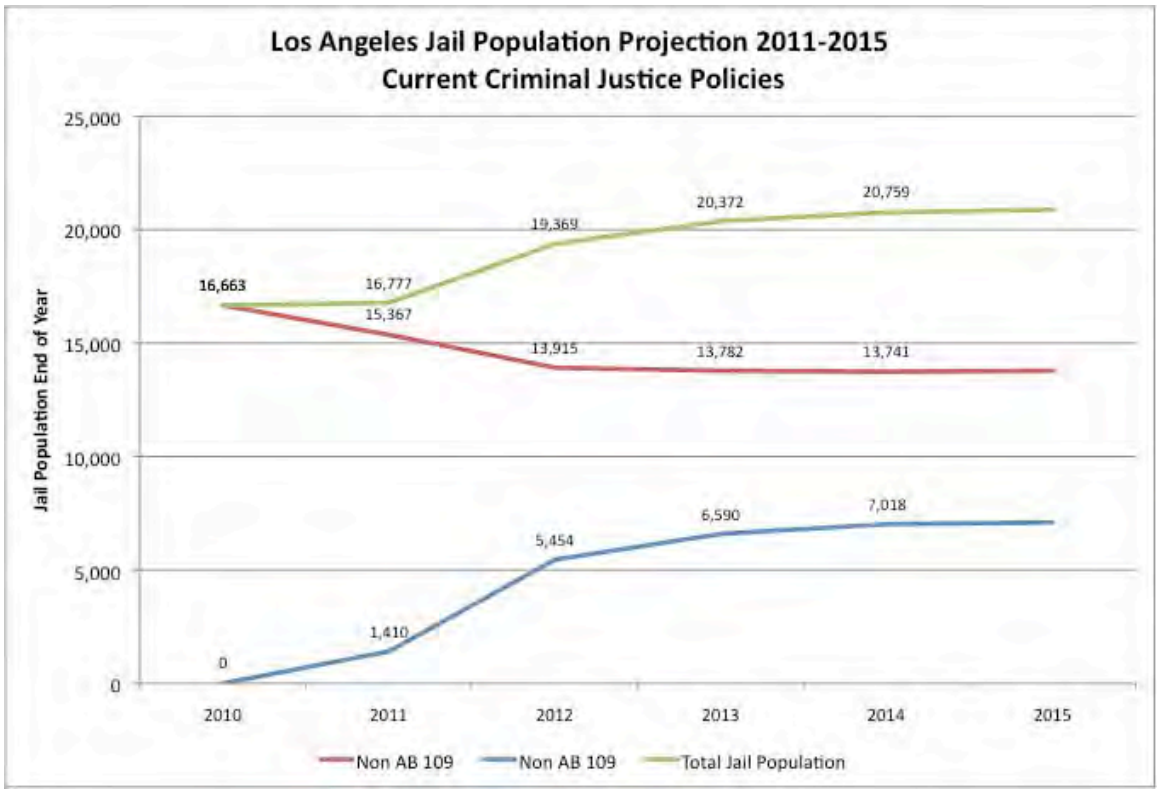
28. The LASD should develop a dedicated Research, Planning and Evaluation division. Several existing LASD staff can be recruited to staff this unit.

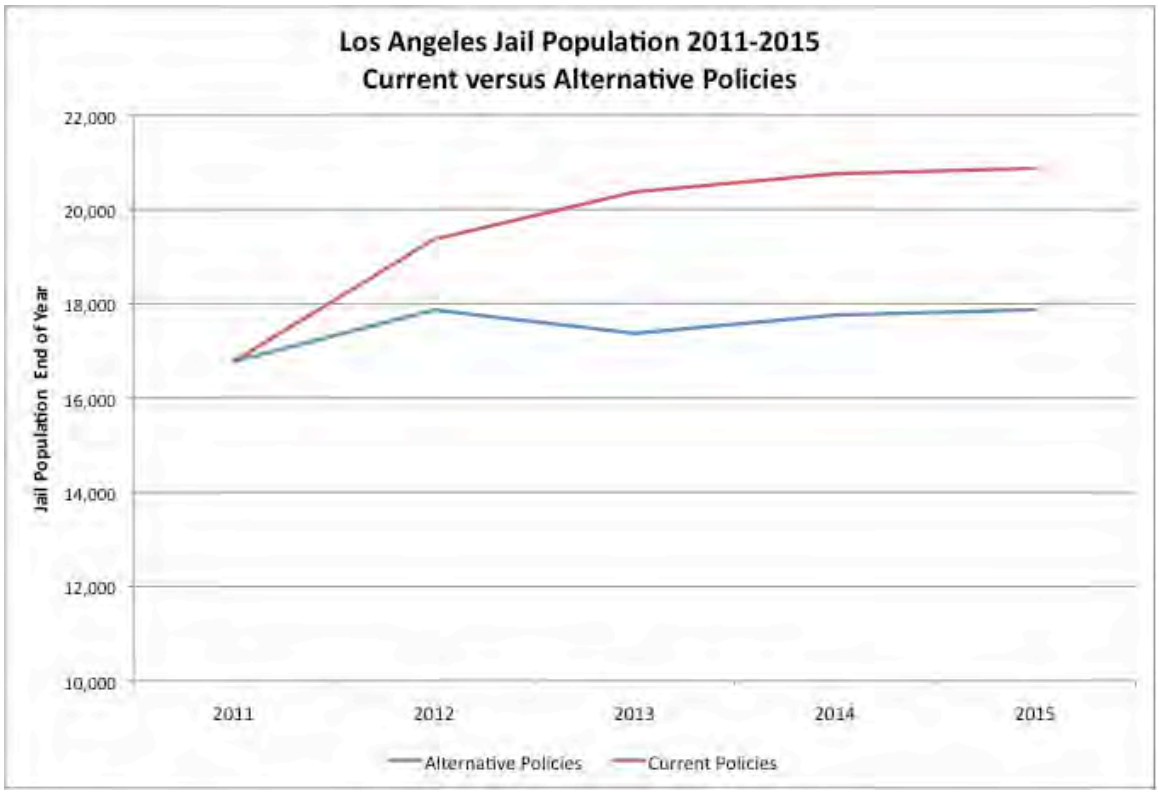
Summary of Population and Capacity Options

Item	Current Trend	Option A	Option B	Option C
Capacity	23,910	21,700	20,700	21,700
Central Jail	5,260	1,500	500	0
Functional Bed Capacity@ 90%	21,519	19,530	18,630	19,530
Populations by 2015				
Pretrial	10,325	9,325	9,325	9,325
County Sentenced	1,830	1,830	1,830	1,830
Awaiting Transfer to CDCR	600	600	600	600
CDCR Tech Violators	400	400	400	400
ICE Mira Loma	625	625	625	625
AB 109	7,096	5,096	5,096	5,096
Totals	20,876	17,876	17,876	17,876
Surplus Beds @90% Occupied	643	1,654	754	1,654

Summary of LASD Suggested Bed Capacity Options

Facility	Current	Option A	Option B	Option C
Central Jail	5,260	1,500	500	0
Twin Towers	4,820	4,820	4,820	4,820
CRDF	2,380	2,380	2,380	2,380
Peter Pitchess DC				
NCCF	4,294	5,294	5,294	5,294
South	1,536	1,536	1,536	1,536
South Annex	1,624	1,624	1,624	1,624
East	1,944	1,994	1,994	1,994
Out Patient	600	600	600	600
Conservation Camps	0	500	500	500
New Women's Facility	0	0	0	1,500
Totals	22,458	20,248	19,248	20,248
Mira Loma	1,452	1,452	1,452	1,452
Grand Totals	23,910	21,700	20,700	21,700
At 90% Capacity	21,519	19,530	18,630	19,530


Los Angeles Jail Population Projection 2011-2015
Current Criminal Justice Policies
Jail Population End of Year
25,000
20,000
15,000
10,000
5,000
0
16,663
16,777
19,369
20,372
20,759
15,367
13,915
13,782
13,741
0
1,410
5,454
6,590
7,018
2010
2011
2012
2013
2014
2015
Non AB 109
Non AB 109
Total Jail Population


Los Angeles Jail Population 2011-2015
Current versus Alternative Policies
Jail Population End of Year
22,000
20,000
18,000
16,000
14,000
12,000
10,000
2011
2012
2013
2014
2015
Alternative Policies
Current Policies

Introduction

This report is designed to provide a comprehensive evaluation of the Los Angles County jail population in terms of its attributes, current and future population trends. More importantly, it provides a plan that will allow the Los Angeles Sheriff's Department (LASD) to safely manage its jail population within its current jail facility capacity by implementing evidence-based policies that have been adopted in other jurisdictions. The plan has been reviewed by Sheriff Baca and he agrees with the plan's recommendations that will allow him to close the antiquated Central Jail facility and still safely manage the growing number of AB 109 inmates and thus avoid costly jail construction.

The study was requested and funded by the American Civil Liberties Union (ACLU). However, it was conducted with the strong support and cooperation of LASD and Sheriff Leroy Baca. A wide array of data were collected to complete the analysis and recommendations that was largely provided by the LASD. These data included detailed data on people admitted and released from the LASD jail system as well as aggregate level data on historical trends in Los Angeles County crime, arrest, jail bookings, releases and overall jail population. These data were used to better understand what factors are driving the jail population and what options can be employed to better manage that population in the future.

In September 2011, the Vera Institute released a major study on the Los Angeles jail system titled "Los Angeles County Jail Overcrowding Reduction Project". [1]That report was based on over two years of research and analysis conducted by Vera. It's fair to say that the report found many inefficiencies in the current criminal justice process that were, collectively increasing the jail population and costs. Over 30 recommendations were made by Vera, most of which were designed to reduce the jail population. Unfortunately to date, none of the recommendations have been adopted by the County's criminal justice system. Vera warned that there would be no impact unless "…every criminal justice agency leader must commit to reducing unnecessary detention and incarceration in the interest of justice and the efficient use of taxpayer resources" (p. iii). This level of commitment has not occurred as of yet.

The recent passage and implementation of AB 109 (California's Realignment Plan) makes it more urgent that action be taken. We estimate and the LASD concurs that the transfer of state sentenced inmates from the California Department of Corrections and Rehabilitation (CDCR) to the local jail will increase the County's jail population by as much as 7,000 inmates by the end of 2014.

This study focuses on actions that the LASD and Sheriff Baca can take to minimize the impact of AB 109 as well as the other issues noted by Vera that serve to inflate the jail population. Just two basic recommendations are offered which if implemented, will lower the projected jail population.

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[1] *Los Angeles County Jail Overcrowding Reduction Project, Final Report, Revised,* September 2011, Vera Institute of Justice.

Los Angeles County Population, Crime and Criminal Justice Trends

A jail population is the product of the number of people being admitted and how long they remain in custody. In estimating the future size of any local jail population, it's important to understand some of the key factors that influence the number of jail admissions.

One such factor is the current and projected size of the County's resident population that is most likely to be arrested and booked into the adult jail system. This high-risk group consists of males between the ages of 18 and 39. According to the California Attorney General's Office, approximately 70% of the 1.2 million adult arrests that occurred in 2009 were people between the ages of 18 and 39. Further, 85% of these arrests were males. The demographics of the at-risk population is also credited by criminologists with the nation's and in particular California's declining crime rate.

The California Department of Finance provides projections of the state's and each county's future resident population. For Los Angeles County, the total county population is projected to grow by 24% over the next 40 years. However, for males age 15-39, the population grows, but at a much slower pace. Further, the proportion of the males age 15-39 year population declines slightly from 18% to 16 % (a relative rate decline of 9%).

Table 1. Projected Los Angeles County Populations 2010-2050

Year	Total	Males Age 15-39	% Of Total
2010	10,514,663	1,871,503	18%
2020	11,214,237	2,019,401	18%
2030	11,920,289	2,050,341	17%
2040	12,491,606	2,014,661	16%
2050	13,061,787	2,111,033	16%
% Change	24%	13%	-9%

Source: California Department of Finance

The next factor to review is the County's crime rate. The California Attorney General's Office is the repository for all of the crime data that is submitted by each county's law enforcement agency. Within each county are multiple law enforcement agencies which always include the county's sheriff.

The total number of serious crimes, which consists of murder, rape, robbery, assault, burglary, theft and arson, has been declining for a number of years. Between 2000 and 2009, the most recent time frame available for California counties, shows a sharp decline in the total number of serious crime since 2000 (Chart 1 and Table 2). Specifically, there has been a 22% reduction with the largest decline being for violent crimes (53% decline).

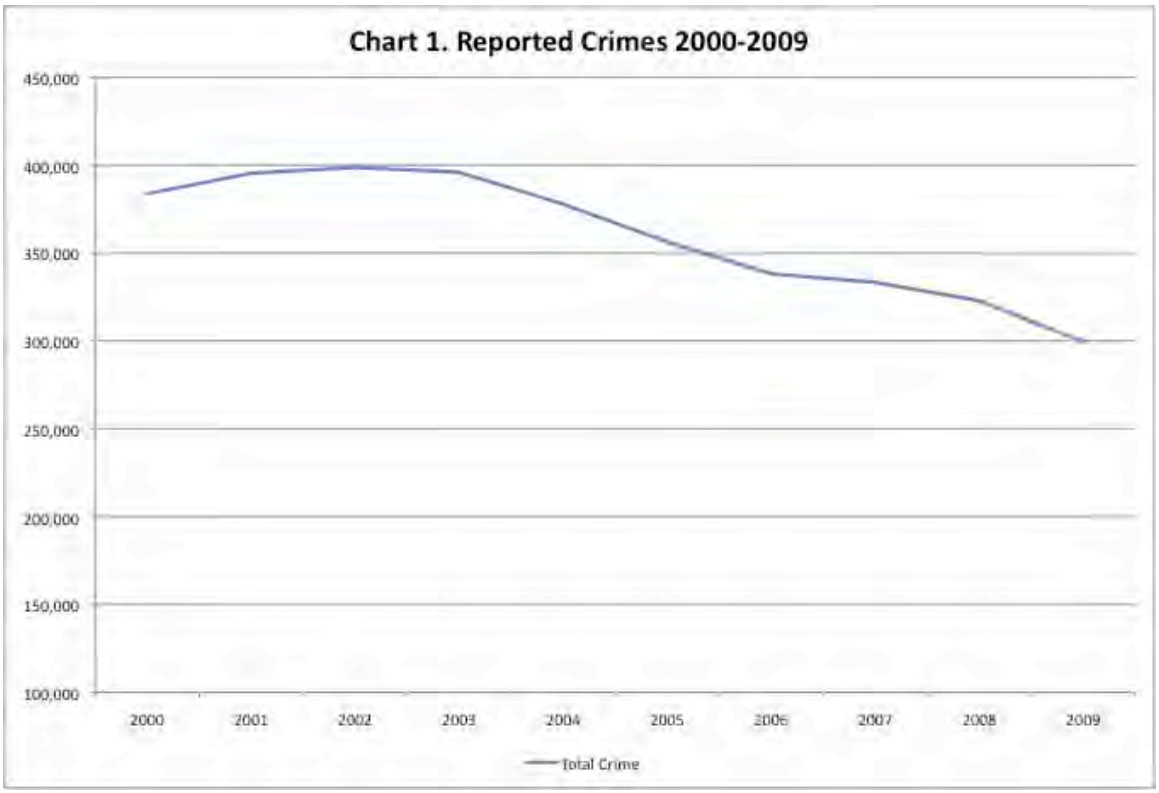

Table 2. Los Angeles County Reported Serious Crimes 2000-2009

Category/Crime	2000	2009	% Change
Violent Crimes	**90,037**	**54,747**	**-39%**
Homicide	1,000	699	-30%
Forcible Rape	2,761	2,114	-23%
Robbery	28,416	24,528	-14%
Aggravated Assault	57,860	27,406	-53%
Property Crimes	**293,735**	**244,672**	**-17%**
Burglary	60,597	50,558	-17%
M.V. Theft	64,265	46,710	-27%
Larceny-Theft	164,602	144,589	-12%
Arson	4,271	2,815	-34%
Total Crime	**383,772**	**299,419**	**-22%**

Source: California Attorney General, Criminal Justice Statistics Center

Both the Los Angeles Police Department (LAPD) and LASD (the two major sources of jail bookings) are reporting more current crime data. The LAPD is showing that serious reported crimes dropped by 7% between 2009 and 2010. The LASD has just released data for 2011 and 2012 for the months of January and February.

In its comparison, the LASD notes an uptick in the overall crime rate per 10,000 population the crime rate for those areas patrolled by the LASD (violent crimes have increased 6% while property crimes increased 10%). However, the five-year trend for the same two-month time period shows a 14% decline. More significantly, the crime rate today in the areas patrolled by the LASD is what it was in 1975 and the homicide rate is what it was in 1966.[2]

The number of people being arrested is a more central statistic as it reflects people who have the potential for being booked into the LASD jail system. In terms of adult arrests, the 2000 to 2009 patterns are somewhat mixed. The total number of arrests per year has increased 287,640 to 328,182.

For felony level arrests there was an increase from 2000 to 2005 followed by decline by 2009. Basically, the number in 2009 was almost the same as it was in 2000 despite an increase in the county population. So, the rate of arrests per 100,000 population has actually declined. The only increase with the felony level crime group was "other" which is not described in any detail.

Misdemeanor arrests represent a much larger group. Here, the trend has been upward but only for three crimes – possession of marijuana, violation of a city ordinance and Failure to Appear (FTA) for court orders. If one removes these three crimes from the total number of misdemeanor arrests, the adjusted total is unchanged. The significant fact about the FTA number is that such an arrest will result in a jail booking.

While this study does not directly concern FTA's, the sharp increase in these arrests suggests flaws in the current pretrial release process. For example, the Vera report noted that once released on bail or bond, the defendant does not receive any reminders from the court for the next scheduled court date. [3]

In terms of more recent data, the LASD reported a total of 48,370 adult felony arrests and 82,589 misdemeanor adult arrests or a total of 130,959 in 2010. This compares to 46,829 felony arrests in 2009 and 80,023 misdemeanors or a total of 126,352. The LAPD reported 129,133 adult arrests in 2010 versus 140,212 in 2009 – a 8% decline. If we combine these two major agency arrest numbers, we see no major increase in total adult arrests between 2009 and 2010.

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[2] http://file.lacounty.gov/lasd/cms1_148405.pdf

[3] Vera Institute, 2011, page xv.

Table 3. Adult Arrests for Los Angeles County 2000-2009

Crime Type	2000	2005	2009
Adult Felony			
Total Felony	**108,318**	**131,176**	**112,264**
Violent	35,596	31,260	30,808
Property	28,245	32,073	29,302
Drugs	31,894	46,411	30,780
Other Sex	1,685	1,617	1,739
Other	10,898	19,815	19,635
Rate per 100,000 Adults	1,727.40	1,992.20	1,626.50
Adult Misdemeanor			
Total	**179,322**	**197,487**	**215,918**
Marijuana	9,044	10,801	14,727
City Ordinances	28,277	36,178	37,052
FTA	18,154	25,589	40,281
Total Adjusted	*123,847*	*124,919*	*123,858*
Rate per 100,000 Adults	2,859.70	2,999.20	3,128.20
Grand Total	**287,640**	**328,663**	**328,182**
Rate Per 100,000 Adults	**4,587**	**4,991**	**4,755**

Source: California Attorney General, Criminal Justice Statistics Center

Historical Jail Admissions, Length of Stay and Average Daily Populations

We now shift our focus to the three key attributes of a jail system: The number of admissions, their length of stay (LOS), and the resulting daily jail population. In many ways, the size of a jail population is the product of decisions made by other criminal justice agencies. Certainly, the number of people arrested each year is a function of law enforcement deciding whom to arrest and for what charges. Once arrested, the courts decide whether to allow a defendant to be released on pretrial status (either vial bail or own recognizance). If not released, the defendant will remain in custody until the court disposes of the charges that have been filed by the prosecutor. Once sentenced, the now offender may have to serve additional time in the jail until the sentence is completed. There are other nuances in the factors that drive a jail population. If a defendant fails to appear in court and is re-arrested, he or she will be returned to custody. If an offender fails probation or parole, that will also often result in admission to the jail until that matter is resolved. In the next section of the report additional data and analysis is presented on these and other matters affecting the jail population.

As noted in the Vera report, once arrested, there are several locations a person can be detained. The LASD operates over 20 field stations where an arrestee can be held in custody for a short period of time. The LAPD has its own detention facility, as do other law enforcement agencies. Since the focus of this study is the Los Angeles County Jail system which consists of eight major facilities (excluding the Mira Loma facility which is reserved for ICE inmates), we only analyzed people who were admitted to that core jail system.

As shown in Table 4, there has been a dramatic change in all three key jail population indicators. Since 1990, when the jail population was just over 22,000, it had dropped to just below 15,000 by September 2011. Similarly, the jail incarceration rate per 100,000 had dropped from 247 to 152 by October 2011.

The primary reason for decline was a dramatic reduction in the number of bookings – from 260, 765 in 1990 to 142,862 in 2011. The decline in bookings appears to be the result of more persons being diverted at the LASD field stations and greater use of field citations. More recently, as noted above, there has been a decline in the number of persons arrested for felons.

The LOS data shows that since 2000, it has remained at the 40-day level. Compared to other large jail systems, this number appears to be high. For example, Maricopa County (Phoenix), Broward County (Ft. Lauderdale), and New York City, have lengths of stay that are below the 30-day range. But it may be that the LOS has not declined to the levels reported in other jurisdictions because as the Los Angeles jail population has declined, the residual jail population has become increasingly composed of persons charged with or sentenced for felony level crimes.

Table 4. Los Angeles County Jail Bookings, Length of Stay and Population 1990 - 2011

Attribute	**1990**	**2000**	**2010**	**2011**
Jail Bookings	260,765	162,406	151,932	142,862
ALOS	31 days	43 days	40 days	39 days
Jail Population	22,003	19,297	16,663	14,863
Incarceration Rate	247	203	170	152
County Population	8.9 million	9.5 million	9.8 million	9.8 million
Crime Rate	4,595	2,754	2,021	NA

Source: California Department of Finance, California Attorney General , and LASD Booking and ADP Daily Reports

Table 5 makes some direct comparisons between the Los Angeles County jail population and overall California jail population. These data come from the California Department of Corrections (CDCR), Correctional Standards Authority (CSA) website plus data provided by the LASD. What is striking is that the only two statistics that distinguish the Los Angeles County jail population are the much longer LOS (39 days versus 17 days) and the much lower jail incarceration rate. The state's LOS would be much lower if Los Angeles was removed from the calculations. One would have expected the longer LOS to generate a much higher incarceration rate, but it does not.

Table 5. Comparisons Between Los Angles County and State-wide Jail Populations September 2011

Indicator	California	Los Angeles
Total Population	71,293	14,749
Pretrial	71%	70%
Felony	80%	78%
Incarceration Rate per 100,000 population	189	152
Average LOS	17 days	39 days

Source: CDCR, CSA Jail Survey, 3rd Quarter 2011

Current Los Angeles Jail Admissions, Releases and the Daily Population Attributes

The next section of the report evaluates in greater detail the more current trends in Los Angeles County jail admissions, releases and the daily population. The analysis is necessarily separated into two time frames – pre and post AB 109. As most readers are now aware, the passage of AB 109 is and will continue to have a profound impact on both the state prison and local jail populations. Effective October 1, 2011, the state courts began sentencing state prisoners convicted of non-violent crimes and who have no prior violent or sex convictions to serve their sentence in the local jails. It is estimated that over 20,000 inmates labeled as the N3s will now be housed in the local jails. Of that number, about 7,000 are projected to be housed in the Los Angeles County jail system. Consequently, all of the analysis must now take into account the sudden surge in the local jail populations.

Relative to AB 109, the legislation will have no impact on total bookings and releases. The same number of people who are arrested and convicted of N3 crimes will continue to be processed by the court system. The only difference is that after being sentenced, the prisoner will remain in jail until the sentence is completed. All of the good time he or she would have received in the state prison still applies. A major difference is that there is no longer any parole supervision requirements for the offender. Once the sentence is complete, the person's sentence is ended.

Chart 2 shows the most recent trends in the key legal statutes of the LA County jail population. Significantly the two key non-AB 109 populations (pretrial and county sentenced inmates) have actually declined slightly.

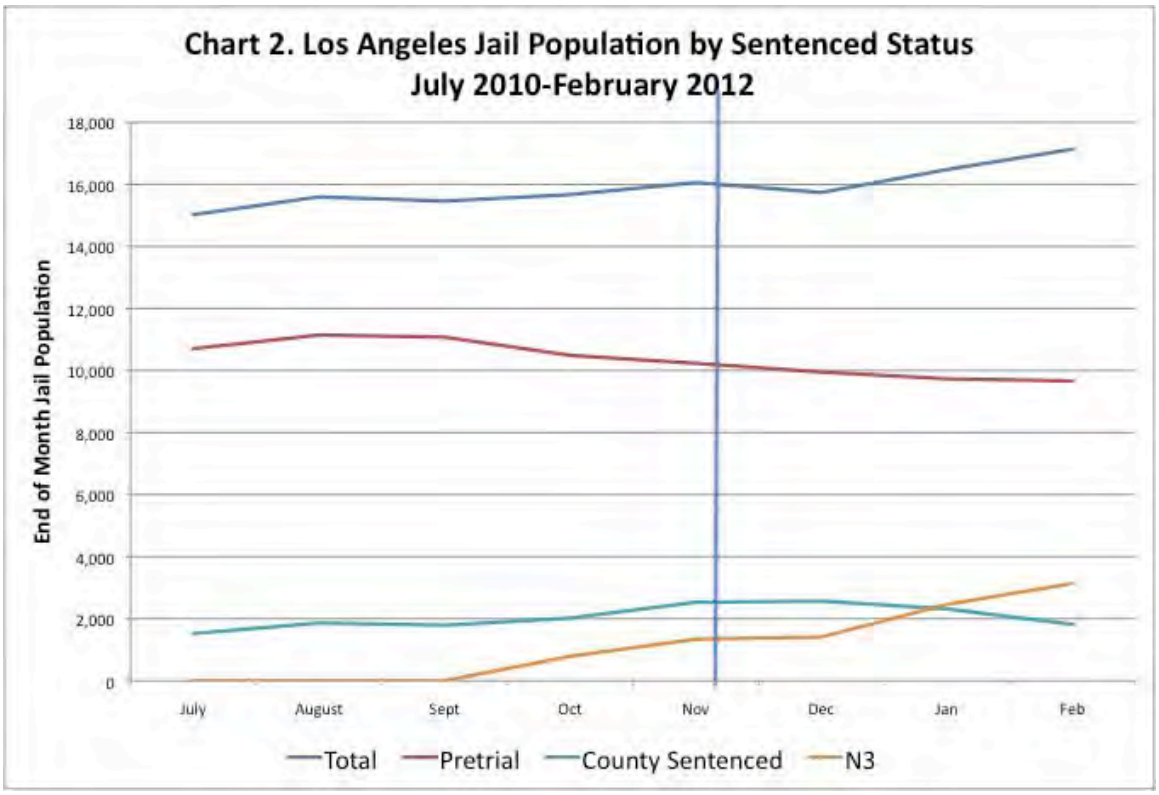
Chart 2. Los Angeles Jail Population by Sentenced Status
July 2010-February 2012
End of Month Jail Population
18,000
16,000
14,000
12,000
10,000
8,000
6,000
4,000
2,000
0
July
August
Sept
Oct
Nov
Dec
Jan
Feb
Total
Pretrial
County Sentenced
N3

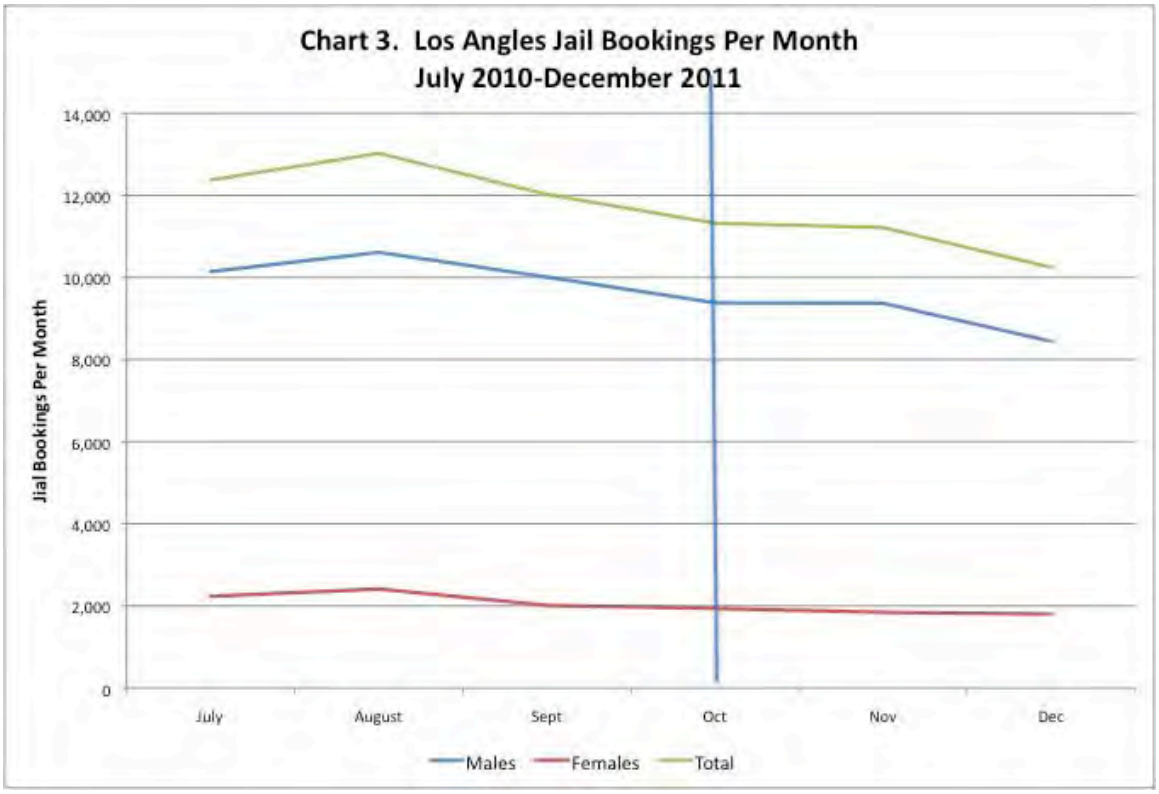
Chart 3. Los Angles Jail Bookings Per Month
July 2010-December 2011
Jial Bookings Per Month
14,000
12,000
10,000
8,000
6,000
4,000
2,000
0
July
August
Sept
Oct
Nov
Dec
Males
Females
Total

In fact, were it not for AB 109 the LA jail population would have been approximately 14,000. The increase has come from the AB 109 population which is rapidly approaching 3,500 and is likely to peak in two years at 7,000. If one looks at the bookings since July 2010, one sees a gradual decline in these numbers – again consistent with the demographic, crime and arrest trends (Chart 3).

As part of the study, JFA received a large data file that consisted of all persons admitted to the Los Angeles jail system via the Inmate Reception Center (IRC) since between January and December 2011. JFA programmers transformed that large data file into two key sub-files: One was a snapshot of the jail population as of December 2011 which consisted of 16,277 people; the other was a file of all inmates admitted and released in 2011. These two data files offered some detailed analysis of the attributes of people admitted and released from custody each year and the daily population that is housed in the system. We also received a second snapshot data file that was created by LASD staff on February 13, 2012 to verify our initial results and continue to track the growing AB 109 population.

The Daily Jail Population

Table 6 summarizes the key attributes of the daily population as of December 2011 for each of the major facilities. These statistics may differ slightly from the formal inmate counts reported by LASD on a daily basis, as there are some delays of entering all of the transfer and placement movements in a timely manner. But in general, the population attributes appear to be accurate and reflective of both the overall population and the population assigned to each facility.

Each facility and the system as a whole have capacities that exceed the inmate population. In total the inmate population was 16,277 while the total bed capacity was 20,445, not including the 1,624 beds at the temporarily closed South Annex facility. The total bed capacity as of this date was about 22,000. But as will be pointed out later on, the excess capacity will be largely exhausted in the next 18 months due to the influx of AB 109 inmates.

The population is largely male (88%) and largely non-white (49% Hispanic, 31% Black, and 15% white) with an average age of 34 years. Approximately 13% of the population is age 50 years or older while 28% are between the ages of 18 and 25 years.

Table 6A shows the primary offense of the February 12, 2012 population by sentence status. The primary offenses are homicide, assault, robbery, drug possession, drug possession with intent to sell, burglary and theft. Overall, about half of the pretrial and pretrial/sentenced populations are charged with violent or sex crimes. This profile shows that most of the minor crimes have been quickly removed from custody via the existing pretrial release process. The fact that most of the sentenced population have been convicted of a non-violent drug offense also shows that a sizeable portion of this population may be more suitable for alternative placements.

Table 6. Attributes of the Los Angeles County Jail Population by Facility - December 2011

Attribute	Central Jail	Twin Towers	CRDF	PDC NCCF	PDC South	PDC East	Out Patient	Mira Loma	Total
Bed Capacity	5,260	4,820	2,380	4,294	1,536	1,944	559	1,452	20,793
Totals	3,763	2,814	1,916	3,523	886	1,491	211	737	15,341
Gender									
Female	0%	1%	100%	0%	0%	0%	0%	0%	12%
Male	100%	99%	0%	100%	100%	100%	100%	100%	88%
Race									
Black	35%	34%	34%	32%	31%	29%	47%	0%	31%
Hispanic	44%	40%	39%	56%	45%	59%	38%	91%	49%
Asian	3%	4%	3%	2%	3%	3%	2%	9%	3%
White	18%	20%	23%	9%	20%	8%	12%	0%	15%
Average Age	36 yrs	38 yrs	35 yrs	31 yrs	39 yrs	28 yrs	45 yrs	34 yrs	34 yrs
Average Days in Custody to Date	150 days	121 days	101 days	106 days	98 days	153 days	123 days	`102 days	127 days
Security Level									
Low	12%	0%	20%	0%	21%	0%	7%	100%	15%
Medium	68%	74%	67%	73%	79%	100%	72%	0%	70%
High	20%	16%	11%	26%	0%	0%	19%	0%	14%
Unclassified	0%	0%	1%	0%	0%	0%	0%	0%	1%
Legal Status									
Pretrial	42%	50%	39%	44%	25%	44%	46%	100%	45%
Pre and Sentenced	21%	19%	15%	21%	10%	25%	18%	0%	18%
Sentenced	37%	32%	47%	35%	65%	31%	36%	0%	37%
Charge Level									
Felony	84%	82%	80%	85%	78%	87%	88%	0%	78%
Misdemeanor	13%	15%	17%	12%	20%	9%	8%	0%	15%
ICE	0%	0%	0%	0%	0%	0%	0%	100%	5%
Other	3%	3%	3%	3%	2%	3%	3%	0%	3%
% of Total	**25%**	**18%**	**12%**	**23%**	**6%**	**10%**	**1%**	**5%**	**100%**

Source: LASD data files. Not included is the temporary IRC population (about 500 inmates) and the PDC South Annex facility which was closed as of December 2011. That facility has a capacity of 1,624.

Table 6A. Los Angeles County Jail Population as of February 2012
Primary Crime by Sentence Status

Most Serious Charge	Pretrial		Pretrial and Sentenced		Sentenced	
Totals	6306	100.0%	3120	100.0%	7022	100.0%
Willful homicide	899	14.3%	555	17.8%	53	0.8%
Vehicular manslaughter	17	0.3%	8	0.3%	16	0.2%
Forcible rape	67	1.1%	32	1.0%	25	0.4%
Robbery	634	10.1%	390	12.5%	257	3.7%
Assault	1,082	17.2%	665	21.3%	1,279	18.2%
Kidnapping	90	1.4%	37	1.2%	10	0.1%
Lewd or Lascivious	169	2.7%	26	0.8%	45	0.6%
Other sex	142	2.3%	65	2.1%	96	1.4%
Sub-Total Violence/Sex	**3,100**	**49.2%**	**1,778**	**57.0%**	**1,781**	**25.4%**
Drug sale	162	2.6%	83	2.7%	298	4.2%
Drug poss w/ intent	167	2.6%	58	1.9%	246	3.5%
Marijuana possession	66	1.0%	34	1.1%	107	1.5%
Possession/other drug	648	10.3%	264	8.5%	1,163	16.6%
Sub-Total Drugs	**1,043**	**16.5%**	**439**	**14.1%**	**1,814**	**25.8%**
Burglary	549	8.7%	280	9.0%	763	10.9%
Theft	440	7.0%	211	6.8%	1,087	15.5%
MV theft	21	0.3%	12	0.4%	47	0.7%
Forgery	75	1.2%	47	1.5%	170	2.4%
Weapons	62	1.0%	44	1.4%	161	2.3%
DUI	107	1.7%	48	1.5%	239	3.4%
Arson	32	0.5%	4	0.1%	14	0.2%
Other felony	390	6.2%	170	5.4%	305	4.3%
Prob./parole violation	39	0.6%	33	1.1%	436	6.2%
Other	448	7.1%	54	1.7%	205	2.9%

The inmate classification system used by the LASD to house inmates is based on a decision-tree system that was developed by the Northpointe Institute. The vast majority of inmates are assigned to medium custody with only 14% placed in high custody and another 15% in low (or minimum) custody (Table 7). The proportion of low custody inmates is quite small compared to other jail systems and California jails. The CDCR, CSA jail survey noted earlier reported that for all of the California jails, the proportion assigned to minimum custody is 24%. That percentage would be even higher if the Los Angeles jail data were removed from the CSA statewide data which includes the LASD data.

Table 7: Comparison of State Jail and Los Angeles County Jail Inmate Custody Levels as of 2011

	State Total		Los Angeles Jail	
Custody Level	**Inmates**	**%**	**Inmates**	**%**
Max	22,478	32%	2,148	14%
Medium	31,425	44%	10,379	70%
Minimum	17,390	24%	2,304	15%
Total	71,293	100%	15,341	100%

Source: CDCR, CSA and LASD data files

There are two probable reasons for the low number of "low custody" inmates. First, the design of the Northpointe Institute decision tree instrument now includes a reclassification instrument that is to be applied to all inmates who have been in custody for 30-90 days depending upon their current custody level. The reclassification instrument, like all custody instruments, is designed to move prisoners to lower custody levels based on their institutional conduct. Since the vast majority of inmates do not become involved in serious disciplinary incidents while incarcerated, there should be a large shift from maximum to medium custody, and, from medium to minimum custody. As shown in Table 6, the average time served for the current jail population is 127 days which means that the vast majority of the current population should be on the reclassification instrument.

The Northpointe instrument design is also unique for three other reasons: It uses legal status as a restriction (pretrial versus sentence), it does not use age which is a good predictor of misconduct, and it does not have a separate scale for the females. All three of these omissions tend to over-classify inmates.

The Northpointe reclassification instrument also makes it difficult for some inmates to move to a lower custody level even if their conduct is positive. Further, based on interviews with the LASD classification staff and Northpointe representatives, the LASD is not applying the reclassification instrument as designed by Northpointe which is further restricting the movement of medium custody inmates to minimum custody thus causing some level of over-classification.

Spot audits of inmates housed at the South Facility found several well-behaved and older inmates who were housed in low security dorms, but were classified by Northpointe as high-medium (levels 7 and 6) custody. Clearly, the Northpointe system and the LASD's lack of adherence to the system needs to be addressed.

Another key statistic in Table 6 is the legal status of the inmate population. We had reported that the LASD aggregate level reports show that 70% of the current jail population is in pretrial status. But what that statistic does not show is that the 70% included inmates who have been sentenced on one or more charges and have at least one pending charge. Thus the percentage of "pure" pretrial cases is 45% and not 70%.

And for those that are in "pure" pretrial status (7,316 as of December 2011), 25% of them had a "no bail" order imposed by the court. These and other factors serve to greatly restrict the number of pretrial defendants who can be released on bail, surety bond or own recognizance. These other factors are described later on in the report.

Jail Admissions, Releases and Length of Stay

Last year, there were over 400,000 admissions into the LASD county-wide custody division which includes the various field stations.[4] As reported earlier, only 142,862 resulted in being booked into the main county jail system. This section of the report provides more detailed information on these admissions. What follows are some of the major findings:

1. Of the 142,862 bookings in a year approximately 25,000 were the same person who was admitted more than once in the 12-month time period. The actual number of mutually exclusive people booked into custody is approximately 118,000 (Table 8).

2. The overall LOS for the people who were released was approximately 40 days.

3. Approximately 37% of the bookings are released within 7 days.

4. Those who are not released within 7 days have an average LOS of approximately 87 days.

5. The vast majority (66%) of the releases are people being released to the community (pretrial) or under probation and parole supervision. Only 18% are being released prior to having their cases disposed of by the courts. This statistic shows that increasing the number of pretrial releases will have less of an impact on the jail population as opposed to a) reducing the time people spend waiting for their cases to be disposed of by the courts or b) reducing their time to serve after being sentenced.

6. The most common reasons for people being released from custody are a) completing inmates completing a sentence or b) being transferred to the custody of another correctional agency.

7. There are large number of releases being made to the CDCR for both new court commitments and parole violations. The numbers of releases will decline significantly with the implementation of AB109. Taking their place, in part, will be persons completing their AB 109 sentences at the Los Angeles County Jail.

8. However, the number of CDCR technical parole violation admissions and releases will decline as use of the parole supervision is not longer required for the AB 109 sentenced offenders.

[4] This number is consistent with the number reported in the previously referenced Vera Institute study.

9. There is a large number of people who are released to the custody of ICE (19,725 releases in 2011). These releases are largely Hispanic males who spend an average of 39 days in custody and occupy approximately 2,000 beds on any given day. They are also largely low and medium custody under the Northpointe Institute classification system.

Table 8. Summary Statistics on Jail Admissions and Releases – 2011

Total County-wide LASD Admissions	400,000
Total Jail System Custody Bookings	142,000
Number of People Admitted	118,000
Overall Length of Stay	39 days
% released within	
1 day	19%
2 days	30%
3 days	36%
7 days	47%
Number Released after 7 days	70,000
Average LOS if not released within 7 days	87 days

Source: LASD data files

Table 9. Primary Release Reason – 2011

Release Reason	Total	%
Pretrial Releases	**24,742**	**18%**
Sheriff release	4,622	3%
Pretrial Release to Detainer	611	0%
Bond or Bail	7,643	5%
Sheriff Misdemeanor Citation	3,780	3%
Dismissal of Charges	1,437	1%
Court Ordered Release	4,198	3%
ROR	2,451	2%
Sentenced Releases	**67,182**	**48%**
Sentence Expired	9,079	7%
Sentenced to Probation	4,139	3%
Transfer to State Parole Supervision	15,153	11%
Sheriff Shortened Sentence	38,811	28%
Transfer to Other Custody	**38,089**	**27%**
Transfer to Other State Prison	548	0%
Transfer to CA Prison	17,816	13%
Transfer to ICE/US Immigration	19,725	14%
Other/Unknown	**9,605**	**7%**
Total	**139,618**	**100%**

Source: LASD data files

Table 10. Summary of Inmates Released to the Custody of ICE 2011

Total ICE Releases to USIM	19,725	100%
Hispanic	18,095	92%
Male	19,002	96%
Low Custody	8,574	43%
Medium Custody	10,713	54%
LOS	39 days	
Daily Population	2,100	

Source: LASD data files

Jail Population Projections

Relying upon these trends population projections were developed to estimate the future size of the jail population. These estimates are separated into groups. The first estimate is for the jail population that is not being sentenced under AB 109. In essence, it represents what the population would have been had AB 109 not passed. The second is just for the AB 109 population. It is based on a data file being managed by the LASD which records the offense, sentence length, and projected time to serve as an AB 109 inmate.

Non-AB 109 Inmate Population

The current trends suggest that bookings and releases for the jail are likely to decline slightly over the next five years. The at-risk population for the County is not expected to increase. Crime rates are likely to remain low. In terms of arrests, they should also remain stable as a function of stable crime rates and no additions to the law enforcement patrol work force due to budget constraints. Overall there should be no increases in bookings for next few years under good trends and policies. The LOS for the non-AB109 releases should also remain constant at the 39-40 day rate.

Based on these assumptions, the Non-AB 109 jail population will remain at the current 15,000 with two adjustments. Traditionally, there is a pool of sentenced inmates who are awaiting transfer to the CDCR. Prior to October 1, 2011, this number averages about 1,100 inmates on any given day. Some portion of this group are now the AB 109 offenders who will included in the AB 109 estimate. As of February 1, 2012, the number of state inmates with no pending charges had dropped to 612 or about 500 below the pre AB 109 time period.

The second adjustment will be for the CDCR technical parole violators. Under AB 109, there is no post release supervision requirements for the N3 offenders. This means that the number of CDCR technical violators housed in the jail will also decline. Prior to AB 109, that number was 1,259. By February, it had declined to 748. One would expect that number to decline even further over the remainder of the year.

Based on these two adjustments, the base projection for the Non-AB 109 jail population declines to about 14,000 by the end of 2012 and remains at that level (See Table 11). Should crime rates continue to decline there would be a further reduction in the jail population but probably no more than another 1,000 reduction by 2015.

AB 109 Population Projections

The LASD has provided JFA with a data file that records key information about the number and attributes of persons being sentenced under AB 109. As shown in Table 12, as of February 29, 2012 there had been 3,535 persons so sentenced. The average sentence is 765 days with a projected length of stay of 305 days (which includes their pretrial credits). Based on these numbers, this population will reach approximately 5,454 by the end of this year and peak at about 7,000 by the year 2014.

Table 11. Current and Projected Los Angeles Jail Population

	End of Year				
Population	**2011**	**2012**	**2013**	**2014**	**2015**
Male Pretrial	9,275	9,182	9,228	9,182	9,219
Female Pretrial	1,062	1,051	1,057	1,051	1,056
Male County Sent	1,728	1,711	1,719	1,711	1,718
Female County Sent	367	363	365	363	365
CDCR Sentenced	815	600	603	600	600
CDCR Tech Parole	754	400	402	400	400
ICE Mira Loma	751	625	628	635	625
Non AB 109 Total	**14,752**	**13,933**	**14,002**	**13,942**	**13,982**
AB 109 Males	1,542	4,482	5,460	5,822	5,896
AB 109 Females	298	972	1,130	1,196	1,200
Sub-Total AB 109	1,410	5,454	6,590	7,018	7,096
Grand Total	**16,162**	**19,387**	**20,592**	**20,960**	**21,078**

This number of 7,000 is consistent with an early projection made by JFA as part of the federal court order in the *Plata/Coleman* case governing prison crowding in the CDCR. That analysis also showed that significant percentages of this population were classified by the CDCR using its risk assessment tool as moderate to low risk to recidivate (Table 13).

Some California counties have been reporting a drop in probation dispositions as defendants opt out for an AB 109 sentence. This is due to the fact that most of these inmates have already served 3-6 months in pretrial status, and would prefer to serve the rest of their sentence in the jail with no post-release probation supervision.

Based on all of these trends it is estimated that the LA County Jail will reach almost 20,000 inmates by this year and peak at about 21,000 the following year and remain at that level through 2015. Again these projections may be reduced is the crime rate and bookings continue to decline albeit at a reduced rate. Any changes in the court processing of pretrial cases by the courts would also serve to reduce the length of stay and thus the pretrial population. Finally the size of the ICE population being held at the Mira Loma facility which numbered about 600 as of March 2012 is subject to change.

Table 12. Key Attributes of AB 109 Sentences
October 2011 – February 2012

	N	%	Avg. Sent. (days)	Avg. Days to Serve
Total AB 109 Sentences	3,535	100.0%	765.0	305.5
Gender				
Male	2,898	82.0%	775.2	310.2
Female	637	18.0%	718.4	284.4
Most Serious Charge				
Vehicular manslaughter	4	0.1%	851.5	406.0
Forcible rape	3	0.1%	730.0	216.3
Robbery	9	0.3%	635.2	214.7
Assault	115	3.3%	737.8	259.5
Burglary	509	14.4%	691.5	286.8
Theft	884	25.0%	712.8	287.2
MV theft	39	1.1%	698.5	268.5
Forgery	118	3.3%	654.8	261.3
Marijuana	94	2.7%	691.5	271.2
Other drug	4	0.1%	699.3	321.3
Other sex	2	0.1%	486.0	55.5
Weapons	161	4.6%	613.0	234.5
DUI	102	2.9%	617.0	244.9
Hit and run	4	0.1%	608.0	214.5
Arson	1	0.0%	1095.0	206.0
Other felony	197	5.6%	715.3	272.6
Drug possession	915	25.9%	728.9	288.0
Drug possession/intent	193	5.5%	1189.6	484.3
Drug sale	170	4.8%	1437.1	597.2
Missing	11	0.3%	-	-

Table 13. Expected Attributes of the Los Angeles County AB 109 Inmates Based on Inmates Housed in the CDCR July 2011.

Attribute	Inmates	%	Attribute	Inmates	%
Total	**7,195**	**100%**	CDCR Risk Level		
			High Drug	958	13%
Race			High Property	1,525	21%
Black	2,314	32%	High Violent	927	13%
White	1,320	18%	Moderate	2,149	30%
Hispanic	3,245	45%	Low	1,493	21%
Gender			Mental Health Problem	1,050	15%
Male	6,098	85%	Gang Member?	1,167	16%
Female	1,097	15%	Any Prior Felonies?	4,331	60%
Crime			Any Prior Serious Felonies	0	0%
Person	569	8%	Any Prior Violent Felonies	0	0%
Drugs	3,400	47%	Committed Crime on Parole	2,146	30%
Property	2,724	38%	Committed Crime on Probation	1,120	16%
Other	502	7%	ICE Hold	648	9%

Source: CDCR data file

Recommended Population Control Options

In order to prevent the projected increase in the jail population two basic recommendations are being made to the LASD – implement a pretrial release program and a comprehensive re-entry program for all sentenced inmates. This section of the report describes what these two programs would look like and their impact on the projected jail population.

Pre-Trial Release

There is no question that the County lacks a comprehensive pretrial program. Although the Los Angeles County Probation Department operates such a program, it has little if any impact on those people being admitted to the custody division. What is required is such a program that will deal with the significant number of inmates who eventually are being released by the courts but are spending an excessive period of time in custody.

To test this proposition a pilot or "stress" test of criteria that could be applied to the pretrial population was conducted with the assistance of the LASD. The focus was on the existing pre-trial population. We began with the total pretrial population (about 10,545) and then applied the following criteria for all pretrial cases that had been in custody for at least 7 days with the number of inmates who are left after the criteria is applied:

1. Original pool of 10,545 pretrial inmates in custody;
2. Less those not already sentenced to another crime (7,044);
3. Less those with no outstanding warrants (4,978);
4. Less those with no "no bails" (2,964);

5. Less those with assaultive crimes that prohibit pretrial (1,753); and,
6. Less those in maximum or high security (1,367).

Here one can see that the number eligible for pretrial release drops to only 1,367. We then applied to a random sample of the COMPAS risk instrument and found that a large percentage were classified as high risk. However, the COMPAS risk instrument may need to be adjusted for three reasons. First, it has not been normed on the Los Angeles County population. Second, a prior study of COMPAS on Broward County jail population by the Florida State University found the FTA risk instrument was not a strong predictor or FTA. Third, as pointed out by JFA in its study of Broward County, the so called high risk pretrial releases actually have low FTA and pretrial arrest rates. So a better use of risk for this purpose would be *higher risk* rather than *high risk*.

The LASD has formulated a very comprehensive and detailed plan to implement a pretrial supervision program.[5] Based on the stress test noted above, that program, if implemented with a sound risk assessment and supervision component, should be able to reduce the projected pretrial population by 750 males and 250 females.[6]

Sentence Re-entry Programs

The most effective way to safely reduce the jail population will be to develop a re-entry program where sentenced inmates would have their imposed sentences reduced by participating in services that will serve to reduce their risk of re-offending.

The LASD has already made great strides in the area through its newly launched Education Based Incarceration (EBI) program. On any given day, approximately 1,200 inmates are receiving counseling and education services that are designed to reduce their risk.

As the same time, the County is not using so called "blended" sentences for the N3 inmates. Conversations with Contra Costa and San Diego County Probation Chiefs indicate that their counties are using the blended sentences in a large proportion of their AB 109 cases. But, it does not appear that this will occur any time soon in Los Angeles. However, under AB 109, the Sheriff has the legal authority to place these inmates in the community prior to the completion of their sentence under some form of supervision. In Los Angeles, this supervision would be similar to the level being provided by the proposed LASD pretrial community control division.

Prior research also shows that altering the inmate's LOS does not have an impact on recidivism for this class of offenders.[7] The CDCR has also reported that significant

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[5] "Pretrial Services Project, Research, Roadmap, and Vision. Reducing jail population by target-specific measures while maintaining public safety." LASD, Offender Services Division.

[6] Such a program could also be operated by the Los Angeles Probation Department or a program operated jointly by the LASD and Probation Department.

[7] California Expert Panel on Adult Offender and Recidivism Programming. (2007). Sacramento: CA: California Department of Corrections and Rehabilitation.

proportions of the AB 109 are not high risks to recidivate. So we can be confident by using the EBI program as re-entry program , it will be possible to moderately reduce their LOS without jeopardizing public safety.

One way that this could be achieved is for inmates who are sentenced to the county jail (after having served several months in pretrial custody) be given the opportunity to participate in one of the EBI's many programs. Upon completion of a program, the inmate would be released to community supervision and continuation of services as required.

The impact on the AB 109 population can be estimated based on the following assumptions.

1. There will be an estimated 8,500 AB 109 admissions each year.
2. 75% of these inmates will participate in the EBI programs prior to being released.
3. Upon completion, they will have their sentence reduced by an average of four months.
4. 20% of these people will be re-arrested and be returned to custody for an average of two additional months.
5. Based on these assumptions, the projected AB 109 population of 7,000 would be reduced by approximately 2,000 inmates.

Bed Capacity Options and Recommendations

As noted earlier in the report, the current jail system has over 22,000 beds that if staffed can be used to house inmates. This number does not include the 1,452 bed Mira Loma facility located in Lancaster which is currently used exclusively for ICE detainees. This section of the report describes several immediate and long-term opportunities to further increase the current bed capacity and that ultimately would allow the closing of the antiquated and poorly designed Central Jail facility. These are not the only options available but suggest some pragmatic steps the LASD could take.

There is consensus within the LASD and other external observers that the long-term objective is to eventually remove all of the male inmates now housed at the Central Jail facility. But in so doing, the LASD will lose 5,260 beds. The so-called "new" part of Central Jail has 1,836 beds but it is currently closed. The remainder of Central Jail is used for a wide variety of low, medium and high custody inmates. In particular, there are nearly 500 beds that are reserved for administrative segregation inmates and others that must be kept separate from other inmates (K-10s).

One option to increase the bed capacity and in particular the maximum security beds that the LASD would lose if Central Jail were to close, is to modify the current space at the North County Correctional Facility (NCCF). NCCF is a modern maximum security complex that is well suited for housing inmates in high and medium custody. It is designed to operate as five separate units and provide for disciplinary segregation and

excellent medical and mental health service capabilities. It also contains three large vocational service areas for printing, sign painting and clothing production. One option we would recommend is to transform the three vocational training units into secure housing units.

We estimate that the vocational area space could hold 600 cells, each being capable of being double celled for a total additional bed capacity of 1,200 inmates. But assuming that 100 of the cells would only be used for single cells, the more realistic bed capacity would be 1,000. This would be more than sufficient to cover the K-10 and Administrative Segregation beds now being used at Central Jail.

The vocational training services would be re-located in the newly constructed and larger vocational training and education service center for the Sheriff's EBI rehabilitation programs.

The second opportunity to add approximately 500 minimum security beds would happen by assuming the management of five CDCR conservation camps (including the Malibu 105 bed female unit).[8] These five camps are being relinquished by the CDCR and can be taken over by the LASD. These beds could be easily used to the rising AB 109 population since prior to the passage of AB 109, many of the inmates who are AB 109 candidates were housed in these camps

These two options, as shown in Table 14 would increase the overall LASD jail bed capacity by about 1,500 beds.

A second option would be to reconfigure and renovate part of Central Jail and use it to house most of the 1,900 women now housed at Century Regional Detention Facility (CDRF). The logic of this alternative would be as follows: The current negative culture associated with Central Jail would be transformed by having a much lower security population there. CRDF would be used largely to house medium and low custody male inmates. Having females would be a temporary move until a more permanent and modern facility could be constructed for the women.[9]

Finally, there is the potential to construct a new female facility. The LASD has preliminary plans for a 1,500 bed facility at the PDC. If the recommended pretrial and re-entry programs are implemented such a facility would be sufficient to house the entire female population. At issue is whether it would be wise to have all of the women at a single location or be able to house some portion of the population in the downtown area to facilitate court appearances and access to the medical facilities at the Twin Towers facilities. These are details that need to be developed once the full effects of the pretrial release and AB 109 re-entry programs are fully implemented.

[8] There are an additional 5 fire camps that the county could add to the ones that are now being used to house state inmates.

All of the jail bed capacity figures are reduced by 10% to allow for seasonal fluctuations in the jail population and the need to separate special need and high-risk inmates. The 10% reduction will ensure the jail system will not be crowded for any sustained period of time.

Table 14. Summary of Possible Bed Capacity Options

Facility	Current	Option A	Option B	Option C
Central Jail	5,260	1,500	500	0
Twin Towers	4,820	4,820	4,820	4,820
CRDF	2,380	2,380	2,380	2,380
Peter Pitchess DC				
NCCF	4,294	5,294	5,294	5,294
South	1,536	1,536	1,536	1,536
South Annex	1,624	1,624	1,624	1,624
East	1,944	1,994	1,994	1,994
Out Patient	600	600	600	600
Conservation Camps	0	500	500	500
New Women's Facility	0	0	0	1,500
Totals	22,458	20,248	19,248	20,248
Mira Loma	1,452	1,452	1,452	1,452
Grand Totals	23,910	21,700	20,700	21,700
At 90% Capacity	21,519	19,530	18,630	19,530

Projected Populations and Capacity Options

Assuming the LASD is able to successfully implement the supervised pretrial and sentenced re-entry programs program, plus make the recommended capacity adjustments, would there be sufficient bed space to safely house the projected inmate population? The answer is yes. Table 15 summarizes the results of the projected effects of each scenario. The "base projection" represents the status quo with Central Jail remaining operational and opening up its now closed units. It would also mean that the LASD is unable to implement the supervised pretrial release program and the re-entry program.

Option A assumes that Central Jail remains partially opened by temporarily housing the female population at a renovated portion of the facility and the rest of them at one of the conservation camps. Central Jail may also be renovated to create classroom space to provide much needed treatment services to the female population.

Option B reduces the female jail population to 500 and mostly pretrial women whose family reside near downtown Los Angeles. Depending upon the ability of the LASD to launch the pretrial and re-entry programs, it may be possible to relocate a sizeable portion of the female population at the Twin Towers facility.

Table 15. Summary of Projected Inmates Population by 2015 and Capacity Options

Item	Current Trend	Option A	Option B	Option C
Capacity	23,910	21,700	20,700	21,700
Central Jail	5,260	1,500	500	0
Functional Bed Capacity@ 90%	21,519	19,530	18,630	19,530
Populations by 2015				
Pretrial	10,325	9,325	9,325	9,325
County Sentenced	1,830	1,830	1,830	1,830
Awaiting Transfer to CDCR	600	600	600	600
CDCR Tech Violators	400	400	400	400
ICE Mira Loma	625	625	625	625
AB 109	7,096	5,096	5,096	5,096
Totals	20,876	17,876	17,876	17,876
Surplus Beds @90% Occupied	643	1,654	754	1,654

Option C envisions the construction of the new female facility at the PDC complex. Current plans call for a 1,500 bed facility, which may or may not be needed for reasons cited earlier in the report.

All of the options provide sufficient bed space with a 10% vacancy rate throughout the system to ensure the jail system can safely manage the inmate population taking into account seasonal fluctuations in the population and the need to separate high risk and special needs inmates.

Other Issues

Inmate Classification

We have already noted that the current inmate classification system is over-classifying inmates for medium custody. This is occurring due to LASD policy and the design of the Northpointe Institute instrument. It should also be adjusted for females so that it does not over-classify them. This latter point will be important as the Department determines the

best long-term facility solution for the women. These issues can and should be corrected in consultation with Northpointe.

Pretrial Risk Assessment
In a similar manner, the COMPAS risk assessment system should be tested and normed for the LASD jail population. In particular, the FTA risk assessment instrument should not be used until the re-validation work is completed.

Evaluation of the EBI Programs
Since the LASD plans to expand the application of the EBI education programs, it would be appropriate at this time to begin a formal impact evaluation. Such a study can and should be done in tandem with the revalidation study of the COMPAS instrument.

Establish a Formal Research, Planning and Analysis Division
The LASD is fortunate to have a number of staff that are highly skilled in data extraction and analysis. Yet, it seems much of this work and talent is not concentrated or structured within a single unit. The LASD is like a major corporation without a formal R&D capability. Such a unit would be issuing formal population projections every six months, analysis of population trends and critical incidents, and, cost-benefit evaluations of new LASD programs and policies. Such a division would be directed by a person with an advanced degree in research methods, but experience in local corrections.

Estimating the Cost of the Proposed New Jersey Pretrial Service Unit and the Accompanying Legislation

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June 11, 2014

Regional Economic Studies Institute

TOWSON UNIVERSITY

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1.0 Executive Summary

The Regional Economic Studies Institute (RESI) of Towson University has been tasked with enumerating the potential costs to the State of New Jersey of instituting Senate Bill No. 946 (2014) and Assembly Bill No. 1910 (2014), both of which will alter the current pretrial process and establish the New Jersey Pretrial Service Unit (NJPSU).

Through the use of current pretrial service statistics, RESI enumerated the potential cost to New Jersey based on three separate categories, as described below.

- **Start-up costs** consist of the spending necessary to launch the NJPSA. These costs include the hiring and training of staff, the purchasing of equipment, and the furnishing of the workspace required.
- **Operating costs** were those incurred through the year-to-year functioning of the NJPSU. These costs included employee expenses, software licenses, facilities and upkeep, and programming provisions.
- **Indirect costs** quantify the potential expenses that would be incurred by the State as a result of the change in judicial practices as the bills mandate or as a result of actions by the NJPSU. These costs were collected from additional public defender and courtroom usage, and the failure to appear (FTA) and recidivism of released defendants. FTA and recidivism cost money to the state through rearrest costs and damages to the community. These costs can increase if levels pretrial misconduct are not properly managed through supervision and programming.

Figure 1: Cost Estimates by Expense Category

Expense	Cost Estimate
Start-Up Costs	$16,591,360
Operating Costs	$379,589,599
Indirect Costs	$65,069,321

Source: RESI

As shown in Figure 1, RESI projected that NJPSU start-up costs would amount to approximately $16.6 million, the annual operating cost of the NJPSU would amount to $379.6 million, and the indirect cost to the state that would be induced by the bills could potentially reach at least $65.1 million.

This cost projection was modeled off the DCPSA program as it best reflects the legislation provided for the NJPSU because it must provide for similar costs of living and because it is widely regarded as the most effective pretrial release program. It is important to note that the NJPSU also has a provision that requires it to consider monetary release conditions only as a final resort when non-financial conditions will not reasonably assure the safety of the community and the appearance of the defendant in court. In comparison, the DCPSA is to first

consider monetary conditions before assigning DCPSA program release. Ultimately, this provides the potential for the NJPSU to experience even higher levels of program spending per arrest than the DCPSA.

RESI also considered the cost saving that would be generated by diverting pretrial defendants away from jail and prison due to release. Using figures from New Jersey's "Report of the Joint Committee on Criminal Justice," RESI found that decreasing the level of pretrial detention by 50 percent could save the New Jersey state budget approximately $164 million dollars. However, there are several things to consider with this figure. First, the committee's assumption that approximately 50 percent of pretrial detainees are being held needlessly is very generous, because most populations see a total release rate of approximately 50 percent. Furthermore, with each release there is an increased change of FTA and recidivism, incurring additional costs against the state. Finally, still considering the $164 million in potential savings, RESI projects that the annual operating costs of the NJPSU would still result in a net budget cost of more than $215 million per year.

Figure 2: Potential Net Cost

Expense	Cost Estimate
Operating Costs	$379,589,599
Pretrial Detainment Savings	$164,250,000
Net Cost	**$215,339,599**

Source: RESI

The NJPSU and associated legislation were designed to shorten the aggregate time-to-trial and, as a result, reduce the time defendants remain in pretrial detention. From streamlining the pretrial process in such a way, a goal of the bills is to save the State money on the pretrial defendants. However, several provisions from the bills will likely extend the time-to-trial and the associated costs, including the following:

- Changing the "initial appearance" phase from an informational court appearance into something that more closely resembles an adversarial hearing.
- Granting defendants the right to appeal the release decision made in aforementioned hearing.
- The use of non-monetary release conditions compared to monetary bonds, which can result in a substantial increase in the time-to-pretrial release of a defendant. This does not affect the overall time to trial, but affects the underlying source of cost (time in pretrial detention).

Time-to-trial is also affected by the judicial caseload. The additional appearances that will be necessary will have to be dispersed among an already overloaded judiciary.

The bills also establish the 21st Century Justice Improvement Fund and grant the Supreme Court the power to increase statutory fees on filings and other matters, funds that are meant to then be distributed to several state judicial departments. However, considering the funding goals and the limit on additional fees (maximum of $50 per instance), there would need to be approximately

- 300,000 applicable crimes committed to meet the $15 million dollar funding cap for the NJPSU;
- 640,000 applicable crimes committed to meet the $17 million funding cap for the e-court initiative; and
- 842,000 applicable crimes committed to meet the $10.1 million funding cap for Legal Services of New Jersey.

The number of applicable crimes needed to meet the Legal Services cap is more than twice the number of arrests in 2012 (301,744) and would constitute the commission of an applicable crime by almost one of every ten citizens of New Jersey. The funding of the later programs may become difficult depending on where the courts find it applicable to increase fees.

The bills are also likely to the negatively impact the commercial bonding industry and likewise hurt the New Jersey economy. If New Jersey enacts the NJPSU, it will divert pretrial release traffic to non-financial conditional release and away from commercial bondsman. The resulting loss in commercial bail usage will be manifested in the loss of commercial bail employees and, eventually, the closing of commercial bonding firms. RESI conducted an economic impact analysis using IMPLAN input/output modeling software. For every 10 employees lost in the commercial bail bonds industry, New Jersey would experience the following economic and fiscal impacts:

- Lose an additional 7 jobs.
- Lose nearly $2.1 million in output.
- Lose nearly $0.6 million in wages.
- Resulting in a loss of approximately $103,000 in tax revenues.

Some of these losses could possibly be offset by the effects of employment gains in the NJPSU; however, the resulting wages would come from the budget of the state government, rather than from the private sector. Spending and employment by commercial bonding firms created a positive net fiscal impact. When the private employment changes to public employment, the net fiscal impact on the state government will be substantially negative.

A review of pretrial research illustrated the importance of maintaining a highly effective pretrial justice process. The presence of supervision on non-monetary releases is highly important, as the level of pretrial misconduct is highly correlated with the presence of proper supervision over all defendants. This indicates the importance of maintaining high quality supervision for non-monetary releases. Other research also further reinforced the importance of rapid pretrial

processing as the length of pretrial detention was directly correlated with the likelihood of FTA and recidivism. Finally, research indicated that pretrial detention is directly correlated with the trial outcome and imprisonment. Though this correlation is often seen to be an injustice to detained defendants, it could also be an indication that the judiciary has substantial insight into correctly detaining those defendants who are likely to be guilty.

RESI found the net costs to the State of New Jersey of instituting Senate Bill No. 946 and Assembly Bill No. 1910 to be at least $215,339,599 considering all potential savings. This cost could likely be higher if the NJPSU does not function quickly and effectively. Depending on the losses experienced by the commercial bail industry, the New Jersey State Government could also lose anywhere from $100,000 to millions in tax revenue. Additionally, reductions in spending that stem from reductions in programming are likely to bring even greater costs in the form of FTA and recidivism. Considering the use of conservative figures throughout this report, RESI holds a $215,339,599 cost to be a conservative estimate of the cost of Senate Bill No. 946, Assembly Bill No. 1910, and the NJPSU.

2.0 Introduction

The New Jersey Senate and General Assembly have recently introduced companion bills that require the provision of pretrial services for all arrested individuals in New Jersey. Senate Bill No. 946 (2014) and Assembly Bill No. 1910 (2014) establish a New Jersey Pretrial Release Services Unit (NJPSU).[1] This prospective entity will be responsible for assessing a defendant shortly after his or her arrest and submitting a release recommendation to the courts based on that defendant's characteristics. This release recommendation can include a myriad of release conditions that the NJPSU can utilize to reasonably assure reappearance of a released defendant and the safety of the community. Additionally, it is the responsibility of the NJPSU to oversee and ensure adherence to these conditions and manage sanctions when the conditions are violated.

The bills also give the NJPSU the power to recommend that a defendant be detained indefinitely until the trial if he or she poses a serious risk of failure to appear or recidivism. The bill contains additional provisions that are not directly associated with the creation or operation of the NJSPU; however, they are necessary for the practical implementation of the program. One of these provisions is a more intensive Initial Appearance before the court to accommodate the judgment process regarding pretrial release conditions. The bills additionally allow the appeal of this judgment, therein adding another potential step in the criminal justice process. The bill also creates a fund to be paid into through the assessment of additional court fees to help fund the NJPSU and several other judicial initiatives.

2.1 Legislation Language

To analyze the cost of the NJPSU and compare it to existing pretrial service programs, certain assumptions must be made about the intent and implementation of the provisions in the bills. SB 946 and HB 1910 provide an expansive, but vague framework for the establishment of a NJPSU. Some provisions are not fully detailed in terms of implementation. Other provisions contain language that must be interpreted contextually.

First, it is stipulated that the NJPSU will assess all arrested individuals. This function is derived from section 10, where it is provided that, "The Pretrial Services Unit shall conduct, prior to a bail hearing or first appearance, an assessment of all criminal defendants…"[2] RESI assumed that any individual who has been the subject of an arrest has been so arrested with the purpose of pursuing criminal charges against that individual. and that therefore, every arrest is subject to a

[1] This study was conducted with the support of the American Bail Coalition. All statements herein are the opinions of the Regional Economics Studies Institute of Towson University.
[2] State of New Jersey, Senate No. 946 (2014): 8, http://www.njleg.state.nj.us/2014/Bills/S1000/946_I1.pdf.

bail hearing or a first appearance and the criminal defendant status. It then follows that every arrested individual will be assessed by the NJPSU.

Section 10 continues to provide that assessments will be made, stating, "…for the purpose of making recommendations to the court concerning the appropriate disposition…"[3] This language establishes that every assessment made will require the submission of a recommendation to the court as to the necessary conditions for the safe release of a defendant, if they so exist. These non-financial conditions under the NJPSU authority are enumerated in section 3, subsection b. of the bills.

Section 10 also stipulates that every defendant released on any number of non-financial conditions will be supervised by the NJPSU. It states, "the Pretrial Services Unit shall monitor each defendant released pursuant to subsection b. of section 3 to ensure that the defendant adheres to the condition or combination of the conditions of the defendant's release ordered by the court."[4]

The bills establish that various sanctions, penalties, and other punitive actions will be taken against released defendants who violate the terms of their releases.[5] The duties of administering sanctions against supervised-release defendants who violate the terms of their non-financial release conditions are not explicitly assigned in the bills. As the NJPSU is the agency responsible for the supervision of the defendants under non-financial release conditions, RESI assumed that this agency will also be charged with filing and/or processing the sanctions against violating defendants.

Additionally, the NJPSU will be assumed to conduct drug testing of its participants as part of both the assessment and supervision phases of the program. Among the section 6 provisions that establish the assessment criteria, the bills state that the assessment should include a consideration of the defendant's "history relating to drug and alcohol abuse."[6] As it cannot be assured that defendants will be forthcoming about this information, drug testing would likely be required to properly assess drug abuse. Additionally, one of the conditions of release that can be set by the NJPSU is that defendants "refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner."[7] Again, this would necessitate drug testing to ensure accurate supervision.

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[3] New Jersey Senate No. 946/Assembly No. 1910 (2014), 8.
[4] Ibid.
[5] Ibid, Section 7 and Section 9.
[6] Ibid, 6.
[7] Ibid, 3.

The language of the bills also implies that the NJPSU will be responsible for providing proper medical, psychological, and psychiatric assistance for defendants released on non-financial conditions. One of the non-financial release conditions provided for use by the NJPSU in section 3 is to require that a defendant "undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose."[8] The bills do not specify whether the cost of this treatment would be deferred to the defendant or if it would fall to the NJPSU and the state government. However, in the following sections, it is made clear that the costs of this program and other similar to it will likely be expensed to the NJPSU itself.

One of the additional release options involving electronic monitoring states that the "costs attributable to the electronic monitoring of an offender shall be borne by the Pretrial Services Unit in the county in which the defendant resides."[9] This passage seems to indicate that costs of programming will likely be the responsibility of the NJPSU rather than that of the defendants it supervises. Additionally, many of the defendants who require the provision of treatment services may be low-income, and may not have the means to cover their treatment expenses. As one of the purported purposes of these bills is to eliminate financial release-barriers caused by commercial bonds, it seems unlikely that the bills would institute a self-payment policy that would exclude the release of a defendant based on financial disposition.

Based on the review of SB 946 and HB 1910, RESI compiled the following catalogue of services that it assumes the NJPSU will be responsible for providing:

- Assess all arrested individuals;
- Compose risk assessments and recommendations to the court as to whether or not defendants should be granted pretrial releases and, if so, on what conditions these releases should be granted;
- Supervise all defendants who are released pretrial on non-financial conditions;
- Administer sanctions against individuals who violate their non-financial release conditions;
- Test assessed and supervised defendants for current or continued drug or alcohol abuse;
- Secure proper medical, psychological, and psychiatric assistance for defendants released on non-financial conditions; and
- Provide electronic monitoring as a supervision method for defendants.

[8] New Jersey Senate No. 946/Assembly No. 1910 (2014), 3.
[9] Ibid.

RESI used these program assumptions to predict the level of services that the NJPSU is likely to provide so that an assessment of the projected program cost could be more accurately conducted.

3.0 Cost Analysis

To formulate a projection of the total fiscal cost of the NJPSU, RESI examined three cost sources of implementing the legislation. These costs sources include the following:

- Start-up costs,
- Operating costs, and
- Indirect costs.

When applicable, these costs were calculated using the empirical and budget data from other pretrial service programs. RESI utilized informed assumptions to evaluate the cost of other variables where necessary.

3.1 Data Note

RESI utilized the in-depth budget report released by the District of Columbia Pretrial Service Agency (DCPSA) in multiple calculations as a baseline for the levels and cost of employees. Although the DCPSA provides some services that are currently outside the scope of the NJPSU provisions, RESI used this source because of the high level of detail that it provides. This high level of detail allows for the effects of these additional services to be easily removed from calculations when necessary. RESI also used total adult arrest data from the FBI Uniform Crime Report as the measure of a jurisdiction's total pretrial program participation.[10] [11] The use of this arrest data ensured a universal and consistent inter-program variable.

3.2 Start-up Costs

Start-up costs consist of the likely expenditures that the NJPSU would incur in establishing its operations. Some of these costs are one-time expenses, while others may reoccur in the future as part of ongoing operations. These costs may be accrued over the course of several months to several years, depending on the rate at which the NJPSU develops its operations to full function. Variables included in the start-up costs of the NJPSU are the costs of staff hiring and training, facilities, and computer hardware and software.

[10] As the FBI UCR does not include arrest from Washington D.C.'s primary police force, the Metropolitan Police Department, RESI combined the UCR total with arrests reported in the Metropolitan Police Department's annual report.

[11] Metropolitan Police Department, "Annual Report (2012)," 30, accessed April 18, 2014, http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/2012_AR_1.pdf.

Staffing

The cost of hiring and training the NJPSU staff first requires calculating the number of employees that the unit requires. To do this, RESI assessed the number of employees that will be needed in the two primary service functions: assessment and supervision. RESI then developed a metric for calculating the cost of hiring and training of the NJPSU staff based on existing employee turnover research conducted by the Center for American Progress.

Assessment Staff

To calculate the number of assessment agents needed for the NJPSU, RESI used a ratio of cases per assessment agent. This ratio was gleaned from the DCPSA's 2012 operations data in conjunction with the 2012 arrest data from Federal Bureau of Investigation's Uniform Crime Report data. The DCPSA employed 61 assessment employees to manage 42,455 arrests. This yielded a ratio of 696 cases per assessment personnel, which was applied to the 301,744 arrests occurring in New Jersey in the same year.[12] This resulted in a projected need for approximately 433 assessment full time employees (FTEs) to oversee New Jersey's caseload.[13]

Figure 3: Assessment Staff

Pretrial Organization	Cases	Cases Per Assessment Employee	Assessment Employees
DCPSA	42,455	696	61
NJPSA	301,744	696	433

Sources: DCPSA, FBI Uniform Crime Report, Metropolitan Police Department Annual Report, RESI

Supervision Staff

The supervision staffing needs were calculated using a methodology similar to that employed in the previous subsection. The DCPSA supervised 19,146 cases between its 173 supervision employees. This equates to a rate of approximately 111 supervisions per employee. The number of prospective supervisions that will occur through the NJPSU was derived by applying the DCPSA ratio of supervisions per arrest to the level New Jersey arrests, resulting in 136,078 prospective New Jersey supervisions.[14] The rate of supervision FTE per supervision was then applied to the level of prospective NJPSU supervisions, resulting in a total of 1,230 supervision FTEs required for New Jersey.[15]

[12] Uniform Crime Reports, Table 69 in "Crime in the United States 2012," accessed April 21, 2014, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/69tabledatadecpdf.
[13] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification," 15, accessed April 14, 2014, http://www.csosa.gov/about/financial/budget/2014/FY14-PSA-Budget-Submission.pdf.
[14] RESI made the assumption that the ratio of supervisions to arrest will be the same in New Jersey as it is in D.C.
[15] Pretrial Services Agency for the District of Columbia, FY 2014 Congressional Budget Justification, 15–21.

Figure 4: Supervision Staff

Pretrial Organization	Supervisions	Supervisions per Supervision Employee	Supervision Employees
DCPSA	19,146	111	173
NJPSA	136,078	111	1,230

Sources: DCPSA, RESI

The total FTE for assessment and supervision staff for the NJPSA will be approximately 1,664 employees.

Cost of Hiring and Training

RESI conducted a literature review of the research on the cost of hiring and training new employees. However, RESI found that there was no study that adequately estimated these costs exclusively. To compensate for this lack of data, RESI used employee turnover cost research as a baseline.

Employee turnover cost differs from the cost of employee hiring and training because it encompasses the additional component of separation. As is explained in an employee turnover study conducted by faculty of the University of Nebraska, the cost associated with the turnover process consists of three parts: separation of the old employee, hiring of a new employee, and training the new hire.[16] Because of a lack of information regarding the separation process of the NJPSU, RESI made the assumption that cost of separation would not exceed one third of the total cost of employee turnover figures, and that the remaining two thirds are the costs for hiring and training.

With this assumption, RESI derived hiring and training cost from an employee turnover study by the Center for American Progress. This study consists of a comprehensive review of 11 research papers and 31 case studies. RESI gleaned two data points from this report:

- First, the average turnover cost for non-physician, non-executives is 20.7 percent of the yearly salary.
- Second, in a case study contained within to be most similar, the turnover for government child protective services (CPS) workers was approximately $10,000 per employee.

[16] Graef, M. I. et al, "Costing child protective services staff turnover," Child Welfare 79 no. 5: 521, accessed April 15, 2014 via EBSCOhost.

Applying the assumption that an employee hiring and training constitutes the remaining two thirds of the turnover cost, hiring and training alone will cost approximately 13.8 percent of employee salary or, alternatively, about $6,667 per employee.[17]

According to the DCPSA budget, the average employee salary was approximately $85,115. Applying this to the prescribed 13.8 percent of salary resulted in a new hire and training cost of $11,727 per employee. The per employee training rates were then applied to the total FTE projections, resulting in a total of $19,503,515 in hire and training cost based on the percentage of salary, and $11,087,519 in cost based on the $6,667 flat rate cost for CPS government employees. RESI calculated that hiring and training cost could range from $11,087,519 to $19,503,515. To keep the cost estimate conservative, RESI assumed a training cost of $11,087,519.[18]

Figure 5: Hiring and Training Costs

	Cost of hiring and training per NJPSU Employee	NJPSU predicted Employment	Total Hiring and Training Cost
Ratio of Salary Cost	$11,727	1,664	$19,503,515
Flat Rate Cost	$6,667	1,664	$11,087,519

Source: RESI

Facilities

To conduct the day-to-day functions of the NJPSU, its employees will require office space. RESI assumed that, with support from current practices, every employee requires his or her own computer and workspace.[19] This space must be procured and furnished.

Office Space

RESI calculated facilities costs based on the space requirements for the previously calculated total FTE. A frequently cited survey conducted by CoreNet found an average of approximately 176 square feet per employee. RESI reviewed several reports on the average cost of leasing office space in New Jersey and found concurring figures in the range of $23 to $25 per square

[17] Heather Boushey and Sarah J. Glynn, "There Are Significant Business Costs to Replacing Employees," November 16 (2012): 2, accessed April 15, 2014, http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.
[18] Pretrial Services Agency for the District of Columbia, FY 2014 Congressional Budget Justification, 33.
[19] Personal Com., DCPSA

foot.[20] RESI used a median of $23.88 per square foot.[21] To accommodate the 1,663 employees required of the NJPSU, approximately 292,711 square feet will be required. Given RESI's assumptions, this square footage of office space will cost approximately $6,989,927 per year.

The lease estimates also assume that the state government does not have vacant facilities that are suitable to house the NJPSU, nor will they be constructing new facilities, which would require greater start-up funds.

Furnishing

RESI used a cost calculator from AllSteel, an office furnishing company to develop a cost estimate based on FTE levels and total projected office space. This source also calculates cost based on the type of workspace being used, such as private managerial office or open workspace for non-managerial employees. According to an analysis of the Baltimore City Pretrial Service Program's current practices, the Maryland Department of Legislative Services found that approximately 5.4 percent of pretrial staff is managerial staff.[22] Applying this ratio to the NJPSA FTE level yields approximately 90 managerial positions and 1,573 non-managers. With these factors, the AllSteel calculator estimated a cost of $21 per square foot for economy-level furniture, which totals to a furnishing expense of $6,146,920. [23]

Alternatively, Business Furniture Incorporated provides a general purpose furnishing budgeting tool that uses inputs of employees and office space. This company provides furnishing to both federal and state governments in New York and New Jersey and is purportedly "New Jersey's largest State Contract furniture dealership."[24] Its price estimates were based on case studies of twelve different businesses. Business Furniture Incorporated found furniture costs to be approximately $15 to $30 per square foot and $3,000 to $5,000 per person.[25] Using this source,

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[20] Cassidy Turley Commercial Real Estate Services, "Office Market Snapshot: Central New Jersey Third Quarter 2013," 1, accessed April 11, 2014, http://www.cassidyturley.com/DesktopModules/CassidyTurley/Download/Download.ashx?contentId=2901&fileName=Central+NJ+Office+Q3+2013_FINAL.pdf.

[21] "Northeast Snapshot, March 2011: New Jersey Office Market," Northeast Real Estate Business, accessed April 11, 2014, http://northeastrebusiness.com/articles/MAR11/snapshot1.html.

[22] Maryland Department of Legislative Services, "Fiscal and Policy Note: House Bill 1232," Maryland General Assembly (2014): 11, accessed April 18, 2014, http://mgaleg.maryland.gov/2014RS/fnotes/bil_0002/hb1232.pdf.

[23] "Square Footage Budgeting Tool," Allsteel, accessed April 14, 2014, http://squarefootbudgeting.office.com/Pages/Home.aspx.

[24] "Government," Business Furniture, Inc, accessed April 14, 2014, http://www.bfionline.com/government-workplace-furniture.html.

[25] Business Furniture, Inc, "What Does Furniture Cost?," PowerPoint presentation, accessed April 14, 2014, http://www.slideshare.net/fullscreen/rbrandeisky/what-does-furniture-cost/1.

the approximate cost of furnishing the NJPSU facilities would likely range from $4,390,658 to $8,781,315.

RESI assumed that the cost of furnishing the NJPSU facilities will cost between $4,390,658 and $8,781,315. To keep the NJPSU cost estimate conservative, RESI utilized the $4,390,658 figure for its total cost estimate.

Computing Equipment

RESI estimated computing equipment cost based on its employment estimate of 1,664 FTE and the assumption that each employee is issued his or her own computer. Based on an assessment of current entry-level business computer cost, RESI assumed a conservative price estimate per computer to be $668.98. This cost includes the computing unit, the monitor, a keyboard and mouse, and Microsoft Office Home and Business 2013 software. RESI included this software in the calculation as RESI assumed that every computer will need this basic computing software to fulfill its function. This software is specifically licensed to each computer and is expected to last the lifetime of the computer.

Figure 6: Entry-Level Desktop Computers

Computer	Hardware (except monitor)	Monitor	Software	Total Cost
Inspiron One 20[26]	$429.99	$109.99	$209.25	$749.23
HP Pavilion 500-205t[27]	$479.99	$89.99	$219.00	$788.98
Lenovo H500[28]	$379.00	$109.99	$179.99	$668.98

Sources: Dell Inc., Hewlett-Packard Company, Lenovo Group Ltd.

Applying the cost of $668.98 per computer to 1,664 employees results in total start-up costs of $1,113,182.72 for purchasing computing equipment.

Case Software

In addition to basic computing equipment, NJPSU will likely require software designed for the assessment and supervision of pretrial defendants.

[26] "Shop for Work: New Inspiron Desktop 3000 Series," Dell, accessed April 15, 2014, http://configure.us.dell.com/dellstore/config.aspx?c=us&cs=04&fb=1&l=en&model_id=inspiron-3847-desktop&oc=smi3847mtw7p13573d&s=bsd&vw=classic.
[27] "HP Pavilion 500-205t Desktop PC with Windows 7," Hewlett-Packard Company, accessed April 15, 2014, http://www.shopping.hp.com/en_US/home-office/-/products/Desktops/HP-Pavilion/F9A61AV?HP-Pavilion-500-205t-Desktop-PC-with-Windows-7.
[28] "Lenovo H500," Lenovo, accessed April 15, 2014, http://shop.lenovo.com/us/en/desktops/essential/h-series/h500/#customize.

Loryx Systems provides a full-service suite called Monitor that offers support for pretrial interviews, court report preparation, risk assessment, and supervision.[29] The software license costs approximately $1,000 per license per year. [30] This cost would result in maximum cost of $1,664,000 per license-year to purchase the Monitor software for every employee. It is important to note that the actual figure would likely be lower as not every NJPSU employee will require this software. Without more information on the duties of specific NJPSU employees, RESI advises that the calculating cost on a per user-license basis is difficult to conduct accurately.

New Dawn Technologies provides the same suite of service as the Loryx Systems Monitor software. However, unlike Loryx Systems, the company provides pricing on a "per case" basis. Based on a system of more than 350 users, New Dawn charges a flat rate of $1.25 per case. Since it is assumed that the NJPSU will be conducting assessments on every arrested in individual (per the explanation in Section 1.1 of this report), the cost of 301,744 cases at $1.25 a case results in a total cost of $377,180 per year.[31]

RESI determined a third price point using New Dawn Technologies's typical fixed price for case management software for more than 350 system users. The company cites a flat cost of $1,840,000 and an annual service and upgrade cost of approximately $138,000.[32] It is important to note that these figures are estimated at a base of 350 employees, roughly one-fifth of the expected NJPSU employee count.

Figure 7: Case Software

Software	Cost	Licenses/Cases	Total Annual Cost	Cost of Initial Installation
Loryx Systems (Monitor)	$1,000 per license	1,664 licenses	$1,664,000	n/a
New Dawn Technologies	$1.25 per case	301,744 cases	$377,180	n/a
"Typical Pricing"	n/a	350+	$138,000	$1,840,000

Sources: Loryx Systems Inc., New Dawn Technologies Inc., FBI Uniform Crime Report, RESI

[29] "Monitor Pretrial Services," Loryx Systems, accessed April 11, 2014, http://www.loryxsystems.com/solutions/pretrial_services.html.
[30] Personal communication with Loryx Product Manager, April 14, 2013.
[31] "Transaction-Based Pricing," New Dawn Technologies, accessed April 11, 2014, http://newdawn.com/solutions/purchasing-options/transaction-based-pricing/.
[32] Ibid.

RESI used the New Dawn Technologies per-case cost estimate of $377,180 per year for the final cost projection as this estimate captured the potential cost of software by the most accurate method available. By paying on a per-case model, it assures that the NJPSU would only be paying for its exact needs.

Start-up Cost Conclusion

Start-up costs totaled to a sum of $16,591,360. The office space and case software portions were not included in the start-up expenses as they will be paid for annually, and will therefore be considered operating costs.

Figure 8: Total Start-Up Cost

Category	Total
Hiring and training	$11,087,519
Furnishing	$4,390,658
Computer hardware	$1,113,183
Start-Up Cost Total	**$16,591,360**

Source: RESI

3.3 Operating Costs

Aside from start-up costs, RESI calculated the expenses necessary for NJPSU's annual operations. Included in these costs are personnel expenses, office upkeep and utilities, programming, and electronic monitoring.

Office Facilities and Upkeep

In measuring the cost of office upkeep and utilities, RESI focused on substantial and foreseeable costs, including energy, furniture, computer hardware, and software. RESI did not include cost estimates that are likely to be relatively negligible, such as sewage and water, or that may be unforeseeable, such as renovations and natural disaster damage.

Facilities

As was calculated in Section 2.1 of this report, the annual lease for the NJPSU facilities will amount to approximately $6,989,927 per year.

Energy

According the Department of Energy, energy costs for a commercial building averaged approximately $2.27 per square foot in 2014. Extrapolating this average against the total area

estimate of 292,710 square feet results in a total projected annual energy cost of $664,452.87 to power NJPSU office facilities.[33]

Furniture

Based on tax standards, the depreciation rate for office furniture is approximately seven years. Using this depreciation rate against the total cost of furniture, $4,390,658, the annual cost for replacing furniture will be approximately $627,237.[34]

Computing Equipment

The typical lifespan of an office computer is three to five years. In general, desktop computers are expected to last longer than their mobile counterparts because they are less likely to be dropped, bumped, or scratched in transit.[35] For this reason, RESI assumed that the computer turnover rate is five years. Additionally, the standard computer depreciation rate used for tax purposes assumes a five-year life span.[36] At that rate, the approximate annual cost to the NJPSU for computer depreciation/upkeep is $222,636.54.

Based on the case software option selected in Section 2.1 of this report, the annual cost for case software for the NJPSU is $377,180.

Figure 9: Facilities and Upkeep

Category	Cost
Facilities	$6,989,927
Energy	$664,452
Furnishings	$627,237
Computer Hardware	$222,636
Software	377,180
Total Facilities and Upkeep	**$8,881,432**

Source: RESI

[33] U.S. Department of Energy, "3.3: Commercial Sector Expenditures," *Buildings Energy Data Book* (April 16, 2014): http://buildingsdatabook.eren.doe.gov/TableView.aspx?table=3.3.8.
[34] "Depreciation of Business Assets," Intuit TurboTax, accessed April 18, 2014, https://turbotax.intuit.com/tax-tools/tax-tips/Small-Business-Taxes/Depreciation-of-Business-Assets/INF12091.html.
[35] "What Is the Average Lifespan of a Computer?," *RecoverySoftware.com*, March 9, 2012, accessed April 17, 2014, http://www.recoverysoftware.com/what-is-the-average-lifespan-of-a-computer/.
[36] "Depreciation of Business Assets," Intuit TurboTax.

Personnel Costs

RESI derived total personnel cost from the projected FTE levels for the NJPSU in conjunction with average employee cost based on the DCPSA budget. As documented in the DCPSA budget, the total employee cost for FY 2012, including salary and other expenditures, was $44,548,000. This figure was averaged across 364 employees for an average employee cost of $122,385.[37] [38] When applied to the estimated 1,664 NJPSU employees, the total cost for NJPSU personnel will be approximately $203,812,571 per year.

Figure 10: Personnel Expenses

	Total FTE	Expenses per FTE	Total Personnel Expenses
DCPSA	364	$122,385	$44,548,000
NJPSU	1,664	$122,385	$203,812,571

Sources: DCPSA, RESI

Programming

As discussed in Section 1.2 of this report, there are a number of programs that the NJPSU will likely be responsible for including drug testing, mental health treatment, and rehabilitation. Aside from the loose provisions in the legislation, these programs are important to include in a pretrial unit to mitigate instances of both failure to appear and recidivism. RESI assumed that these programs will be included in the practices of the NJPSU.

Drug Testing

The DCPSA spent $3,897,000 on drug-use assessments for 42,455 arrests in 2012.[39] Scaling up the DCPSA spending to the 301,744 arrests under jurisdiction of the NJPSU resulted in a prospective $27,697,476 in drug-use assessment spending.

Drug Rehabilitation

The DCPSA referred 1,809 defendants for mental health treatment out of their 42,455 arrests in 2012, spending a total of $12,532,000 on drug treatment and reducing drug use.[40] This spending went to support in-house drug treatment by the DCPSA, as well as contracted drug treatment providers. They referred approximately 4.3 percent of their arrests for drug rehabilitation treatment. When the DCPSA rate was applied to the NJPSU arrest load of

[37] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification."
[38] According to this DCPSA data, the average salary of employees made up $85,115 of the average employee total cost.
[39] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification," 14, (Budget Strategy 3.1).
[40] Ibid, 14.

301,744, it resulted in approximately 12,857 prospective drug rehab referrals. Scaling up the cost of treating the DCPSA's 558 referrals to treating NJPSU's 12,857 referrals resulted in approximately $89,069,739 of predicted drug rehabilitation program spending for the NJPSU.[41]

Mental Health

The DCPSU referred 558 defendants for mental health treatment of their 42,455 arrests in 2012, spending a total of $4,772,000. This spending went to support a clinically trained mental health assessment and treatment staff as well as funding to contracted mental health service providers. The DCPSA referred approximately 1.3 percent of their arrests for mental health treatment. When the DCPSA rate was applied to the NJPSU arrest load of 301,744, it resulted in approximately 3,966 NJPSU mental health referrals. Scaling up the cost of treating the DCPSA's 558 referrals to treating NJPSU's prospective 3,966 referrals resulted in approximately $33,916,438 of mental health program spending for the NJPSU.[42]

Electronic Monitoring

The NJPSU legislation states that the unit shall provide electronic monitoring of select defendants and will be responsible for bearing the cost of these programs. The DCPSA's High Intensity Supervision Program is responsible for supervising defendant with electronic monitoring through Global Positioning Systems and provides a model by which RESI can calculate the potential cost of such a provision in the NJPSU.

Of the 42,455 D.C. arrests, there were 1,268 defendants being electronically monitored by the DCPSA in FY 2012. DCPSA expenditures for assuring compliance through these systems and the associated partnerships totaled to $2,281,000. Assuming the same rate of electronic supervisions to arrest for the NJPSU as exists for the DCPSA, NJPSU spending on electronic monitoring will amount to $16,211,943 for 9,012 defendants.[43]

[41] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification," 21.
[42] Ibid, 14.
[43] Ibid, Budget Strategy 2.1 and 4.1 of HISP.

Figure 11: Programming

Program	DCPSA		NJPSU	
	Participants	Program Spending	Participants	Program Spending
Drug testing	-	$3,897,000	-	$27,697,476
Drug rehabilitation	1,809	$12,532,000	12,857	$89,069,739
Mental health treatment	558	$4,772,000	3,966	$33,916,438
Electronic monitoring	1,268	$2,281,000	9,012	$16,211,943
Total Cost	**-**	**$23,482,000**	**-**	**$166,895,596**

Source: DCPSA, RESI

Operating costs totaled $379,589,599 per fiscal year based on 2012 data and budgets.

Figure 12: Annual Operating Cost

Category	Cost per Year
Facilities and Upkeep	$8,881,432
Personnel	$203,812,571
Programming	$166,895,596
Total	**$379,589,599**

Source: RESI

3.4 Indirect Costs

The indirect costs of the NJPSU legislation contained within the sister bills are those costs that the NJPSU itself will not be responsible for financing. The indirect costs are those cost that will be incurred by state government as a result of the practices and provisions of the NJPSU and the provisions of the bills. These costs include the increased spending on public attorneys and court room time caused by the additional step in the criminal justice process and the additional opportunity for a court decision to be appealed.

State government may also accrue costs due to an increase in failures to appear (FTA). Similarly, an increase in recidivism by pretrial release defendants could increase costs to state and local law enforcement agencies. There are also numerous social costs, including crime to persons

and property, to community wellness, to personal security, and quality of life, that are beyond the scope of this study.[44]

Public Defenders and Court Costs

Current New Jersey law establishes the Initial Appearance (IA) phase of the criminal justice process as a non-adversarial hearing in which the defendant is informed of his or her rights and the charges against him or her, future court dates are established, and bail decisions are set.[45] SB 946 and HB 1910 alter the IA phase by stipulating that judges will make rulings regarding defendants' applicability for pretrial release or detention and provide defendants with a right to council during this process. By extension, the bills guarantee public defenders to low-income defendants during this phase. Additionally, the bills allow the presentation of evidence and witnesses, making the IA an adversarial hearing.[46]

Public Defender Costs

The provision of public defenders to indigent defendants incurs significant costs to state government. RESI used a study conducted by the Maryland Department of Legislative Services (DLS) to approximate the cost of the additional public council provisions. The DLS study examined the added cost to state government for public defenders after the ratification of a law that requires the Maryland judiciary to provide indigent defendants with representation at the IA phase of a criminal trial. This result is identical to the outcome that the New Jersey provisions will have. DLS found that, in Maryland, this provision would cost $33,000,197 per fiscal year.

RESI assumed that the portion of indigent defenders per arrest in New Jersey is similar to that of Maryland. Under this assumption, RESI scaled the cost of IA public defenders from 191,281 arrests in Maryland, to 301,744 arrests in New Jersey. This resulted in a potential increased IA public defender cost of $52,057,504 in New Jersey. This estimate includes the cost of assistant public defenders, support staff, IT employees, fiscal clerks, and human resources employees.

Court Costs

The additional IA provisions in the bills are likely to result in an increase in required court resources. The adversarial hearing will require more time from the court, as evidence and witnesses must be presented. By extension, this change will require additional spending on

[44] Kathryn E. McCollister, Michael T. French, and Hai Fang, "The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation," *Drug and Alcohol Dependence* 108 (2010): 98–109, accessed April 14, 2014, http://www.sciencedirect.com/science/article/pii/S0376871609004220.
[45] "RULE 3:4. Proceedings Before the Committing Judge," New Jersey Courts, accessed April 15, 2014, http://www.judiciary.state.nj.us/rules/r3-4.htm.
[46] State of New Jersey, Assembly No. 1910 (2014): 5, http://www.njleg.state.nj.us/2012/Bills/A5000/1910_I1.pdf.

employee labor and may cause a potential space issue as IA hearing times increase. As the bills call for the use of a uniform risk assessment tool, the defense may often call into question issues of the actuarial sciences behind the tool, which will require expert witnesses provided by state government.[47]

These cost, though they are substantial, are incalculable given the scope of this analysis. RESI cannot reasonably estimate the increase in court resource demand in practice. However, these costs are likely to incur a substantial burden on the courts.

Failure to Appear

Failure to Appear (FTA) occurs when a defendant who is released pretrial does not appear in court for his or her hearing. FTAs incur costs to state government through the need for law enforcement to recapture the fugitive as well as court downtime caused by the missed hearing. Whereas, with commercial bail, the cost of recapture is born by the bail bonding agency, under a pretrial service program, these costs fall to state and local jurisdictions.

RESI used two studies to calculate the potential cost of additional FTA caused by the implementation on pretrial services. A research report prepared by Robert G. Morris, Ph.D., surveyed the FTA and recidivism rates of released defendants in Dallas County, Texas, based on the method of release. These defendants encompassed both misdemeanor and felony charges. The survey found that defendants released on pretrial services had a FTA rate of 37 percent, while those release on commercial bonds had an FTA rate of 23 percent.

In a similar study, the United States Department of Justice surveyed the FTA rates for the 75 largest counties in the nation. The study focused on the FTA rate of 250,000 felony defendants. Again, the FTA rate is higher under pretrial conditional release, at 22 percent, than under commercial surety bonds, at 18 percent.[48]

Based on the above studies, RESI assumed a possible increase in FTA ranging from 4 percent to 16 percent when utilizing pretrial service releases instead of commercial bonds. To calculate the potential increase in FTA occurrences in New Jersey that could be caused by a change from commercial bail system to a pretrial service release system, RESI first estimated the number of New Jersey releases. The common standard for release rate is 50 percent of defendants. Applying this assumption to the 301,744 arrests in the jurisdiction results in approximately

[47] New Jersey Senate No. 946/Assembly No. 1910 (2014), 5.
[48] U.S. Department of Justice Office of Justice Programs, "Pretrial Release of Felony Defendants in State Courts," Bureau of Justice Statistics Special Report (November 2007): 9, accessed April 18, 2014, http://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

150,872 releases. This equates to a potential increase in FTA of 6,035 to 24,140 defendants. According to the Morris report, the average FTA incurs a cost to state government of approximately $1,775.[49] At this cost level, pretrial service releases have the potential to incur $10,711,912 to $42,847,684 in costs to state government.

It is important to note that these FTA rates are from a variety of jurisdictions that do not necessarily provide the same levels of pretrial programming as the DCPSA, the agency by which the NJPSU has been modeled thus far. The DCPSA maintains an FTA rate of 11 percent only on the cases that it is supervising and therefore may not include the FTAs of defendants who the agency had suggested to release on recognizance or personal bond.[50]

Recidivism

Recidivism occurs when a defendant who is released pretrial commits another crime. The cost of recidivism to state government includes the cost of rearrest and reprocessing by the criminal justice system. Additionally, recidivism can incur property and social costs, such as loss of life, loss of property, diminished community quality of life, and loss confidence in the criminal justice system. However, examining all of the cost associated with these effects is outside the scope of this analysis.

Morris's research examines the effects of release method on the likelihood of defendant recidivism within twelve months of release. The report finds that commercial bond defendants are 1.2 percent less likely to recidivate then those released through pretrial services. In the Department of Justice's study of felony defendants, the data indicate that subjects were less likely to recidivate if they were released through pretrial services by 1 percent.[51]

Upon closer examination of both reports, RESI found that Morris also finds felony defendants approximately 1 percent less likely to recidivate. However, when misdemeanor and felony defendants were aggregated, the rate returns to 1.2 percent, in favor of commercial bonds. Because of the bias effect that restricting the study to felony defendants had on the findings, RESI did not consider the Department of Justice recidivism rate in its projection. Using Morris's reported recidivism levels, RESI assumed that New Jersey would experience approximately 1,810 additional recidivisms.[52]

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[49] Robert G. Morris, "Pretrial Release Mechanisms in Dallas County, Texas: Differences in Failure to Appear (FTA), Recidivism/Pretrial Misconduct, and Associated Costs of FTA," (January 2013): 7, accessed April 17, 2014, http://www.utdallas.edu/epps/ccjs/dl/Dallas%20Pretrial%20Release%20Report%20-FINAL%20Jan%202013c.pdf.
[50] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification," 7.
[51] Morris, "Pretrial Release Mechanisms in Dallas County," 8.
[52] Ibid.

The cost of recidivism to state government differs from the cost of a normal arrest. A standalone crime incurs costs for arrest, processing, and detention. The cost of a recidivating criminal on pretrial release, however, should only consider the arrest and processing cost. The detention cost of a recidivating defendant is largely dependent on when the recidivism occurs relative to the defendant trial date. The closer to his or her trial date that a defendant recidivates, the less time he or she will spend in pretrial detention. This results in less detention cost to the state government. There is no available data or studies that would allow RESI to construct an assumption as to the average time to recidivism. Therefore, RESI did not consider the additional cost of detention as a cost of recidivism or an indirect cost of pretrial release.

A study by the Urban Institute Justice Policy Center finds that the minimum cost of processing a defendant up to the point of detention is $1,270.34, with a maximum cost of $2,049.25, based on the rearrest charges.[53] Applying these costs against the 1,810 additional recidivisms resulted in a potential indirect cost of $2,299,905 to $3,710,093 incurred by state government.

Figure 13: Potential Indirect Costs

Category	Potential Cost (low)	Potential Cost (high)
Public defenders and court costs	$52,057,504	$52,057,504
Failure to appear	$10,711,912	$42,847,684
Recidivism	$2,299,905	$3,710,093
Total Potential Indirect Costs	**$65,069,321**	**$98,615,281**

Source: RESI

3.5 Conclusion

The New Jersey Pretrial Service Unit is likely to be a capital intensive project. The level of arrests in New Jersey dictates that a large amount of employees will be needed to process defendants. To facilitate the work environment and resources of these employees, start-up costs will total at least $16,591,360 (using economy and entry level materials). Operating costs will total to at least $379,589,599 annually, a large part of which is driven by high FTE demands and the additional programming provisioned in the bills. The potential indirect costs could come to $65,069,321 a year depending on the intensity at which the NJPSU pursues effective programming and personnel.

[53] John Roman and Aaron Chalfin, "Does It Pay To Invest In Reentry Programs For Jail Inmates?," The Urban Institute (2012), accessed April 22, http://www.urban.org/reentryroundtable/roman_chalfin.pdf.

Figure 14: Cost Summary

Category	Total Cost
Start-up costs	$16,591,360
Operations costs	$379,589,599
Indirect costs	$65,069,321

Source: RESI

4.0 Additional Cost Considerations

The cost projections provided above consider the additional costs likely to be incurred to the New Jersey state government due to the passing of Senate Bill No. 946 and Assembly Bill No. 1910. The above projections do not attempt to account for possible spending reductions within the cost estimate. This addendum will address some of the potential sources of spending reductions.

4.1 Cost Model

Potential spending reductions could be implemented if a less intensive pretrial services system were utilized as a model for the NJPSU. The DCPSA has a high level of spending per arrest when compared to the Kentucky Pretrial Services (KPS). The KPS has a total budget of approximately $12,094,900 to serve approximately 172,434 arrests, while D.C. spent $58,081,000 serving 42,455 arrests.[54] However, KPS does not provide the high level of services that DCPSA provides, nor does it provide the services that NJPSU would be required to provide under the bills.

The congruent services of the DCPSA and the NJPSU have already been established above. However, the KPS does not provide medical and drug rehabilitation services to its released defendants. Additionally, the Kentucky judiciary still assigned 111,684 monetary releases, and only 61,306 non-financial releases last year. This portion of monetary release to pretrial service release is much higher than the significant majority of pretrial releases that occur under non-financial conditions in the DCPSA and the prospective NJPSU.[55]

The KPS would not be an accurate cost model, as it does not fulfill the goals of the NJPSU. The cost difference between these programs is further justified by the difference in cost of living of between the locations. To assess this difference, the cost of living calculations were first indexed against a $50,000 salary in Kentucky. A Kentucky salary of $50,000 adjusted for cost of living in New Jersey is an average of $72,824, similar to that of that of D.C., which is

[54] Personal communication with Manager at Pretrial Services, Kentucky (Budget); Uniform Crime Reports, "Crime in the United States 2012," Table 69. (Arrests)
[55] Kentucky Statistical Analysis Center, "2010 Sourcebook of Criminal Justice Statistics in the Commonwealth," 72, accessed May 14, 2014, http://justice.ky.gov/departments/gmb/2010+Sourcebook.htm.

adjusted to an average of $79,502. The Kentucky cost of living is approximately 31 percent lower on average than New Jersey and 37 percent lower than D.C. These differences in salary caused by cost-of-living adjustments makes a significant impact on spending levels; in both the DCPSA and the KPS, personnel costs constitute more than 75 percent of the budget.[56] [57]

Using the DCPSA spending levels can be further substantiated through comparison with California's Santa Clara County Office of Pretrial Services (SCOPS). With the limited amount of pretrial service spending data, one of the few in depth budgets provided was from the SCOPS. The SCOPS spent $5,059,184 during FY 2011, facilitating the counties 7,540 arrests in CY 2012.[58] Additionally, the SCOPS spent about $4,400,000 on personnel expenses for its 37 employees, resulting in average per employee cost of about $119,000, resembling the average DCSPA employee cost of $122,385.[59]

If a less intensive program is used as a model for the NJPSU, additional costs for FTA and recidivism should also be taken into account. The level of service provided by a pretrial release agency has a substantial impact on the outcome of a pretrial release. When a released defendant is not supervised during release, they are approximately 36 to 42 percent more likely to fail to appear, and up to 16 percent more likely to recidivate.[60] It is apparent that the intensity of a pretrial program has a significant impact on the effectiveness of its pretrial misconduct prevention. If the assumed spending levels – and likewise supervision level – of the NJPSU is reduced, the indirect costs that the state would incur from FTA and recidivism could increase dramatically, above what was projected in Section 3.4.

4.2 Reductions in Pretrial Populations

The NJPSU has the potential to save New Jersey money by reducing the pretrial populations being held in jails. In March 2014 the New Jersey Joint Committee on Criminal Justice released a

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[56] "Cost of Living: How far will my salary go in another city?," CNN Money, accessed May 14, 2014, http://money.cnn.com/calculator/pf/cost-of-living/.

[57] These projections come from a calculator provided by CNN that utilizes data provided by the Council for Community and Economic Research.

[58] This results in the spending of approximately $671 per arrest. This figure is about half the DCPSA spending of $1402 per defendant. However, it is not indicated in the SCOPS audit that they are responsible for financing medical or drug rehab treatment, which represent a large portion of D.C. Budget.

[59] Management Audit of the Office of Pretrial Services, "Structure, Staffing and Budget of the Office of Pretrial Services," accessed May 14, 2014, http://www.sccgov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf.

[60] Christoper T. Lowenkamp and Marie VanNostrand, "Exploring the Impact of Supervision on Pretrial Outcomes," Laura and John Arnold Foundation (November 2013): 12, accessed May 27, 2014, http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_Supervision_FNL.pdf.

report estimating the number of pretrial detainees who could be released under a reformed pretrial system.[61]

The report finds that there are approximately 9,000 pretrial defendants jailed in New Jersey on any given day. The report states that, "conservatively," approximately 50 percent of these defendants are being held on low levels of bail and should, under a non-bail based system, be released pretrial.[62] According to these figures, there are approximately 4,500 unnecessary pretrial detainees each day. The report estimates that it costs jails an average of $100 to jail a detainee for a day. This results in approximately $450 ,000 spent each day to detain defendants who could potentially be released into the community. If the NJPSU were able to achieve these additional release levels, it would save the state approximately $164,250,000 a year. However, this figure is still less than half of the projected operating cost of $379,589,599 and would still leave a net fiscal cost of $215,339,599.[63]

As a result of the additional releases projected by the New Jersey Joint Committee on Criminal Justice, there would also be additional costs for FTA and recidivism of the released defendants. According to the study, the pretrial detainees are jailed, on average, between 60 and 90 days. Applying this to the previous data outlined, this range means there would be approximately 18,250 to 27,375 additional releases each year. Even at low rates of recidivism and FTA, this will still result in a substantial amount of cost incurred by pretrial release misconduct.[64]

There is no evidence to support that pretrial detainment will decrease as a result of the NJPSU and the associated legislative provisions, however, as the as the exact parameters of the risk assessment tool that the NJPSU will utilize are unknown. In contrast to the analysis made by the New Jersey Joint Committee on Criminal Justice report, it is possible that the NJPSU will find there are a greater number of high-risk defendants who are currently being detained, and therefore the cost of pretrial detainments will increase. For example, at the federal judicial

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[61] New Jersey Judiciary, "Report of the Joint Committee on Criminal Justice," accessed May 12, 2014, http://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf.
[62] The assumption from the New Jersey Joint Committee on Criminal Justice of a 50 percent pretrial detainee reduction does not sound "conservative." This figure seems to be based on the commonplace figure of 50 percent of defendants being released pretrial in total. New Jersey already releases a large portion of its pretrial population. However, of those defendants who remain jailed, a significant portion of whom have likely remained jailed for other reasons (bail has purposefully been set high as the defendant is a risk to self/community, the family/individual are unwilling to pay because of reoccurring destructive behavior, the individual finds remaining in jail to be preferred to financial sacrifice required to post bail). Applying the 50 percent release rate to this population would not yield an accurate result, as this population is already dense with high risk defendants - a distilled section of the pool of pretrial defendants.
[63] New Jersey Judiciary, "Report to the Joint Committee on Criminal Justice," 12.
[64] Ibid.

level, approximately 64 percent of pretrial defendants are detained, even though the system only uses monetary release conditions for 27 percent of defendants. This illustrates a non-financial release dominated system that still experiences a high level of pretrial detention.[65]

4.3 Time-to-trial

The NJPSU and associated legislation was developed with the goal to shorten the average time-to-trial and, as a result, reduce the length of time that defendants will remain detained or supervised before trial. As was mentioned in Section 4.2 of this report, pretrial detainment incurs a cost to the state. Reducing the time it takes to process defendants through the criminal trial process will reduce the total cost.

Reductions in time-to-trial will purportedly stem from a streamlining of the pretrial processes. Specifically, the rapid assessments and recommendations that the NJPSU will make to judges during the initial appearance phase are aimed to increase the courts' ability to make quick decisions regarding pretrial detention and release. However, the bills also provide other alterations to the pretrial process that are likely to increase the time required by the court to process defendants through their pretrial hearings.

The bill establishes that, at the initial appearance, the defendant will have the right to council as well as the opportunity to "testify, to present witnesses, to cross examine witnesses who appear at the hearing, and to present information by proffer or otherwise."[66] As was stated in previously in this report, changing what has traditionally been a non-adversarial judgment into a trial-like adversarial hearing will increase the time that these court proceedings will take. Additionally, the judicial decisions made in this stage can be appealed, further increasing the demand for court time.

Monetary release was also found to also decrease a defendant's time to pretrial release, and thereby decreases the amount of time that a defendant must stay detained as a fiscal burden to the State. In a study conducted on the Kentucky pretrial population, it was found that defendants who posted a monetary bond stayed detained pretrial for an average of 4 hours, while those assigned to a monetary bond were detained for 35 hours. Those defendants released through pretrial services were detained for more than 100 hours on average. Though monetary bails reduced time to release is not a direct decrease in time to trial, it achieves the same effect of reducing pretrial detention time and thereby lowering cost.

[65] U.S. Department of Justice, "Pretrial Release and Misconduct in Federal District Courts, 2008-2010," 5, accessed May 14, 2014, http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf.
[66] New Jersey Senate No. 946/Assembly No. 1910 (2014), 3.

A shortage of judges in New Jersey compounds the issues of time-to-trial as it creates a virtual bottle-neck behind which cases become backed up. With the potential for time demanding pretrial hearings and appeals, the time-to-trial could increase even more. According to Assemblyman Gordan Johnson there are approximately 49 judicial vacancies statewide.[67] The report by the Joint Committee on Criminal Justice compared the caseload of judges in Washington D.C. to the caseload in New Jersey and found that in D.C. there was an average of 46.5 cases per applicable criminal judge compared to Essex County, New Jersey which had approximately 217 cases-per-judge.[68] Ultimately, from 2009 to 2013 there was a net increase of 1 percent in backlogged cases even though the total number of filings fell by 9%.[69] Again, the longer duration that cases are pending pretrial, the more costs that will be incurred by pretrial detention and pretrial supervisions.

It is difficult to accurately project the potential time demands on the New Jersey courts, as the exact in court actions and appeal rates will not be known unless the bills are put into practice. However, the additional time demands stated above indicate that there is a reasonable likelihood that time demand may increase. Adding to the issues caused by an increase in demand for court time, there already exists a shortage of judges in many jurisdictions. As these factors push time-to-trial longer, the costs to the state will increase as well.

4.4 21st Century Justice Improvement Fund

The New Jersey bills also establish a means by which the NJPSU and other programs will be funded. They permit the Supreme Court the power to increase filing fees and other statutory fees payable to the court by up to $50 dollars per instance. All of the money collected through these increases will then be collected into the 21st Century Justice Improvement Fund. The disposition of these funds is also dictated by this bill as follows:

- The first $15 million appropriated will contribute to funding the operation of the NJPSU.
- Any remaining funds up to $17 million will fund the development of an e-court filing system.
- After that, any remaining funds go to Legal Services of New Jersey, up to $10.1 million.
- The rest of the funds then go to the New Jersey General Fund, up to $10 million.
- All remaining funds at the end would then return to the court for the further development, maintenance, and administration of court information technology.[70]

[67] New Jersey Budget Committee, Budget Hearing, recorded April 30, 2014 2:00 PM, http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=ABUB&SESSION=2014.
[68] New Jersey Judiciary, "Report of the Joint Committee on Criminal Justice," 43 (footnote 179).
[69] New Jersey Budget Committee, Budget Hearing, recorded April 30, 2014 2:00 PM.
[70] New Jersey Senate No. 946/Assembly No. 1910 (2014), 5.

For funding from the 21st Century Justice Improvement Fund to meet the NJSPU $15 million funding cap, it would require approximately 300,000 instances of applicable fees to be collected. For perspective it is important to consider that there were approximately 315,000 arrests in New Jersey in 2012. Further, for the Fund to meet the e-court system funding cap and begin to contribute to Legal Services of New Jersey there would have to be at least 640,000 instances of applicable fees collected. As the Supreme Court has not yet assigned additional amounts to specific fees, RESI cannot estimate the potential collections of the 21st Century Justice Improvement Fund.[71]

5.0 Economic Impact Analysis

When New Jersey instates the NJPSU it will divert pretrial release traffic to non-financial conditional release, and away from commercial bondsman. The resulting loss in commercial bail usage will be manifested in the loss of commercial bail employees and eventually the closing of commercial bonding firms. The level of commercial bail employment and firm closure cannot be quantified without a full understanding of the future release rates, therefore RESI elected to model the loss of employment on a per-ten-employee basis. RESI conducted an economic and fiscal impact analysis for every 10 employees who are lost from the New Jersey's bail bonds industry. RESI used the IMPLAN input/output model. For more information regarding IMPLAN and RESI's methodology, please refer to Appendix A of this report. A glossary of terms can be found in Appendix B of this report.[72]

5.1 Findings

According to RESI's analysis, a loss of 10 employees in New Jersey's bail bonds industry would result in a loss of approximately 17 employees, nearly $2.5 million in output, and nearly $0.6 million in wages. This loss is a compilation of the effects of direct, indirect, and induced impacts. A summary of the total economic impacts can be found in

[71] It is important to note, however, that wherever the court finds appropriate to add these additional fees, there are instances in which indigent defendants will be unable to pay. And as one of the goals of the bills is to eliminate the holding of indigent defends on small bonds, RESI assumes that the court will not be able to collect some portion of the fees that they assess.

[72] This impact does not account for any positions created by the NJPSU. This is strictly the net impacts from 10 employees from the bail bond industry

Figure **15** below. For detailed economic impacts, please refer to Appendix B of this report.

Figure 15: Total Economic Impacts

Impact Type	Direct	Indirect	Induced	Total
Employment	10.0	4.1	3.3	17.4
Output	$1,028,672	$544,071	$486,940	$2,059,684
Wages	$242,698	$190,089	$155,051	$587,837

Sources: IMPLAN, RESI

RESI also estimated the fiscal impacts associated with a change of 10 employees in New Jersey's bail bonds industry. The fiscal impacts of 10 employees can be found in Figure 15.

Figure 16: Total Fiscal Impacts

Impact Type	Total
Property	$47,813
Income	$18,078
Sales	$24,282
Payroll	$872
Other	$12,037
Total	**$103,082**

Sources: IMPLAN, RESI

5.2 Conclusion

For a loss of every 10 employees in the bail bonds industry, New Jersey would lose 17 jobs, nearly $2.1 million in output, and nearly $0.6 million in wages. A loss of 10 employees in New Jersey's bail bonds industry would also result in the loss of approximately $103,000 in tax revenues. These losses could be offset by the effects of employment gains in the NJPSU; however, the resulting wages would come from the budget of the state government, rather than from the private sector. Spending and employment by commercial bonding firms create a positive net fiscal impact. However, when the private employment changes to public employment, the net fiscal impact on the state government will be substantially negative. Though the tax income from the employment may remain the same, the government will incur an extra $242,698, assuming that the wages paid are similar.

6.0 Legislation Review

Beyond the previous justifications for using the DCPSA as a model for the NJPSU costs, the language of the New Jersey bills when compared to the legislation of other pretrial programs

further supports the assumption that the DCPSA is an accurate cost model.[73] An analysis of the D.C. Code, wherein it establishes the functions of the DCPSA, shows that the legislation establishing the NJPSU is nearly identical. Moreover, where the jurisdictions differ in their provision, it is the NJPSU that seems to call for more intensive pretrial services. RESI also examined the legislation that governs the KPS to illustrate how this program is not codified to be as intensive as the NJPSU and the DCPSA.

6.1 The District of Columbia Pretrial Service Agency

The powers and responsibilities of the DCPSA stem from Title 23, Chapter 13 of the D.C. Code. The important difference between the pretrial release process of the DCPSA and that of the NJPSU is found just prior to their respective release conditions. The D.C. legislation states that a non-financial release condition will only be used after it cannot reasonably assure reappearance and the safety of the community through release on personal recognizance *or* an unsecured appearance bond.[74] However, the New Jersey bills provide that release conditions be imposed after only personal recognizance if found inadequate, further stating that "monetary bail shall be set when it is determined that no other conditions of release will reasonable assure the defendants appearance in court and that the defendant does not present a danger to any person or the community."[75] This difference is substantial considering that most of the rest of the legislation of the two jurisdictions remains the same. This establishes that though the DCPSA would first consider using a monetary condition of release thereby deferring the cost away from its pretrial programs, the NJPSU will instead have to seek non-financial release conditions first without considering monetary options. This potentially means the NJPSU will be responsible for higher levels of supervision, and more cost, than the DCPSA.

The release conditions at the disposal of the DCPSA are largely similar to that of the NJPSU. It has the power to limit where the defendant may travel, which in practice has evolved into the use of electronic monitoring. It also can require that a defendant remain under the direct supervision of an individual or organization. It can assign the defendant to check in with a pretrial officer at prescribed times, or return to custody for specified hours following release for school or work. Similar to the NJPSU, the DCPSA also has the power to require a defendant to "undergo medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency."[76] The sections of the legislation from both D.C. and New Jersey pertaining to conditions of release can be found in Appendix D of this report, wherein all other release

[73] *Previous justifications* include those pertaining solely to the provisions of the NJPSU legislation in relation to the actually practices of the DCPSA, as well as the importance of instituting intensive programs to avoid indirect costs
[74] District of Columbia Code § 23-1321 (b).
[75] New Jersey Senate No. 946/Assembly No. 1910 (2014), 1.
[76] District of Columbia Code, § 23-1321 (c).

conditions are also enumerated. These conditions of release are important as they represent the similar potential program cost between the DCPSA and the NJPSU.

The D.C. and prospective New Jersey legislation also provide a similar pretrial procedure regarding how the courts are to assess whether a defendant should be detained indefinitely before his or her trial. In both jurisdictions, upon motion from the prosecutor the court will conduct a hearing on whether the defendant can be released pretrial. These motions are restricted to defendants who meet any of several factors that indicate that the defendant may pose an increased risk of obstruction of justice, danger to individuals or the community, or failure to appear. In these hearings, the burden of proof rests on the defendant, as the legislation states that the assumption of the court will be that "no condition or combination of conditions will reasonably assure" the defendants good behavior upon release.[77] In both D.C. and New Jersey, judgments can be appealed for reassessment. In both jurisdictions, this hearing is adversarial, meaning that the defendant is allowed to call witnesses, cross-examine witnesses for the defense, and present evidence. Further similarities between the legislation of these hearings can be found in the excerpts of the bills found in Appendix E of this report. These similarities in the hearing process of higher risk defendants are significant as, among other factors, it likely indicates a similar rate of release of high risk defendants, and therefore a similar level of associated costs.

Finally, it is important that the D.C. legislation also establishes a framework for the salary of its employees. In § 23-1306, it states that "all employees other than the chief assistant shall receive compensation that is comparable to levels of compensation established for Federal pretrial services agencies."[78] This aids in substantiating the employee expenditures of the DCPSA because it links the personnel costs to the salaries of Federal pretrial service employees who work in numerous jurisdictions across the country. This fact is important when using the DCPSA as a model for the NJPSU cost analysis as personnel costs naturally constitute a significant portion of the cost projections.

6.2 Kentucky Pretrial Services

Chapter 431 of the Kentucky Revised Statutes (KRS) establishes the pretrial processes for Kentucky defendants. It is first important to note that § 431.510 of the KRS states that all for-profit bail bonding is illegal in the state.[79] With a lack of traditional commercial bail options, this necessitates Kentucky to provide alternate pretrial release processes. RESI examined and highlighted some of the key factors that indicate that the Kentucky legislation calls for a less

[77] District of Columbia Code, § 23-1322 (b)
[78] Ibid, § 23-1306.
[79] Kentucky Revised Statutes, § 431.510.

intensive and therefore less costly pretrial service program than does the legislation of New Jersey or D.C.

The most substantial difference between the NJPSU is that, similar to the DCPSA, the KPS is required to first consider release on the personal recognizance and unsecured bail bonds. Only defendants who are found to still pose a risk of FTA and danger to the community are then assessed for non-financial release conditions.[80] As stated previously, the NJPSU is only to consider monetary conditions as a last alternative, which can be reasonably assumed to result in the management of additional defendants on conditional releases. This speculation is substantiated, in part, by the large number of financial releases that are still assigned by the Kentucky courts, as discussed in Section 4.1 of this report.

The KPS is also limited in its options of pretrial release conditions. Outside the execution of a non-commercial bail bond, the KPS can utilize the following non-financial release conditions:

- Place the defendant in the custody of a person or organization who has agreed to supervise them;
- Place restrictions on travel, association and places of abode;
- Require the defendant to submit to drug testing;
- Require the defendant to participate in a faith-based drug or alcohol treatment or recovery program;
- Place the defendant in an electronic monitoring program which may include house arrest; and/or
- Require the defendant to return to custody after specified hours.

Kentucky requires any defendants participating in the drug testing or electronic monitoring to bear the costs of their participation if they are able. Additionally, the remaining cost of the electronic monitoring program is explicitly assigned to fall to the county or counties that have assigned the defendant to it. There is no provision for medical, psychological, or psychiatric treatment. The KPS is also authorized to "to impose any other condition deemed reasonably necessary to assure appearance as required."[81] RESI could not discern the extent of the use of this open-ended provision. These limited release options result in a program of lesser intensity and cost then what is expected from the NJPSU and what is experienced by the DCPSA.

6.3 Conclusion

A comparison of the D.C. and Kentucky legislation against that of New Jersey is useful in determining what the likely structure and intensity of the NJPSU program will be. RESI did not

[80] Kentucky Revised Statutes, § 431.520.
[81] Ibid, § 431.520.

include many administrative details in this review as they were similar across all of the programs and were insignificant in assessing the potential cost of the NJPSU.

Of the programs studied, RESI found the NJPSU is most similar to the DCPSA in its legislative parameters. Neither of the jurisdictions' legislation illegalizes commercial bonds as the Kentucky legislation does; however the goal of the legislation is to provide as many tools to the pretrial service programs as possible so that they may divert the maximum number of defendants away from commercial bond release conditions.

The similarity in provisions between the D.C. Code and New Jersey legislation, in conjunction with the statements made by the New Jersey committee, seem to indicate that the NJPSU is aimed to resemble the services and structure of the DCPSA.

7.0 Literature Review

7.1 "Exploring the Impact of Supervision on Pretrial Outcomes"

A study funded by the Arnold Foundation titled "Exploring the Impact of Supervisions on Pretrial Outcomes" found that very little empirical evidence exists regarding the effectiveness of pretrial supervisory programs on failure to appear (FTA) rates and new criminal activity (NCA) or recidivism. The objective of the study was to measure the impact of pretrial supervision on two different factors, FTA and NCA, using empirical evidence.

The study group included 3,925 defendants who were released from jail to wait out their case dispositions. The analysis group included 2,437 who were released with some type of pretrial supervision and 1,488 who were released without any supervision. It is important to note that the study did not differentiate between different terms of release (i.e., random drug testing, electronic monitoring, etc.). The terms of the release were left up to each jurisdiction that submitted data to define. As a result, terms of release could vary significantly. To test the possible outcomes of pretrial supervision, the researchers developed a series of bivariate and multivariate models.[82] Findings included the following:

- Pretrial supervision of any length makes FTA less likely.
- The multivariate models that controlled a defendant's gender, race, time in the community, and defendant risk level indicated that supervision significantly reduced the likelihood of FTA.
- Those defendants who were supervised for longer than 180 days were 12 to 36 percent less likely to commit new criminal activity. [83]

[82] Bivariate models analyze the relationship between two variables while multivariate has more than one dependent variable.
[83] Lowenkamp and VanNostrand, "Exploring the Impact of Supervision on Pretrial Outcomes."

In regard to the last finding, it is important to note that only some of the models that tried to determine the impact of pretrial supervision were statistically significant. The findings highlight the importance of pretrial agency supervision in pretrial release, and inform the assumption that there will be a direct correlation between the level of supervision and the likelihood of pretrial misconduct. This assumption is of pivotal importance when considering the balance that the NJPSU will have to seek between up-front program costs and the indirect costs caused by pretrial failure.

7.2 "The Hidden Costs of Pretrial Detention"

This study examined the effect that a period of pretrial detention has on a released defendant. The study was divided into two parts. The first considers the effect that pretrial detention has on FTA and recidivism of a defendant who is eventually released pretrial. The second portion examines the effect of pretrial detention on defendant recidivism after all trial proceedings had concluded and they had been released (post-disposition). The observed FTA and recidivism rates were then analyzed against factors including the length of pretrial detention, the risk level of the defendant, and the original crime of the defendant.

The study found that there was a slight correlation between the detention lengths and the likelihood of FTA. With all other variable controls considered, it was found that defendants who are detained two to three days are 1.09 times more likely to FTA than defendants detained for only one day. More significant, the study found that low-risk defendants who were held for two to seven days were 1.22 times more likely to FTA, and those held 15 to 30 days were 1.41 times more likely to FTA, compared to their counterparts who are held for one day or less.[84]

Pretrial recidivism was also found to correspond with the length of pretrial detention. In general, the longer the defendant is detained pretrial, the more likely they are to recidivate; this is especially true for low-risk defendants, who are up to 1.74 times more likely to recidivate when held for 31 days or more. However, this trend is not as true for moderate- to high-risk defendants. Moderate-risk defendants saw the highest levels of recidivism focused in the pretrial detention periods from two to fourteen days. There was no discernable trend in high-risk defendant recidivism.[85]

Pretrial detention was also positively correlated with post-disposition recidivism. Each increasing detention duration category showed an increased likelihood of pretrial recidivism,

[84] Christoper T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "The Hidden Costs of Pretrial Detention," Laura and John Arnold Foundation (November 2013): 10, accessed May 26, 2014, http://www.arnoldfoundation.org/sites/default/files/pdf/ LJAF_Report_hidden-costs_FNL.pdf.
[85] Ibid, 11.

with defendants "1.16 times more likely to recidivate if detained 2 to 3 days, increasing to 1.43 times if detained 15 to 30 days." Overall, there was a 1.3 times greater likelihood for a defendant to recidivate if he or she was held pre-trial.[86]

This raises questions on the efficacy and implementation of the proposed bills. The New Jersey courts already experience case back up, and this leads to long pretrial durations.[87] If the NJPSU and the associated legislation are not enacted in a way that can assure a rapid processing of pretrial defendants, the state could potentially experience a significant increase in FTA and recidivism. In a separate study based on defendants from Kentucky, the Kentucky Bar Association found that defendants who were release through pretrial services were held for approximately 100 hours, while the defendants who posted a monetary bond were released after an average of just four hours. Based on the findings of the original report, this disparity in detention time cause by the pretrial services system could be very harmful.[88]

However, it is important to note that the study does not show that the relationship between pretrial detainment and FTA or recidivism is necessarily a causal one. It only shows that a correlation exists, stating that the "association [between pretrial detention and FTA/recidivism] could indicate that there are unknown factors that cause both detention and recidivism, but it is an association worthy of further exploration."[89]

7.3 "Investigating the Impact of Pretrial Detention on Sentencing Outcomes"

In another pretrial detention study by Arnold Foundation, researchers analyzed the effects of pretrial detention on the defendants' sentencing outcomes. The study found a significant correlation between pretrial detention and sentencing. In total, they found that defendants detained until case disposition were 4.44 times more like to be sentenced to jail and 3.32 times more likely to be sentenced to prison. They also found that the length of a jail sentence for a detainee is approximately 2.78 times longer, and 2.36 times longer for a prison sentence.[90]

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[86] Lowenkamp, VanNostrand, and Holsinger, "The Hidden Costs of Pretrial Detention," 19.

[87] New Jersey Judiciary, "Report of the Joint Committee on Criminal Justice," 43 (footnote 179). States the overload of cases on New Jersey judiciary: "In the District of Columbia these [pretrial] cases are heard by one of the six "Felony One" judges. In July 2013, the active caseloads of these judges ranged from thirty-three (33) to fifty-six (56) defendants with an average of 46.5. In New Jersey these types of cases would be heard by Superior Court judges assigned to the Criminal Part. During July 2013, there were ten (10) judges assigned to Essex County. The active caseloads for these judges ranged from 169 to 263 with an average of 217. Essex is one of New Jersey's twenty-one counties."

[88] Kentucky Bar Association, "Amended Executive Summary, Uniform Schedule of Bail Pilot Project for 2010 Year End Report," 1, accessed June 2, 2014, http://www.kybar.org/documents/cle/ac_material/ac2011_17.pdf.

[89] Lowenkamp, VanNostrand, and Holsinger, "The Hidden Costs of Pretrial Detention," 20.

[90] Christoper T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "The Effect of

Low-risk defendants were found to have the highest sentencing difference, with pretrial detainees being 5.41 times more likely to be sentenced to jail then than the released counterparts, and 3.76 times more like to be sentenced to prison. Moderate-risk detainees were four times more likely to see jail time then there released counterparts and three times more likely to be sentenced to prison. High-risk detained defendants were approximately three times more likely to be sentenced to jail or prison then their released counterparts. [91]

The Arnold Foundation noted, in a research summary about the report, that the disparity in equality between released and detained defendants is representative of a failure of pretrial detainment, stating the findings "shed new light on the impact that a defendant's release or detention before trial can have on the eventual sentence in the case." [92] There is an implied argument made by the Arnold Foundation that pretrial detention causes a greater likelihood of jail and prison sentences. However, this is not necessarily accurate. First, it is important not to confuse the existence of correlation for causation. The presence of a defendant in pretrial detention is not the cause of a jail or prison sentence, but rather those who are sentenced to correctional detention tend to also be those who are detained pretrial. Alternatively, the correlation can be easily be explained by an efficiently functioning judiciary that detains many of the defendants who it foresees to be guilty, or assess the overall situation to be one that is indicative a likely guilty verdict. The argument that pretrial detainment leads to a greater likelihood of jail and prison sentencing, and increases the length of sentencing, is likely over-exaggerated because of the lack of consideration for the aforementioned factors.

Pretrial Detention on Sentencing," Laura and John Arnold Foundation (November 2013): 10, accessed May 26, 2014. http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_Supervision_FNL.pdf.

[91] Lowenkamp, VanNostrand, and Holsinger, "The Effect of Pretrial Detention on Sentencing," 11.

[92] Laura and John Arnold Foundation, "Pretrial Criminal Justice Research," November 2013, 3, accessed May 27, 2014, http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

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Appendix A—Methodology

A.1 IMPLAN Model Overview

To quantify the economic and fiscal impacts of an economic event on a region, RESI utilizes the IMPLAN input/output model. This model enumerates the employment and fiscal impact of each dollar earned and spent by the following: employees of the district, other supporting vendors (business services, retail, etc.), each dollar spent by these vendors on other firms and each dollar spent by the households of the event's employees, other vendors' employees, and other businesses' employees.

Economists measure three types of economic impacts: direct, indirect, and induced impacts. The direct economic effects are generated as the event creates jobs and hires workers to support the event's activities. The indirect economic impacts occur as the vendors purchase goods and services from other firms. In either case the increases in employment generate an increase in household income, as new job opportunities are created and income levels rise. This drives the induced economic impacts that result from households increasing their purchases at local businesses.

Consider the following example. A new firm opens in a region and directly employs 100 workers. The firm purchases supplies, both from outside the region as well as from local suppliers, which leads to increased business for local firms, thereby hypothetically creating jobs for another 100 workers. This is called the indirect effect. The workers at the firm and at suppliers spend their income mostly in the local area, hypothetically creating jobs for another 50 workers. This is the induced effect. The direct, indirect and induced effects add up to 250 jobs created from the original 100 jobs. Thus, in terms of employment, the total economic impact of the firm in our example is 250.[93]

A.2 Input Assumptions

RESI determined economic impacts based on the loss of ten commercial bail employees. RESI analyzed IMPLAN industry sectors based on the provided expenditures. RESI's analysis includes the following modeling assumptions:

- Economic impact multipliers are developed from IMPLAN input/output software.
- IMPLAN data are based on the North American Industrial Classification System (NAICS).
- IMPLAN employment multipliers are adjusted for inflation using the Bureau of Labor Statistic's CPI-U.
- Impacts were based on 2012 IMPLAN data for New Jersey, the most recent available.
- Impacts are represented in 2014 dollars.

[93] Total economic impact is defined as the sum of direct, indirect, and induced effects.

- Employment impacts include both full- and part-time employees. IMPLAN does not differentiate between full- and part-time employment.
- Impacts in this report are presented as a change of 10 employees. A change of 20 employees would result in impacts twice as high, while a change of 100 employees would result in impacts 10 times as high.
- RESI analyzed industry sectors based on NAICS code 812990, Other personal services.

Appendix B—Glossary

A glossary of economic and fiscal impact terminology frequently used throughout this report can be found in Figure 16.

Figure 17: Glossary of Terms

Term	Definition
Economic Impact	This term refers to the changes in the economy resulting from an event. RESI typically reports employment, output, and wage impacts.
Employment	This term refers to the number of new full-time equivalent (FTE) jobs created as a result of the event which has been modeled in IMPLAN.
Fiscal Impact	This term refers to the change in tax revenues resulting from an event. RESI typically reports state and local tax revenues, which are combined in IMPLAN.
IMPLAN	This term refers to the input/output modeling software used to model changes in the economy in a particular region. The user builds a model based on prepackaged economic data from IMPLAN (typically at the state or county level), then enters input figures—an industry change of employment or sales, a household change of income, and/or several other input types—for the industry sectors expected to be impacted as a "scenario." IMPLAN runs the scenario created in the model and produces the economic and fiscal outputs.
Output	This term refers to the economic activity created as a result of the event which has been modeled in IMPLAN. It is synonymous with "state GDP." In other words, it is the market value of all goods and services produced by the economy of the region being modeled.
State GDP	This term refers to the change in market value of all goods and services produced by the economy of the region which has been modeled in IMPLAN. It is synonymous with "output."
Wage Impact	This term refers to the change in employee compensation (including all salaries and wages) associated with the job and output creation resulting from the event which has been modeled in IMPLAN.

Source: RESI

Appendix C— Detailed Economic Impacts

Figure 18: Detailed Employment Impacts

Industry	Direct	Indirect	Induced	Total
Agriculture	0.0	0.0	0.0	0.0
Mining	0.0	0.0	0.0	0.0
Utilities	0.0	0.0	0.0	0.0
Construction	0.0	0.1	0.0	0.1
Manufacturing	0.0	0.0	0.0	0.1
Wholesale Trade	0.0	0.1	0.1	0.1
Retail Trade	0.0	0.0	0.6	0.6
Transportation and Warehousing	0.0	0.2	0.1	0.2
Information	0.0	0.2	0.1	0.3
Finance and Insurance	0.0	0.2	0.2	0.4
Real Estate and Rental and Leasing	0.0	0.3	0.2	0.5
Professional, Scientific and Technical Services	0.0	0.6	0.1	0.8
Management of Companies and Enterprises	0.0	0.0	0.0	0.0
Administrative and Support and Waste Management and Remediation Services	0.0	1.6	0.2	1.8
Educational Services	0.0	0.0	0.2	0.2
Health Care and Social Services	0.0	0.0	0.8	0.8
Arts, Entertainment and Recreation	0.0	0.3	0.1	0.4
Accommodation and Food Services	0.0	0.1	0.3	0.5
Other Services	10.0	0.2	0.3	10.5
Government	0.0	0.1	0.0	0.1
Total	**10.0**	**4.1**	**3.3**	**17.4**

Sources: IMPLAN, RESI

Figure 19: Detailed Output Impacts

Industry	Direct	Indirect	Induced	Total
Agriculture	$0	$28	$498	$525
Mining	$0	$199	$267	$466
Utilities	$0	$9,427	$10,708	$20,135
Construction	$0	$7,882	$3,889	$11,771
Manufacturing	$0	$16,983	$24,004	$40,987
Wholesale Trade	$0	$12,343	$24,123	$36,466
Retail Trade	$0	$2,090	$49,518	$51,608
Transportation and Warehousing	$0	$21,479	$12,108	$33,587
Information	$0	$89,043	$21,990	$111,033
Finance and Insurance	$0	$52,917	$61,449	$114,366
Real Estate and Rental and Leasing	$0	$64,328	$92,345	$156,672
Professional, Scientific and Technical Services	$0	$96,118	$22,020	$118,138
Management of Companies and Enterprises	$0	$8,816	$3,885	$12,701
Administrative and Support and Waste Management and Remediation Services	$0	$109,151	$12,921	$122,072
Educational Services	$0	$133	$10,098	$10,231
Health Care and Social Services	$0	$11	$83,693	$83,704
Arts, Entertainment and Recreation	$0	$20,079	$7,379	$27,458
Accommodation and Food Services	$0	$7,698	$21,527	$29,225
Other Services	$1,028,672	$17,831	$18,875	$1,065,378
Government	$0	$7,514	$5,645	$13,159
Total	**$1,028,672**	**$544,071**	**$486,940**	**$2,059,684**

Sources: IMPLAN, RESI

Figure 20: Detailed Wages Impacts

Industry	Direct	Indirect	Induced	Total
Agriculture	$0	$5	$95	$100
Mining	$0	$22	$20	$42
Utilities	$0	$1,319	$1,576	$2,895
Construction	$0	$2,913	$1,033	$3,945
Manufacturing	$0	$3,116	$2,886	$6,003
Wholesale Trade	$0	$4,691	$9,167	$13,858
Retail Trade	$0	$938	$20,961	$21,899
Transportation and Warehousing	$0	$7,335	$3,965	$11,299
Information	$0	$20,255	$4,929	$25,184
Finance and Insurance	$0	$17,391	$18,268	$35,659
Real Estate and Rental and Leasing	$0	$4,591	$2,284	$6,875
Professional, Scientific and Technical Services	$0	$38,738	$9,767	$48,506
Management of Companies and Enterprises	$0	$5,369	$2,366	$7,736
Administrative and Support and Waste Management and Remediation Services	$0	$61,488	$6,369	$67,857
Educational Services	$0	$71	$5,548	$5,618
Health Care and Social Services	$0	$5	$42,089	$42,094
Arts, Entertainment and Recreation	$0	$4,214	$3,062	$7,276
Accommodation and Food Services	$0	$2,974	$8,355	$11,329
Other Services	$242,698	$8,925	$8,828	$260,450
Government	$0	$5,730	$3,483	$9,213
Total	**$242,698**	**$190,089**	**$155,051**	**$587,837**

Sources: IMPLAN, RESI

Appendix D—Release Conditions Legislation

District of Columbia Code: § 23-1321. Release prior to trial

(a) Upon the appearance before a judicial officer of a person charged with an offense, other than murder in the first degree, murder in the second degree, or assault with intent to kill while armed, which shall be treated in accordance with the provisions of § 23-1325, the judicial officer shall issue an order that, pending trial, the person be:

(1) Released on personal recognizance or upon execution of an unsecured appearance bond under subsection (b) of this section;

(2) Released on a condition or combination of conditions under subsection (c) of this section;

(3) Temporarily detained to permit revocation of conditional release under § 23-1322; or

(4) Detained under § 23-1322(b).

(b) The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a local, state, or federal crime during the period of release, unless the judicial officer determines that the release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) (1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, the judicial officer shall order the pretrial release of the person subject to the:

(A) Condition that the person not commit a local, state, or federal crime during the period of release; and

(B) Least restrictive further condition, or combination of conditions, that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition or combination of conditions that the person during the period of release shall:

(i) Remain in the custody of a designated person or organization that agrees to assume supervision and to report any violation of a condition of release to the court, if the designated person or organization is able to reasonably assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) Maintain employment, or, if unemployed, actively seek employment;

(iii) Maintain or commence an educational program;

(iv) Abide by specified restrictions on personal associations, place of abode, or travel;

(v) Avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) Report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) Comply with a specified curfew;

(viii) Refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) Refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner; the terms "narcotic drug" and "controlled substance" shall have the same meaning as in section 102 of the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981, (D.C. Law 4-29; D.C. Official Code § 48-901.02);

(x) Undergo medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, if available, and remain in a specified institution if required for that purpose;

(xi) Return to custody for specified hours following release for employment, schooling, or other limited purposes, except that no person may be released directly from the District of Columbia Jail or the Correctional Treatment Facility for these purposes;

(xii) Execute an agreement to forfeit upon failing to appear as required, the designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court the indicia of ownership of the property, or a percentage of the money as the judicial officer may specify;

(xiii) Execute a bail bond with solvent sureties in whatever amount is reasonably necessary to assure the appearance of the person as required; or

(xiv) Satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

(2) In considering the conditions of release described in paragraph (1)(B)(xii) or (xiii) of this subsection, the judicial officer may upon his own motion, or shall upon the motion of the government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation or the use as collateral of property that, because of its source, will not reasonably assure the appearance of the person as required.

(3) A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection to assure the safety of any other person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in § 23-1322(b).

(4) A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition that requires that the person return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the

condition. Unless the requirement is removed and the person is released on another condition or conditions, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed the conditions of release is not available, any other judicial officer may review the conditions.

(5) The judicial officer may at any time amend the order to impose additional or different conditions of release.

New Jersey Senate No. 946/ Assembly No. 1910 (2014)

(Section 1. through Section 4.)

1. (New section) The provisions of P.L. , c. (C.) (pending before the Legislature as this bill) shall be liberally construed to effectuate the purpose of relying upon contempt of court proceedings or criminal sanctions instead of financial loss to ensure the appearance of the defendant, that the defendant will not pose a danger to any person or the community, and that the defendant will comply with all conditions of bail. Monetary bail shall be set when it is determined that no other conditions of release will reasonably assure the defendant's appearance in court and that the defendant does not present a danger to any person or the community.

2. (New section) Upon the appearance before a court of a defendant charged with an offense, the court shall issue an order that the defendant be:

a. released on conditions including the execution of a bail bond pursuant to subsection b. of section 3 of P.L. , c. (C.) (pending before the Legislature as this bill);

b. released on his own personal recognizance; or

c. detained pursuant to section 4 of P.L. , c. (C.) (pending before the Legislature as this bill).

3. (New section) a. Except as provided under section 4 of P.L. , c. (C.) (pending before the Legislature as this bill), a court shall order the pretrial release of a defendant on personal recognizance when, after considering all the circumstances, the court determines that a defendant will appear as required either before or after conviction and the defendant will not pose a danger to any person or the community, or obstruct or attempt to obstruct justice, and that the defendant will comply with all conditions of release.

b. Except as provided under section 4 of P.L. , c. (C.) (pending before the Legislature as this bill), if a court determines that the release described in subsection a. of this section will not reasonably ensure the appearance of the person as required or will endanger the safety of any other person or the community, or will not prevent the person from obstructing or attempting to obstruct the criminal justice process, the court may order the pretrial release of the person:

(1) subject to the condition that the person not commit any crime during the period of release and avoid all contact with an alleged victim of the crime and with potential witnesses who may testify concerning the offense; or

(2) subject to the least restrictive condition, or combination of conditions, that the court determines will reasonably ensure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person:

(a) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is reasonably able to ensure to the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(b) maintain employment, or, if unemployed, actively seek employment;

(c) maintain or commence an educational program;

(d) abide by specified restrictions on personal associations, place of abode, or travel;

(e) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(f) comply with a specified curfew;

(g) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(h) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

(i) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(j) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(k) satisfy any other condition that is reasonably necessary to ensure the appearance of the person as required and to ensure the safety of any other person and the community; or

(l) be placed in a pretrial home supervision capacity with or without the use of an approved electronic monitoring device. The costs attributable to the electronic monitoring of an offender shall be borne by the Pretrial Services Unit in the county in which the defendant resides.

c. Except as provided under section 4 of P.L. , c. (C.) (pending before the Legislature as this bill), if the court determines that the conditions under subsection b. will not reasonably ensure the appearance of the person as required or will endanger the safety of any other person or the community, or will not prevent the person from obstructing or attempting to obstruct the criminal justice process, the court may set bail for the offense charged in accordance with current statutory law and court rule.

d. The court may at any time amend an order made pursuant to this section to impose additional or different conditions of release. The court may not impose a financial condition that results in the pretrial detention of the person.

4. (New section) a. The court may order the detention of a defendant before trial if, after a hearing pursuant to the section 5 of P.L. , c. (C.) (pending before the Legislature as this bill), the court is clearly convinced that no amount of sureties, non-monetary conditions of pretrial release or combination of sureties and conditions would ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process.

b. Except where a defendant charged with a crime is subject to a hearing upon the motion of the prosecutor or upon the court's own motion as set forth under paragraphs (1) and (2) of subsection a. of section 5 of P.L. , c. (C.) (pending before the Legislature as this bill), there

shall be a rebuttable presumption that some amount of sureties, non-monetary conditions of pretrial release or combination of sureties and conditions would ensure the defendant's appearance as required, protect the safety of the community, and prevent the defendant from obstructing or attempting to obstruct the criminal justice process.

c. A defendant shall have the right to appeal an order of detention before trial to the Appellate Division of the Superior Court, which may make a determination as to whether an amount of sureties, non-monetary conditions of pretrial release or combination of sureties and conditions would assure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process. An appeal filed under this subsection shall be heard and decided no later than 30 days following the initial order of detention.

Appendix E—Release Hearing Legislation

New Jersey Senate No. 946/ Assembly No. 1910 (2014)

5. (New section) a. A court shall hold a hearing to determine whether any condition or combination of conditions set forth under subsection b. of section 3 of P.L. , c. (C.) (pending before the Legislature as this bill) will ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process:

(1) Upon motion of the prosecutor in a case that involves:

(a) a crime enumerated under subsection d. of section 2 of P.L.1997, c.117 (C.2C:43-7.2);

(b) an offense for which the maximum sentence is life imprisonment;

(c) any indictable offense if the defendant has been convicted of two or more offenses under paragraph (1) or (2) of this subsection.

(d) any indictable offense where the victim is a minor; or

(e) any indictable offense enumerated under subsection c. of N.J.S.2C:43-6.

(2) Upon motion of the prosecutor or upon the court's own motion, in a case that involves a serious risk:

(a) that the defendant will flee;

(b) that the defendant will pose a danger to any person or the community; or

(c) that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror.

b. The hearing shall be held immediately upon the defendant's first appearance unless the defendant, or the prosecutor, seeks a continuance. Except for good cause, a continuance on motion of the defendant may not exceed five days, not including any intermediate Saturday, Sunday, or legal holiday. Except for good cause, a continuance on motion of the prosecutor may not exceed three days, not including any intermediate Saturday, Sunday, or legal holiday.

During a continuance, the defendant shall be detained, and the court, on motion of the prosecutor or sua sponte, may order that, while in custody, a defendant who appears to be a drug dependent person receive an assessment to determine whether that defendant is drug dependent.

c. At the hearing, the defendant has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing. The facts the court uses to support a finding pursuant to section 4 of P.L. , c. (C.) (pending before the Legislature as this bill) that no condition or combination of conditions will reasonably ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process shall be supported by clear and convincing evidence. The defendant may be detained pending completion of the hearing.

d. The hearing may be reopened, before or after a determination by the court, at any time before trial, if the court finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process.

6. (New section) In determining whether no amount of sureties, non-monetary conditions of pretrial release, or combination of sureties and conditions would ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process, the court shall take into account the available information concerning:

a. The nature and circumstance of the offense charged, including whether the offense is a crime enumerated under subsection d. of section 2 of P.L.1997, c.117 (C.2C:43-7.2), is an indictable offense where the victim is a minor, or involves a firearm, explosive, or destructive device;

b. The weight of the evidence against the defendant, except that the court may consider the admissibility of any evidence sought to be excluded;

c. The history and characteristics of the defendant, including:

(1) the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(2) whether, at the time of the current offense or arrest, the defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal or State law;

d. The nature and seriousness of the danger to any person or the community that would be posed by the person's release;

e. The release recommendation of the pretrial services agency obtained using a validated risk assessment instrument under section 9 of P.L. , c. (C.) (pending before the Legislature as this bill).

District of Columbia Code: § 23-1322. Release prior to trial

(a) The judicial officer shall order the detention of a person charged with an offense for a period of not more than 5 days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the government to notify the appropriate court, probation or parole official, or local or state law enforcement official, if the judicial officer determines that the person charged with an offense:

(1) Was at the time the offense was committed, on:

(A) Release pending trial for a felony or misdemeanor under local, state, or federal law;

(B) Release pending imposition or execution of sentence, appeal of sentence or conviction, or

completion of sentence, for any offense under local, state, or federal law; or
(C) Probation, parole or supervised release for an offense under local, state, or federal law; and
(2) May flee or pose a danger to any other person or the community or, when a hearing under § 23-1329(b) is requested, is likely to violate a condition of release. If the official fails or declines to take the person into custody during the 5-day period described in this subsection, the person shall be treated in accordance with other provisions of law governing release pending trial.
(b) (1) The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in § 23-1321(c) will reasonably assure the appearance of the person as required and the safety of any other person and the community, upon oral motion of the attorney for the government, in a case that involves:
(A) A crime of violence, or a dangerous crime, as these terms are defined in § 23-1331;
(B) An offense under section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Official Code § 22-722);
(C) A serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror; or
(D) A serious risk that the person will flee.
(2) If, after a hearing pursuant to the provision of subsection (d) of this section, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community, the judicial officer shall order that the person be detained before trial.
(c) There shall be a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community if the judicial officer finds by probable cause that the person:
(1) Committed a dangerous crime or a crime of violence, as these crimes are defined in § 23-1331, while armed with or having readily available a pistol, firearm, imitation firearm, or other deadly or dangerous weapon;
(2) Has threatened, injured, intimidated, or attempted to threaten, injure, or intimidate a law enforcement officer, an officer of the court, or a prospective witness or juror in any criminal investigation or judicial proceeding;
(3) Committed a dangerous crime or a crime of violence, as these terms are defined in § 23-1331, and has previously been convicted of a dangerous crime or a crime of violence which was committed while on release pending trial for a local, state, or federal offense;
(4) Committed a dangerous crime or a crime of violence while on release pending trial for a local, state, or federal offense;
(5) Committed 2 or more dangerous crimes or crimes of violence in separate incidents that are joined in the case before the judicial officer;
(6) Committed a robbery in which the victim sustained a physical injury;

(7) Violated § 22-4504(a) (carrying a pistol without a license), § 22-4504(a-1) (carrying a rifle or shotgun), § 22-4504(b) (possession of a firearm during the commission of a crime of violence or dangerous crime), or § 22-4503 (unlawful possession of a firearm); or

(8) Violated [subchapter VIII of Chapter 25 of Title 7, § 7-2508.01 et seq.], while on probation, parole, or supervised release for committing a dangerous crime or a crime of violence, as these crimes are defined in § 23-1331, and while armed with or having readily available a firearm, imitation firearm, or other deadly or dangerous weapon as described in § 22-4502(a).

(d) (1) The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the government, seeks a continuance. Except for good cause, a continuance on motion of the person shall not exceed 5 days, and a continuance on motion of the attorney for the government shall not exceed 3 days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the government or *sua sponte*, may order that, while in custody, a person who appears to be an addict receive a medical examination to determine whether the person is an addict, as defined in § 23-1331.

(2) At the hearing, the person has the right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed.

(3) The person shall be afforded an opportunity to testify. Testimony of the person given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in proceedings under §§ 23-1327, 23-1328, and 23-1329, in perjury proceedings, and for the purpose of impeachment in any subsequent proceedings.

(4) The person shall be afforded an opportunity to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.

(5) The person shall be detained pending completion of the hearing.

(6) The hearing may be reopened at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the appearance of the person as required or the safety of any other person or the community.

(7) When a person has been released pursuant to this section and it subsequently appears that the person may be subject to pretrial detention, the attorney for the government may initiate a pretrial detention hearing by ex parte written motion. Upon such motion, the judicial officer may issue a warrant for the arrest of the person and if the person is outside the District of Columbia, the person shall be brought before a judicial officer in the district where the person is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with this section.

(e) The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person

and the community, take into account information available concerning:
(1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or dangerous crime as these terms are defined in § 23-1331, or involves obstruction of justice as defined in § 22-722;
(2) The weight of the evidence against the person;
(3) The history and characteristics of the person, including:
(A) The person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
(B) Whether, at the time of the current offense or arrest, the person was on probation, on parole, on supervised release, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under local, state, or federal law; and
(4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release.
(f) In a release order issued under § 23-1321(b) or (c), the judicial officer shall:
(1) Include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and
(2) Advise the person of:
(A) The penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
(B) The consequences of violating a condition of release, including immediate arrest or issuance of a warrant for the person's arrest; and
(C) The provisions of § 22-722, relating to threats, force, or intimidation of witnesses, jurors, and officers of the court, obstruction of criminal investigations and retaliating against a witness, victim, or an informant.
(g) In a detention order issued under subsection (b) of this section, the judicial officer shall:
(1) Include written findings of fact and a written statement of the reasons for the detention;
(2) Direct that the person be committed to the custody of the Attorney General of the United States for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
(3) Direct that the person be afforded reasonable opportunity for private consultation with counsel; and
(4) Direct that, on order of a judicial officer or on request of an attorney for the government, the person in charge of the corrections facility in which the person is confined deliver the person to the United States Marshal or other appropriate person for the purpose of an appearance in connection with a court proceeding.
(h) (1) The case of the person detained pursuant to subsection (b) of this section shall be placed on an expedited calendar and, consistent with the sound administration of justice, the

person shall be indicted before the expiration of 90 days, and shall have trial of the case commence before the expiration of 100 days. However, the time within which the person shall be indicted or shall have the trial of the case commence may be extended for one or more additional periods not to exceed 20 days each on the basis of a petition submitted by the attorney for the government and approved by the judicial officer. The additional period or periods of detention may be granted only on the basis of good cause shown, including due diligence and materiality, and shall be granted only for the additional time required to prepare for the expedited indictment and trial of the person. Good cause may include, but is not limited to, the unavailability of an essential witness, the necessity for forensic analysis of evidence, the ability to conduct a joint trial with a co-defendant or co-defendants, severance of co-defendants which permits only one trial to commence within the time period, complex or major investigations, complex or difficult legal issues, scheduling conflicts which arise shortly before the scheduled trial date, the inability to proceed to trial because of action taken by or at the behest of the defendant, an agreement between the government and the defense to dispose of the case by a guilty plea on or after the scheduled trial date, or the breakdown of a plea on or immediately before the trial date, and allowing reasonable time to prepare for an expedited trial after the circumstance giving rise to a tolling or extension of the 100-day period no longer exists. If the time within which the person must be indicted or the trial must commence is tolled or extended, an indictment must be returned at least 10 days before the new trial date.

(2) For the purposes of determining the maximum period of detention under this section, the period shall begin on the latest of:

(A) The date the defendant is first detained under subsection (b) of this section by order of a judicial officer of the District of Columbia after arrest;

(B) The date the defendant is first detained under subsection (b) of this section by order of a judicial officer of the District of Columbia following a re-arrest or order of detention after having been conditionally released under § 23-1321 or after having escaped;

(C) The date on which the trial of a defendant detained under subsection (b) of this section ends in a mistrial;

(D) The date on which an order permitting the withdrawal of a guilty plea becomes final;

(E) The date on which the defendant reasserts his right to an expedited trial following a waiver of that right;

(F) The date on which the defendant, having previously been found incompetent to stand trial, is found competent to stand trial;

(G) The date on which an order granting a motion for a new trial becomes final; or

(H) The date on which the mandate is filed in the Superior Court after a case is reversed on appeal.

(3) After 100 days, as computed under paragraphs (2) and (4) of this section, or such period or periods of detention as extended under paragraph (1) of this section, the defendant shall be treated in accordance with § 23-1321(a) unless the trial is in progress, has been delayed by the timely filing of motions, excluding motions for continuance, or has been delayed at the request

of the defendant.

(4) In computing the 100 days, the following periods shall be excluded:

(A) Any period from the filing of the notice of appeal to the issuance of the mandate in an interlocutory appeal;

(B) Any period attributable to any examination to determine the defendant's sanity or lack thereof or his or her mental competency or physical capacity to stand trial;

(C) Any period attributable to the inability of the defendant to participate in his or her defense because of mental incompetency or physical incapacity; and

(D) Any period in which the defendant is otherwise unavailable for trial.

(i) Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Prepared Remarks for Guggenheim Symposium
Sonja Starr

Thanks to organizers; it's an honor to be here.

Anne's been a strong proponent of the expanded use of risk assessment in the criminal justice system, and I've been a vocal critic, though we've had a chance to talk about these issues in recent months and as it turns out we've discovered a lot of common ground. We both believe in using data to improve the practice of criminal justice, and we both care about equality concerns that arise when people are treated differently based on their characteristics. Anne's organization has been working to develop risk assessment instruments that try to address some of these equality concerns, which is a positive development, and she'll tell you a bit more about that shortly.

But my focus, meanwhile, is on calling the attention of the legal community and the media and the public to the very, very serious problems that exist with almost all of the risk assessment instruments that are already in widespread use in criminal justice systems around the country. We are already subjecting millions of criminal defendants to procedures that determine their treatment based on actuarial instruments that explicitly treat socioeconomic and demographic factors as risk factors, and that means that poor people and people with the "wrong" demographics are being systematically and purposely treated more harshly by the criminal justice system. This is a serious injustice that has not received much attention, in large part because the instruments are not transparent and people who are not social scientists tend not to understand how they work. Those of you who are journalists can play an important role in bringing this problem to light.

These actuarial instruments have been around for decades in the context of parole board decision-making especially, and they are also now used in a variety of other criminal justice contexts. My own research has focused mostly on the use of risk assessment in sentencing, which is the fastest-growing trend in this area. In at least 20 states, many or all judges are being given risk scores for defendants before they sentence them, often as part of a presentence investigation report. Many other states are considering legislation to do the same, and prominent organizations like the National Center for State Courts and the American Law Institute, which drafts the Model Penal Code, have called for the expansion of this practice, which they often refer to as "evidence-based sentencing."

I find "evidence-based sentencing" to be something of a misnomer, bordering on doublespeak, because the risk scores don't actually have anything at all to do with the evidence in the defendant's own criminal case, which is normally the main thing that determines the defendant's sentence. Instead the "evidence" in question comes from studies of past offenders with similar preexisting characteristics—it's extrapolating the defendant's future crime risk based on a profile. So really, a better term for this is "profiling." And judges are told to use these profiling-based risk

predictions to determine the defendant's sentence, just like parole boards use them to decide whether to release a prisoner early.

There are a number of reasons to be concerned about this practice, but my primary concern is that many of the characteristics that are included in these profiles are inappropriate--and in some cases unconstitutional--bases for punishment. Put simply, people should not be punished extra, or for that matter punished less, based on who they are or how much money they have.

The instruments being used in sentencing and parole vary, but all contain several variables related to criminal history. Most also contain gender, age, employment status, education level, and marital status. The most popular instruments, like the LSI-R, include a whole battery of questions that relate to the defendant's financial status and history, family background, and neighborhood. For example, from the LSI-R:
--Financial problems, such as past or present trouble paying bills, rated from 0 to 3
--Reliance on social assistance, including welfare, unemployment, disability pensions
--Dissatisfaction with marital or equivalent situation: they rate the happiness of a person's relationship from 0 to 3
--Rewarding nature of a person's relationship with his parents—so an absent parent or one with whom the defendant has a bad relationship counts against him
--Similar ratings for relationships with other family members
--Whether parents or other family members have a criminal record
--Quality of accommodations
--Stability of accommodations—how often the person has moved
---High crime neighborhood
--Participation in organized leisure activities like membership in clubs (lack of this is a risk factor)
--Criminal records of acquaintances.

Another popular instrument, COMPAS, which for example just got adopted statewide in Michigan, includes similar factors, plus others, like chance of finding work above minimum wage, high school grades, whether the defendant's parents have been incarcerated, whether the defendant's parents used drugs, whether the defendant or any of his family members have ever been a crime *victim*.

Essentially, every indicator of socioeconomic disadvantage that you can think of has been included, and all of them add to the risk score. I want to make clear that this happens automatically, mechanically—*every* defendant who is on social assistance will have the same number of points added to his risk score because of it. It's built into the formula. We're used to thinking about disparities in sentencing as being something subtle and unconscious, insidious, something we have to detect through complicated empirical analyses—we look for evidence of whether judges are subtly taking inappropriate factors into account. But this is something different. This is the state *codifying* discrimination on the basis of these factors—it is explicitly built

into the instrument. Any time the judge gives any weight to the risk score, she is giving weight to socioeconomic and demographic factors. The point of this system is that the state *wants* poor people, people with all these risk factors, to be punished extra, and it's directing judges to do so.

Somewhat surprisingly, the nature and severity of the crime on which the defendant is being sentenced are not included in any of the instruments. Perhaps it's for this reason that the LSI-R training manual specifically says that it "was never designed to assist in establishing a just penalty," although that is precisely what it is now widely being used for.

Race is generally not included in the assessments, although certainly many of these variables are extremely strongly correlated with race. When you sentence people to extra time for being poor, you are bound to increase racial disparities as well.

The trend toward evidence-based sentencing has been greeted in large part with celebration. Scholars as well as judges, sentencing commissioners, and organizations focused on sentencing reform have embraced it as a new era of scientific, rational, "smarter" sentencing. Perhaps surprisingly, some of the strongest advocates have been progressive critics of mass incarceration, who hope that using risk scores will allow incarceration to be avoided in some cases by helping judges to identify low-risk offenders.

I disagree. It is bad policy and almost surely unconstitutional for the state to direct judges to deem classes of people categorically more dangerous, and sentence them for longer, on the basis of their poverty and their demographic characteristics. I agree that we have a mass incarceration crisis in this country, and we need to think creatively and in data-driven ways about policy solutions, but this particular use of data cannot be the right path. One of the reasons the social impacts of mass incarceration are so worrisome is that they are demographically, socioeconomically, and geographically concentrated. For instance, one in every nine black men under 35 is in prison right now, and one in three young black men will be at some point in his life. And if you narrow your focus to the poorest communities, or to particular crime-ridden neighborhoods, or to young men who are unemployed or lack high school diplomas, you get far higher numbers. There's a large literature documenting the hugely distortive effects on communities when you remove, say, half the young men in them. The risk prediction instruments could exacerbate all of these problems.

And that's one reason that people who maybe don't ordinarily worry so much about discrimination against men, or against the young or the unmarried, for instance, really should worry here. Those are all dimensions along which the impact of the criminal justice system is concentrated and concentration is something we should worry about.

I think that advocates of these instruments are in fact endorsing forms of explicit discrimination that they would never endorse were it not for the fact that they are somehow sanitized by the scientific framing that accompanies them—the fact that it's referred to as "evidence-based" and supported by regressions. But to me, behind this anodyne scientific language is an expressive message that is toxic. Stereotyping groups as criminally dangerous is a practice with a nasty cultural history in this country, and this practice involves the state officially labeling certain groups of people dangerous, on the basis of their identity and poverty, rather than their criminal conduct.

Basing sentences on gender as well as socioeconomic variables is also almost certainly unconstitutional, and my own research has been pitched at lawyers and judges to make this case.

First, gender. It's well established law that gender classifications require an "exceedingly persuasive justification"—this is a really tough test to pass. It's hardly ever legal for the state to treat people differently based on gender. Weirdly, though, even though everybody in the literature seems to take for granted that including race in the instruments would be unconstitutional, the use of gender doesn't seem to bother anyone. If scholars or advocates even mention it, they just say that because men really do on average pose higher recidivism risks, including gender in the instruments advances the state's important public safety interests and thus it passes the "exceedingly persuasive justification" test.

The problem with this response is twofold. First, this assumes the instruments actually advance those public safety interests effectively, which I think has not been persuasively established--I'll address that in a couple of minutes. Second, the argument runs afoul of one of the most central principles of the Supreme Court's gender discrimination jurisprudence: the prohibition on statistical discrimination. In general, the state cannot defend gender discrimination on the basis of generalizations about what men and women tend to do, even if those classifications are not just empty stereotypes but in fact are empirically well supported. In *Craig v. Boren*, for instance, the Court struck down a drinking-age law that discriminated against men even in the face of studies showing that young men posed more than ten times the drunk driving risk of young women.

There are lots of other examples in the case law, and this principle is something that really destroys any attempt to defend gender-based risk assessment, because the whole approach is grounded in reliance on statistical generalizations.

And this same principle is also the reason it's unconstitutional to discriminate in sentencing or parole based on financial factors such as unemployment, education, and income.

Until recently lawyers and legal scholars really had overlooked this problem. The reason for that is that generally, the courts are very tolerant of discrimination on the basis of socioeconomic status—they tend to defer to legislative judgments on that.

And so lawyers tend to think: Bringing a constitutional challenge based on socioeconomic discrimination is a loser.

But that's just not true when it comes to socioeconomic discrimination in the criminal justice system. For more than half a century, the Supreme Court has applied especially demanding scrutiny to policies adversely affecting poor defendants. The seminal case is *Griffin v. Illinois*, which described the provision of equal justice for poor and rich as the "central aim of our entire judicial system."

In *Bearden v. Georgia*, in 1983, the Supreme Court unanimously held that a defendant's probation could not be revoked because after losing his job he had become financially unable to pay a restitution order, since that would impermissibly make his sentence turn on his socioeconomic status.

Crucially, the Court in *Bearden* squarely rejected the state's attempt to argue, based on empirical studies of recidivism risk, that the defendant's unemployment and financial status rendered him an elevated public safety risk. The Court's response to this was much like its response to statistical discrimination in the gender context. It wrote:

"This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future. …[T]he State cannot justify incarcerating [him] solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty."

And that's exactly the problem with so-called "evidence-based sentencing." These actuarial instruments lump defendants together with other people who share their socioeconomic characteristics, and on the basis of those other people's past conduct, they classify defendants as dangerous. They punish a person for his poverty. And the Supreme Court has already unanimously held that unconstitutional—it just seems like everyone's forgotten.

OK, so what if we tried to predict risk statistically, but *didn't* use these demographic and socioeconomic characteristics? Suppose instead, we took into account the nature of the defendant's crime, which current risk instruments mainly ignore, as well as past history? That would be far less morally and legally problematic, because it would be based on the defendant's criminal conduct. And I think there's good reason to believe it would be about as accurate. Nothing predicts future behavior like past behavior, and I know Anne and the Arnold Foundation have found that a behavior-based risk assessment instrument at least in the bail context gets quite accurate results, which is a big step forward.

The thing is, factors like demographics and socioeconomics *are* correlated with crime, but once you already have behavioral factors, current and past criminal conduct, in your model, adding those problematic variables might not add much

marginal predictive value. Sure, adding more factors might get you another percentage point or two or three of accuracy, but I don't think we should pursue every last marginal improvement in predictive accuracy at all costs, at the cost of our most fundamental principles of equality and justice.

Now, beyond these equality concerns, I do have a few other concerns about these risk assessment instruments.

One problem is that if the purpose of risk assessment is to protect the public from the defendant's future crimes, these actuarial analyses are not actually asking the question they would need to ask in order to advance that purpose. They predict recidivism risk in the abstract—just "how risky is this person." They make no attempt to predict how the judge's sentencing choice would affect that risk—i.e., the responsiveness or "elasticity" of recidivism risk to differing lengths of incarceration.

And the people who have the highest recidivism risk are not necessarily the people whose recidivism risk is going to be the most reduced by incarceration—in fact, people who are more crime-prone to begin with may also be more likely to be hardened rather than helped by prison. We really don't have the science in place to know what subsets of people will have their behavior changed for the better by prison. Investigating this question requires studies that use rigorous causal inference methods—it's a very challenging empirical question. And so far, the best research on the way incarceration affects recidivism risk has been more general—does incarceration *generally* reduce crime risk--rather than focused on which characteristics are most associated with a greater responsiveness to incarceration.

Then there are some procedural concerns about risk assessment. One major concern is lack of transparency—people in many states are being sentenced on the basis of corporate, proprietary products that they don't have access to. Neither the defendant nor the judge knows the weight that has been given to each specific variable in producing the risk score. That's outrageous in my view.

In addition, defendants are essentially being forced to participate in an assessment interview, which includes detailed questions about their past and about their mental states. If they don't participate, they will be scored as uncooperative and may be punished for it. That seems like compelled self-incrimination, a violation of the Fifth Amendment.

I've got various other methodological objections that I've outlined in my paper, but I'll stop here. Thanks again, and I look forward to the rest of our discussion.

Bail reform to require 'extraordinary amount of resources,' judge says

minky.jpg
Superior Court Judge Stuart Minkowitz presides over a case in Sussex County in 2013. Minkowitz, the assignment judge for Morris and Sussex counties, told the Morris County freeholders on Wednesday that coming bail reforms will be sweeping. Morris-Sussex will be implementing a pilot program of the new system next year. (Tony Kurdzuk | The Star-Ledger)

Ben Horowitz | NJ Advance Media for NJ.com By **Ben Horowitz | NJ Advance Media for NJ.com**
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MORRISTOWN — The bail reform law going into effect in New Jersey in 2017 will require "an extraordinary amount of resources" including the hiring of additional staff members, the assignment judge for Morris and Sussex counties told the Morris County freeholders on Wednesday.

The constitutional amendment, approved by state voters as a ballot question in 2014, will require full hearings within 48 hours for defendants who are accused of an indictable offense and considered a flight risk or a danger to the community. The hearings will require attorneys for both sides and will be held on weekends as well as weekdays, said **Judge Stuart Minkowitz.**

Most offenders will be released with conditions and will require supervision by a new pre-trial services staff, while those accused of murder and other violent offenses may be detained without bail, Minkowitz said.

"Bail as we know it is going away," Minkowitz said.

The law is scheduled to become effective statewide on Jan. 1, 2017, but Morris-Sussex, along with the court vicinages serving Camden and Passaic counties, will begin some implementation of the new procedures in mid-2016 as a "pilot program" ahead of the rest of the state, Minkowitz said.

REPORT: Bail bond industry was helping free dangerous suspects

Minkowitz, who has been working with state judiciary officials to plan the program, briefed the freeholders on the status of the program and what it will require.

Minkowitz estimated that the judiciary will need nine additional staff members for pretrial supervision of defendants in Morris County alone. Those positions would be funded by the state.

Officials from the Morris County Prosecutor's Office also spoke at the meeting and they said "10 to 15" additional staff members would be needed to provide pretrial services. Those positions, which would be funded by the county, would likely cost about $1.5 million, according to the prosecutor's office.

The law was passed in 2014 with two major purposes in mind: To ensure that the most **dangerous criminals are detained** before trial, and to ensure that those accused of less serious offenses aren't held in jail simply **because they can't afford to pay bail.**

"In the past, those who could afford to pay were released and those who could not stayed incarcerated," Minkowitz said.

Meanwhile, the bail guidelines still in effect "did not allow judges to consider whether a defendant was a danger to the community, only if they were a flight risk," Minkowitz pointed out.

The system drew severe criticism after some violent offenders committed crimes while out on bail after posting only a portion of their bail through bail bondsmen.

Under the new system, Minkowitz said, there will be no more "paying of bail at the police station" and many of those charged with an indictable crime will go to jail for 48 hours pending their hearing. Under guidelines still being worked out, police may have discretion to release low-risk offenders.

Suspects will be fingerprinted at the police station and police will have access to numerous criminal databases that will tell them of the defendant's prior record.

A computerized "risk assessment tool" will determine whether the defendant is a low, moderate or high risk, and will assign a numerical score. That key bit of information will guide police, attorneys and judges, Minkowitz said.

For many defendants, the judge will make a "determination of conditions of pretrial release," which could be as serious as wearing an ankle bracelet and might still include bail in certain situations, Minkowitz said.

If the prosecutor wants to detain a suspect accused of a violent crime, he or she will have three days beyond the 48 hours to hold a "plenary hearing" where "the state must provide clear and convincing evidence that the person should be detained," Minkowitz said.

Officials from the prosecutor's office agreed that the new law will require a lot of redirection along with new staffing.

"We are 100 percent certain this is a paradigm shift that none of us has experienced," said Assistant Prosecutor John McNamara Jr., the office's senior trial counsel.

The freeholders said they are uncertain where the funds will come from, but acknowledged it is something that will have to be paid for.

"It's an unfunded mandate," said Freeholder Director Kathy DeFillippo. "People voted to support this."

Freeholder Douglas Cabana, an attorney, suggested the problems could be addressed by the Legislature, but noted that under present circumstances, "Procedurally, this is going to be a challenge."

"We're going to have to provide resources within our 2-percent cap," Cabana said. "Other areas may have to be cut."

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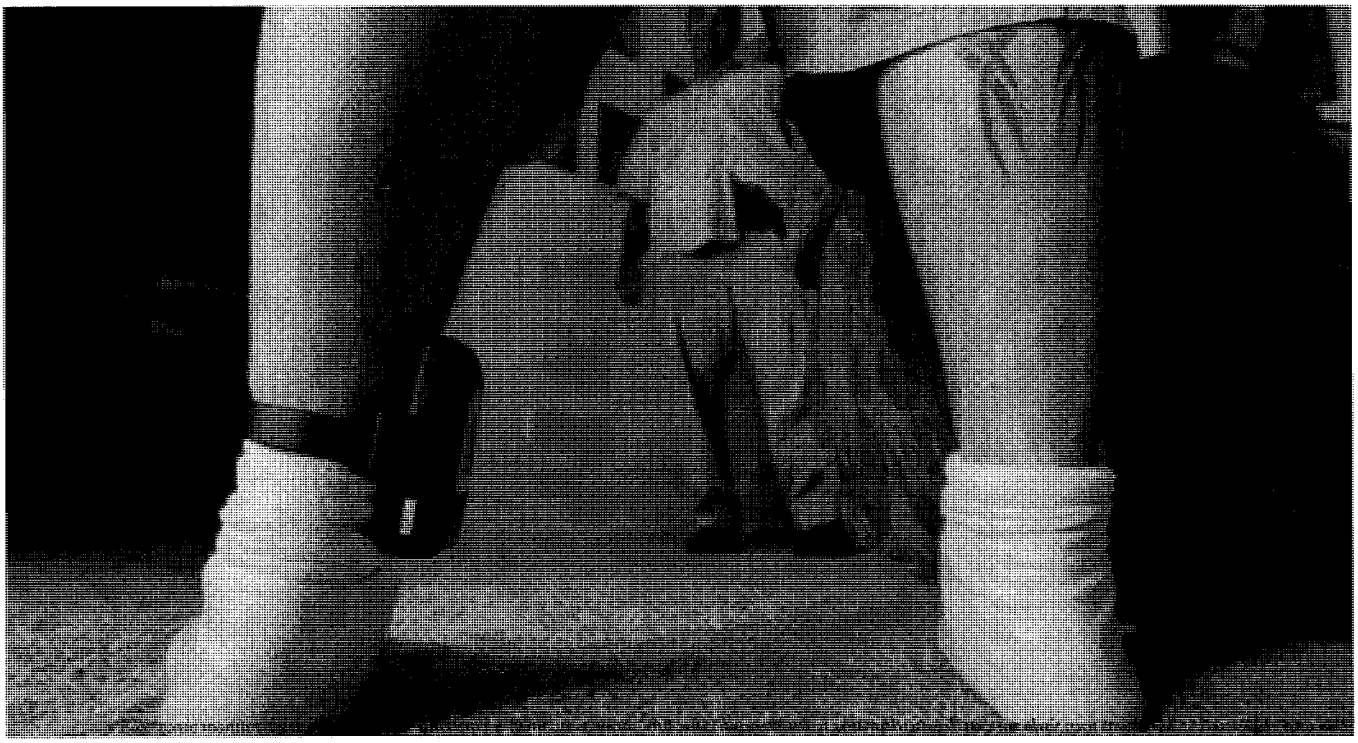
IBT SPECIAL REPORT (TOPIC/IBT-SPECIAL-REPORT)

Chain Gang 2.0: If You Can't Afford This GPS Ankle Bracelet, You Get Thrown In Jail

Some states now require people to pay for their own electronic monitoring once they bail out of jail. And if you miss a payment, you better watch out.

BY ERIC MARKOWITZ (/REPORTERS/ERIC-MARKOWITZ) / SEPTEMBER 21 2015 7:55 AM EDT



On a recent broiling August day, Antonio Green, an out-of-work construction worker, sat in his living room, a folder full of receipts open across his legs. He explained how an electronic monitor, strapped to his left ankle for a period of 275 days beginning last fall, sent him into debt and nearly wrecked his life.

It's widely known that an increasingly privatized criminal justice system makes money off poor people. But Green found himself in the latest for-profit craze: GPS tracking.

It all started with a traffic violation. Green, a 49-year-old father of five from Lugoff, South Carolina, about 30 miles northeast of Columbia, acknowledged that he shouldn't have been driving at all. He didn't have a license. But last October, his mother's car, a 1994 Chrysler, had broken down at a nearby Taco Bell. So he hitched a ride to go retrieve it for her.

On his way home while driving his mother's car, he failed to use his turn signal at an intersection, and a local police officer pulled him over.

Green was arrested, placed in handcuffs and taken down to the local county jail, where he waited overnight until his elderly mother was able to post the $2,100 to bail him out. A condition of Green's bail, ordered by the judge, was that Green wear -- and pay for -- an electronic monitoring device.

Green, who lives on a monthly $900 disability check, couldn't believe what he was hearing. "Pay for it?" Green said. "I never heard of that."

But he was indeed hearing correctly. In Richland County, South Carolina, any person ordered to wear the ankle monitor as a condition of their bail must lease the bracelet from a private, for-profit company called Offender Management Services (OMS), which charges the offender $9.25 per day, or about $300 per month, plus a $179.50 set-up fee, according to county documents obtained through a Freedom of Information Act request made by International Business Times.

"The electronic monitoring people are like old-fashioned bounty hunters," says Jack Duncan, a public defender.

This arrangement reflects an opportunistic pitch by prison-oriented technology companies that has found favor with budget-minded government officials. In effect, companies like OMS have allowed municipalities like Richland County to save the costs of monitoring offenders by having the offenders pay themselves. The county wins, the company wins and people like Green find themselves confronting additional drains on their limited means.

In Richland County, if offenders don't -- or simply can't -- meet their payments, the company is obliged to contact police in order to "return [the offender] to the custody of the [Richland County] Detention Center," a public facility.

In other words, if you can't pay your electronic monitoring bill, you get sent back to jail.

"The electronic monitoring people are like old-fashioned bounty hunters," says Jack Duncan, a public defender in Richland County, who says some of his clients have been locked up because they can't make their payments. "It's a newfangled debtors' prison. People are pleading guilty because it's cheaper to be on probation than it is to be on electronic monitoring."

Richland County is far from the only county in the United States that requires people to pay for their own tracking. In the last decade, "offender-funded" electronic monitoring programs -- as they're known in the business -- have exploded in popularity.

States like Georgia, Arkansas, Colorado, Washington and Pennsylvania now contract with private, for-profit companies that require individuals to pay for their own tracking, according to analysis of county and state records by IBT. While there is no centralized database on how often states charge defendants for their tracking, from 2000 to 2014 the use of electronic monitoring as alternative to jail detention grew by 32 percent, according to figures (http://www.bjs.gov/content/pub/pdf/jim14.pdf) provided by the Bureau of Justice Statistics in a 2014 annual survey of jails. In 2014, NPR conducted (http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor) a survey that found that in "all states except Hawaii and the District of Columbia, there's a fee for the electronic monitoring."

One industry report (http://raycomgroup.worldnow.com/story/28718203/city-of-columbia-judges-have-yet-to-utilize-program-to-track-criminal-suspects) now pegs the number of people under electronic monitoring in the United States at 100,000, and that number likely will grow.

Companies routinely use lobbyists -- especially at state and local jurisdictions -- to establish relationships with officials from local corrections departments. The country's largest private corrections company, GEO Group, spent $2.5 million in lobbying dollars in 2014, in part for its electronic monitoring efforts, according to company statements. In a nod to the high value of local relationships, GEO noted in company documents (http://www.geogroup.com/documents/Political_Activity_Report_2014.pdf) that "approximately $0.3 million was for lobbying at the Federal level and approximately $2.2 million was for lobbying at the state and local levels."

In Richland County, Offender Management Services paid lobbyist Robert Stewart, the retired chief of the South Carolina Law Enforcement Division -- an elite unit that holds exclusive authority over state police departments. County records show that in 2013, the year before OMS signed its contract with Richland County, OMS was paying $38,000 per year to Stewart's consulting firm, Stewart Konduros & Associates -- while Stewart himself was serving on a panel for bond reform (http://www.wistv.com/story/24016355/mayors-panel-on-violent-crime-and-bond-reform-presents-options-to-council) in Columbia.

Stewart, in an interview, maintained that the panel was composed of several individuals who endorsed a variety (https://columbiasc.gov/depts/city-council/docs/2013/12-10/mayors_panel_on_violent_crime_and_bond_reform_final_report.pdf) of reforms. He also noted that requiring defendants to pay for electronic monitoring was becoming fairly commonplace. "The taxpayers in this state don't want to have to pay for it," he said.

And that's exactly the point.

Over the last 30 years, the United States has become the world's leading jailer, locking up some 2.2 million people every year. The cost to taxpayers is enormous. President Obama recently pegged the yearly price tag of incarceration at $80 billion per year, a figure that represents both state and federal dollars, with more than 90 percent occurring at the state and local levels. Sensing an opportunity, many companies have swooped in, pitching electronic monitoring programs as an alternative to detention -- with the added benefit of being free for taxpayers.

As government agencies look to decrease the financial burden of keeping so many people locked up, the electronic monitoring business appears poised for growth. SuperCom, an Israeli software provider, predicts the industry will balloon to $6 billion in annual revenues by 2018, largely from offender-funded programs.

Clearly, the business is good for businesses and cheaper on taxpayers. But is it fair to charge individuals for their own electronic tracking? Several lawyers interviewed for this story say absolutely not, even though it routinely happens.

"The business model itself is blatantly illegal," said Alec Karakatsanis, a lawyer and the co-founder of Equal Justice Under Law, a nonprofit civil rights organization. "If it were ever challenged in court, it would be struck down immediately." Cherise Burdeen, executive director of the Pretrial Justice Institute, agreed, saying that "charging of offenders for their supervision conditions, whether that's electronic monitoring -- all of that is unconstitutional and illegal." Jack Duncan, the public defender, simply contends that electronic monitoring is "a legal monstrosity."

Stewart, the lobbyist, won't comment on the legality of the devices -- he says that's a question the courts should decide -- but said that defendants like Antonio Green don't necessarily have to pay for anything. "They agree to be on it," he said. "They don't have to take this. They can say I don't want to do it." Saying "no" to the device, however, means going back to jail.

Some local prosecutors say electronic monitoring devices are a pragmatic way to address the reality of inmates being released in an age of tight government budgets. The ability to track defendants while they await trial, they say, is an important public safety tool.

"OMS provides both professional and effective real-time supervision of individuals on bond as well as direct access of the information to law enforcement," Dan Johnson, the fifth judicial circuit solicitor in South Carolina, said in an email to IBT.

'Peak Incarceration'

The electronic monitoring pitch is appealing to state and county governments.

For example, Behavioral Inc., one of the largest electronic monitoring companies now owned by the private prison behemoth GEO Group, boasts (http://www.georeentry.com/case-studies/luzerne-county/) in marketing materials that in Luzerne County, Pennsylvania, offender-funded electronic monitoring "has saved the county...more than $40 million in jail bed costs by diverting offenders to community supervision."

In some states, counties don't only save money by contracting out the monitoring to private companies -- they actually make money from it. For instance, in Mountlake Terrace, a suburb north of Seattle, the city contracts with a small electronic monitoring company, which charges the the town $5.75 "per client." However, the person placed on electronic monitoring actually pays the city $20 per day, resulting in a net revenue for the city of "approximately $50,000 to $60,000" per year, according (http://www.cityofmlt.com/cityServices/police/electronicHomeMonitoring.htm) to Mountlake Terrace county documents.

"We're at peak incarceration as a society," says Karakatsanis. "A lot of these companies are devoting extraordinary efforts to shift their business model and profit off of that growing surveillance and supervision."

For people like Antonio Green, poor and charged with a low-level crime, the net effect of a for-profit monitoring system goes something like this: Try to find a way to keep paying, or plead guilty and simply go to jail. And that's exactly what happened.

By August 2015, Green had paid well over $2,500 to OMS.

Green dropped out of high school in the 11th grade, and subsequently worked as a logger, fork lift operator and construction worker. For 16 years, he built homes all around South Carolina, and he loved the work. But a decade ago, while hoisting a wooden plank onto a scaffold, he felt a twinge of pain shoot up his back. Subsequent spinal surgeries left him unable to work. He has debilitating arthritis in both of his hands, and earns about $11,000 per year through monthly disability checks.

"I gave up," Green told me. "I was falling apart. It felt like being on a chain gang. Those bills were getting out of hand. I said, 'They're just going to have to lock me up.'"

After nine months wearing the device, Green had gone broke, racked up debt from overdraft fees, and spiraled into anxiety over his finances. Like many districts around the country, the wheels of justice in Richland County turn slowly. Green faced another year waiting for a trial, all the while paying his monthly electronic monitoring bills.

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On Aug. 4, 2015, Green turned himself in. He'd simply run out of money.

Spider-Man Led To Electronic Monitoring

The original idea behind electronic monitoring comes, in many ways, from a fantasy.

In 1977, a district court judge named Jack Love from Albuquerque, New Mexico, was flipping through his favorite comic book: Spider-Man. In one episode, the villain, known as "Kingpin," slapped a futuristic bracelet onto Spiderman's wrist. The bracelet allowed Kingpin to watch Spiderman's every move. This gave Judge Love an idea: Could an electronic monitor do the same for the defendants that passed through his court?

A few days later, Love wrote to the New Mexico corrections department. In the envelope, he enclosed a copy of the Spider-Man comic strip, recently dug up (http://www.bleedingcool.com/2012/06/24/when-spider-man-invented-electronic-tagging/) by comic site BleedingCool. The state ignored Love. But Love, undeterred, contacted Michael Goss, a computer salesman.

Love convinced Goss to quit his job and build a prototype. By 1983, Goss patented his invention: The GOSSlink electronic bracelet. The 4 oz. battery-powered, waterproof anklet was "about the size of a pack of cigarettes," according to a news story (http://articles.latimes.com/1987-10-23/local/me-10584_1_psychiatric-hospital) at the time.

But it wasn't for another 10 years that defenders would actually have to pay for the device themselves. Throughout the '80s, the government bore the burden of paying for anyone placed on electronic monitoring, whether it was assigned to them for probation or pretrial detention. To this day, the federal government continues to pay for any costs associated with electronic monitoring.

But the state courts have taken an alternative approach. One of the first offender-funded models was launched in Los Angeles in 1992, shortly after the Rodney King riots. During those riots, some 11,000 people were arrested. That's when a private company, Sentinel, stepped in to offer its services to the county's probation department. (Sentinel did not return request for comment.)

In company documents, Sentinel said the company "pioneered the offender-funded program model." And in a subsequent case study, the company noted (http://www.sentrak.com/files/CaseHistory_7OFund.pdf) that the 1992 Los Angeles "program was the nation's lead offender-funded model." The company also said that because "this program was so successful, many agencies across the country have capitalized on the Sentinel model and have reaped the benefits."

"The first rule is follow the money," says Jack Duncan.

Thus, the modern era of electronic monitoring began.

Like many industries, businesses compete for contracts with a mix of lobbying, marketing and old-fashioned schmoozing. Companies routinely pitch their products' services at trade shows and conferences around the country. "You go to the National Association of Pretrial Services Conference, or the American Parole and Probation Association, and in the vendor room is all this technology for tracking," says Cherise Burdeen. "They portray it as a great technology, and they tell all these county folks, "This doesn't cost you anything; the defendant pays for it all!"

While OMS is a relatively small player in the electronic monitoring marketplace, it is part of an industry that has harvested a substantial fortune from an increasingly high-tech prison industry.

"The first rule is follow the money," says Jack Duncan. "And the big time corporations are the ones who are getting into the business, because there's a lot of money to be made."

For instance, OMS leases tracking equipment from Satellite Tracking of People, a Texas company that was purchased in December 2013 by Securus Technologies, a prison technology company valued at well over $1 billion. Part of the pitch to law enforcement is that electronic monitoring enables round-the-clock tracking capabilities. But hosting all that GPS data comes at a price.

According to a balance sheet obtained by IBT, Securus recorded $26.3 million in 2014 revenue from its new "offender monitoring systems" business after its 2013 acquisition.

Other companies have logged impressive figures as well. Behavioral Inc., the largest electronic monitor provider, was purchased in 2011 for $415 million by the GEO group. And Omnilink, another large purveyor of electronic monitoring services, was recently acquired for $37.5 million. There is also ProTech, developed by 3M, iSecure Trac, G4S, Sentinel Offender Service and Track Group.

Though several companies now operate lucrative mini-empires in the industry, there are few

established guidelines on how the devices are actually imposed on users.

"I think that the companies don't want a clear-cut examination of the legal status of electronic monitoring," said James Kilgore, a criminal justice researcher and activist who is working on a book about privatized electronic monitoring. "What is it? Where does it fit? Is it incarceration? Is it not incarceration? I don't think they want that discussion because they want to keep it in this nebulous status so they can market it in as many instances as possible and widen the net."

The Fear Of Letting People Out On Bail

To understand a bit why Antonio Green -- a man arrested for a traffic violation -- was placed on electronic monitoring, you first need to go back to a case that he had nothing to do with.

In July 2013, Lorenzo Young, a "documented gang member" was arrested -- and later convicted -- for the murder of Kelly Hunnewell during an apparent botched robbery at a bakery where Hunnewell worked.

The case received a ton of media attention, partly because Young was out on bond at the time of the murder. In response, Columbia mayor Steve Benjamin created a panel on bond reform to "improve upon and recommend new tools to keep career criminals in jail and off the street."

"Lorenzo Young never should have gotten out of jail, and now one young woman has lost her life and four small children have lost their mother," Benjamin said in a statement. "The people of Columbia won't stand for it, and neither will I."

Benjamin created a taskforce. The chair of the panel was Robert Stewart, the paid lobbyist for OMS.

Electronic monitoring for defendants out on bail is typically reserved for people charged with violent crimes. But since the tracker program launched in August 2014 -- just a couple months before Green's arrest -- judges have made it a condition of bond hundreds of times, often for minor traffic violations or low-level misdemeanors, according to court documents and public defenders.

"There's a mythology around the technology, that somehow authorities are in control of individuals who are on electronic monitoring," says Kilgore.

"They've just gone berserk with it," says Jack Duncan. "It's gotten out of hand."

Sam Wiseman, a professor at the Florida State University College of Law who has researched pretrial electronic monitoring extensively, said this "net widening" is common. "Nobody is going to give the [judge] an award for releasing a defendant on his own recognizance," he says. "That doesn't make the news. What does make the news, is when someone gets released and goes on to commit a crime."

There is the argument to be made that offenders who wear the device are more likely to appear for their trial. After all, a "non-negligible percentage of defendants flee despite having posted large bonds," according to Wiseman. Between 1994 and 2004, he noted, nearly a quarter of all state court felony defendants who released on bail failed to appear at trial.

But critics, especially James Kilgore, say it's a flimsy argument that electronic monitoring -- whether used in a pretrial or probation setting -- could ever really have some sort of large-scale, positive societal affect.

"There's a mythology around the technology, that somehow authorities are in control of individuals who are on electronic monitoring," says Kilgore. "They're not in control of them. If someone wants to commit a crime, you can take that bracelet off with a pair of scissors."

'A Slap In The Face'

For the nine months Antonio Green wore his BluTag, the device received and recorded his GPS latitude and longitude once a minute, as well as the date and time stamp, the speed at which he traveled and the nearest street address as determined by the U.S. Postal Service. "The receiver and transmitter are housed in a rugged, weatherproof, factory sealed, plastic case," according (http://www.leg.state.nv.us/74th/Interim_Agendas_Minutes_Exhibits/Exhibits/AdminJustice/E031708L.pdf) to company documents.

Green says that police were dispatched to his house on one occasion -- because he forgot to keep the device charged. He said the device didn't stop him from running from his court date, because he never planned to in the first place. "My dad was a man," he said. "That's how he raised me. He said if you go out and get in trouble, face it like a man."

Green admits he's not perfect. His license was initially suspended for a DUI, and his arrest record includes a domestic violence charge and disorderly conduct. But he says he's been turning his life around in the last year, finding odd-jobs and making money where he can. He said he was even saving up money to buy an engagement ring for his girlfriend -- until the ankle bracelet sent him into debt.

"Me and my girlfriend started having arguments because I couldn't help her out,' he told me. "And I started getting overdraft fees; it started getting real tough." Mr. Green began to cry as he reminisced about all that he lost because of the monitor. "Birthdays, school clothes...It was real tough." Green said he even had suicidal thoughts. A doctor prescribed him antidepressants.

As fate would have it, when Green appeared at the court, he was informed that his case had actually been thrown out on June 8. In fact, Cox says, the court did not inform Cox nor Green that the case had been dismissed on June 8 until Cox made a Motion to Amend Bond on August 4.

"Unfortunately, he just sort of slipped through the cracks of the judicial system," said Cox in an interview. In other words, Green was paying his electronic monitoring for two extra months while the court did not actually even care about his whereabouts.

"That," Cox says, "was just a slap in the face."

Later that day, OMS removed the ankle bracelet from Green's leg, making him -- at least theoretically -- a free man. But it doesn't always feel that way for Green. "I've been living on overdraft," he said. "I went through all my money."

He added, "It's just a rip-off."