Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

MEETING NOTICE AND AGENDA
Committee to Study Evidence-Based Pretrial Release
VIDEOCONFERENCE

Date and Time of Meeting: February 26, 2018 at 2:00pm
Place of Meeting:

Carson City	Las Vegas
Nevada Supreme Court Law Library 107 201 S. Carson Street Carson City, Nevada	Nevada Supreme Court Conference Rooms A & B *(Committee Members and Presenters)* Courtroom *(Guests and Public)* 408 E. Clark Avenue Las Vegas, Nevada
Teleconference Access: 1-877-336-1829, passcode 2469586	

All participants attending via teleconference should mute their lines when not speaking; it is highly recommended that teleconference attendees use a landline and handset in order to reduce background noise.

AGENDA

I. Call to Order
   A. Call of Roll
   B. Approval of 7/19/17 Meeting Summary* **(Tab 1)**
   C. Opening Remarks
   D. Public Comment

II. Pilot Site Program Status Updates - *Judge Stephen Bishop, Ms. Heather Condon, Ms. Kowan Connolly, and Ms. Anna Vasquez* **(Tab 2)**

III. NPR Assessment Results/End-of-Year Data Analysis - *Dr. James Austin* **(Tab 3)**

IV. Status of Criminal History Repository **(Tab 4)**
   A. Presentation - *Ms. Mindy McKay, Records Bureau Chief, General Services Division*
   B. Convictions Versus Arrests Discussion

V. Modifications to NPRA Discussion **(Tab 5)**
   A. Expansion of Crime Types for Administrative Releases Discussion

VI. Discussion of Release Conditions Imposed by Judges During Pilot Program **(Tab 6)**
   A. Release Programs Available to Judges to Support Release Conditions
   B. Las Vegas Township Community Impact Center Presentation - *Judge Joe Bonaventure*

VII. Outcome Measures Discussion **(Tab 7)**

VIII. Pretrial Release Education Discussion **(Tab 8)**
   A. NJLJ Winter Seminar: Summary of Pretrial Release Presentations/Discussions - *Judge Kevin Higgins*
   B. Discussion on NIC Training Resources - *Ms. Lori Eville, National Institute of Corrections*

IX. Other Items/Discussion **(Tab 9)**
   A. Pretrial Justice Institute's "State of Pretrial" Report
   B. National Task Force on Fines, Fees, and Bail Practice: Key Resources for States
   C. NV Advisory Committee to the United States Commission on Civil Rights
   D. Reference Articles

X. Next Meeting Date: TBD

XI. Public Comment

XII. 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)
- 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: Nevada Supreme Court, 408 East Clark Avenue.

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 Sue Berget and Jamie Gradick

July 19, 2017
3:00 p.m. – 5:00 p.m
Videoconference (Carson City, Las Vegas)

Members Present

Justice James Hardesty, Chair
Judge Stephen Bishop
Judge Joe Bonaventure
Jeremy Bosler
Heather Condon
Judge Gene Drakulich
Judge Elizabeth Gonzalez
Judge Douglas Herndon
Chris Hicks
Judge Kevin Higgins
Judge Cedric Kerns (*Dana Hlavac, Proxy*)
Phil Kohn
Judge Victor Miller
Judge Michael Montero
Judge Scott Pearson
Judge Elliott Sattler
Judge Mason Simons (*Randall Soderquist, Proxy*)
Dagny Stapleton
Judge Diana Sullivan
Judge John Tatro
Judge Alan Tiras
Judge Ryan Toone
Judge Natalie Tyrrell
Anna Vasquez
Jeff Wells
Steven Wolfson

Guests

Jim Austin
John Boes
Jackie Bryant
Connor Cain
Tom Clark
Christy Croug
Tracy DiFillippo
Ozzie Fumo
Tom Green
Judge Pierre Hascheff
Amy Justin
Richard Justin
Steve Krimel
Mark Mathers
Thomas Pitaro
Amy Rose
Adella Ybarra

AOC Staff

Jamie Gradick
Hans Jessup
John McCormick
Kandice Townsend

I. Call to Order - Justice Hardesty called the meeting to order at 3:00 p.m.

- Ms. Gradick called roll; a quorum was present.
- Attendees approved the summary of the 3-20-17 meeting.
- Opening Remarks
  - Justice Hardesty commented on recent correspondence sent to members of the judiciary from various bail bond agencies/representatives and explained that judges cannot, per the Nevada Code of Judicial Conduct, respond to or publically speak to these requests since these letters "advocate legal positions." Justice Hardesty assured attendees that issues raised in this correspondence will be addressed as appropriate.
- Public Comment
  - Carson City
    - Good afternoon, Justice Hardesty and committee. I am Steve Krimel from Nevada Bail Institution. I appreciate very much the explanation earlier, um, and I am looking forward to hearing what you have decided to do as a group with standardized bails that we have advocated on behalf of. With that comment, I just say thank you very much and if there is anything we can do to be of assistance, we will.
    - Good afternoon, Justice. My name is Richard Justin, and I own Justin Brothers Bail Bonds. I have been a licensed bail agent for 33 years, um, and I have some great concerns on the ability for my business to stay open as a result, whether intended, or unintended, as a result of this project's work in Washoe County and uh I'm kinda here on an educational mission to you. I don't know what to do, but I can tell you that at this point I'm at a very, uh, I'm at a turning point in my professional life, I'm 64 years old and, uh, I've spent my entire retirement, I've spent my savings, and I don't have very much left in reserves and I feel the need to let you know that if things don't change in Washoe County that I will be requesting some sort of assistance from this committee as far as the runoff of my liability and I don't know how long I will be able to last, but the ... at some point in the future if I don't get some assistance here I will have to ask a Federal Magistrate for, in bankruptcy court, for the assistance that I will need. I am at a dire place and I've never been here before, I've been successful, I've done over 20,000 pretrial service agreements, I've arrested personally over 1,000 people, I was mentored for the past 32 years by the gentleman you saw here before me, Steve Krimel. My family, I'm a second generation in the bail industry and right now I cannot afford to service my liability so I am letting this committee know and all the local judges, who have been so very gracious to me throughout the years, and still are giving me help when I needed it, extensions, I mean, you know, stuff that's within the law, and . . . but I just don't know where things are going to go, and I'm at that point, that turning point where I've got to make start making some decisions. The basis for which I can do my recovery depends on the amount of revenue that I have, the amount of bail that I'm not writing is skewing the acturarial for me to be able to perform my duty. I've had to lay all the personnel off, my daughter left college at CalPoly in California to come up and assist me, and I don't know what's going to happen, but I may end up asking this committee to dissolve my liability in this state so that I can shut this down

without damaging myself anymore and the state anymore. So that's the position I have, I don't really know what to tell you other than that. I appreciate you listening and if you have any questions they have my contacts. Thank you. You know, your honor, I have been to all of them, I've been to most all of the meetings. I haven't been able to attend some because I had a case before the court, so I've been to most of them so I pretty much know what's going on. Thank you.

- Las Vegas
  - My name is Thomas Pitaro. I've been following this bail issue and I've done a lot of independent reading on this, especially with the evidenced-based risk assessments, and what we are trying to do with that, and to that, I would like to make two comments concerning it. The idea of the evidenced-based risk assessment is, it appears to be, that the modern approach in a number of jurisdictions and has to be, I think it has to be developed here and used here. The problem I'm having as a practicing attorney that goes to …. on this is that we don't have an evidenced-based risk assessment problem, we don't have a problem with anything, save and except the judiciary. The biggest impediment to these programs is, in fact, the judiciary, especially that I deal with in Clark County, they don't appear to particularly care about this and they will ignore it, I've had courts look at it, and will flat-out ignore it, and doesn't tell me anything. The second thing is, and this, and in this respect maybe because maybe I've practiced longer than most people here, I've practiced for a number of years before the 1984 Bail Reform Act changed things, but everyone in the system seems to be absolutely obsessed that the only bail is money bail. These evidenced-based risk assessments is trying to change that so we can deal with the problems in a rational thing, and make rational decisions, rational decisions are not made in court by the judges, at least in Clark County, when it comes to bail. The major thing I would like to say concerning that, is the law, and Justice Hardesty knows this, because of his presentation at the Assembly Judiciary Committee he supplied a great deal of this research and what the law says is that bail determined is supposed to be individualized and based upon the individual, and if that's what the evidenced-based risk assessment is, but the idea of the financial aspect of it gets lost, and I think most people agree that the modern, the modern judicial view, is that you cannot use money bail to keep people in jail and Justice Hardesty as you may remember and, and in one of your power points, you put that comment in from one of the other courts and for the poor bail means jail, and that is true. So that's the thing, the difficulty with this, it's not putting the data together, it's not going through and finding these things because quite truthfully a lot of the social science have done this work in other states, in other jurisdictions as well as in Nevada. You better take the gavel, quite truthfully, and hit the judges over the head that the Supreme Court's supposed to supervise and make them follow the law on it, and have them look at it and have some sort of base understanding of what bail is or isn't. We had that bail increase in Clark County that were just pulled out of the air, and now that leads to the second thing I see is on the Agenda and the twist

that is the idea of standard bail. The recent development in courts, go back to Justice Hardesty of you putting those in your power point presentation and some of the other things when you spoke at the Assembly Judiciary is one of the major points is we have an equal protection argument. When you have a standard bail by charge that is bail based upon charge and not based upon an individual's ability to pay, and/or the evaluation of the person of whether he is going to be involved in the two factors that bail deals with, and that is flight on the one hand and danger on the other, that we build in an equal protection argument there that people will stay and not flee may not be able to make bail, and people who will flee can't make bail, likewise danger to the community is nothing brilliant, this is the basis of what these cases are; and so this concept when I saw it , heard this, and I wasn't aware it was there, and now we're talking about a standard bail schedule for the state that we walk ourselves into, it's an absolute equal protection argument because the poor can't make bail by these bail schedules. The average family in Clark County makes like $50,000, but come down to the Justice Court you see that bail is $100,000, $200,000, $300,000 are set, as the Court knows, and Justice Hardesty knows because you reference this once again in your power points, is one of the reasons these laws back in antiquity that the precursor of the Bill of Rights, the precursor of the absolute right to bail were based upon the fact that judges were setting bail so high to keep people in, and that the purpose of bail has become, quite truthfully, to keep people in, not to keep them out, and we a constitutional right, an absolute right to bail, and judges take an oath of office to protect and defend and to implement the Constitution then I think we have a serious problem when our problems of standard bails and keeping people in jail because they can't pay for it are ones, we are going to pay for it, it is going to come back and bite us in the rear and this committee is to be admired for going out there and trying to deal with it; but I think one of the things that has to be done is the implementation of this and make sure that the judiciary does it. The fear that the judiciary seems to have, and if I said it to let someone out of jail and something bad happens, it's going to affect me politically. Well, that may be, but then you probably shouldn't have taken the job because the job is to make the determinations effect. I applaud what you are doing save and accept a standard bail is a clear equal protection argument. Thank you.

- Good afternoon everybody, my name is Ozzie Fumo and I'm a criminal defense attorney and I've been practicing in Las Vegas for the last 20 years. I hate speaking after Mr. Pitaro because he is much more eloquent so I will just hit a couple of bullet points that I wanted to touch on. I mentioned this to Justice Hardesty up at the Legislature where we were discussing the risk assessment factor and he was educating me on the profits and how it worked. As I look around the table and have looked at the names of people who are on the committee and don't see any attorneys who have argued bail for a client in the last several years and I'd like to see the committee be a little more balanced. Secondly, the risk assessment factors, which may have changed since I last looked at it, gives no guidance to the judges, justice court judges, district court judges, who look at it and see let's say a low risk to reoffend and don't know what that

means. They don't know if that means automatic goare?, they don't know if that means the state and the Feds attorney can argue for more bail, and if they think they can argue for more bail, they just throw the risk assessment out, which means why have the bail factor when there is no guidance for them. I'd like to see something in there, and I discussed this with Justice Hardesty, about non-violence, first time offenders should get a can get a non-cognizant release, or something to that effect, and not have to wait in custody. It costs us, as taxpayers, hundreds of dollars a day to keep someone in custody for a non-violent, first time offense when there should be an automatic owner cognizant release. Most of them, if not all, will definitely show up for court and the cases do get resolved. It's a waste of resources to keep them in there and have to undergo argue or post bail. I would also like to see you give judges more guidance to release defendants with non-monitor, look to a schedule, look to a pathway, so they can look to a non-monetary conditions first before they set the bail because, like Justice Hardesty said at the Assembly, and like Carl said, not only can we have people protection problems with poor being held in custody, bail means jail, the people can't afford it, the court can't afford it, and they just sit there longer, much more waste of resources, so if they look toward the non-monetary conditions for plenty out there that we discussed that would give the judges a little more guidance too. Thank you and I look forward to your presentation.

II. Pilot Site Program –Status Updates

- Justice Hardesty commented on the status of the pilot program and the significant amount of work the pilot sites are accomplishing.
  - Additional resources are needed; some pilot sites are struggling to keep up.
  - There is a need for additional training, not just for pretrial services staff but also for attorneys and the judiciary. There needs to be discussion on how to achieve a uniform approach to utilizing this program; this needs to be a priority if the Committee is going to move forward with this program.
- Ms. Anna Vasquez provided a status update on the pilot program in Clark County.
  - Out of approximately 534 cases, there were 100 releases, and very few FTAs or rearrests. Most of those not released via the tool are currently in jail; for many (approximately 200), bail was set but they were not able to post bail.
  - Dr. Austin explained that FTA and rearrest rates are well below where they were before the implementation of the current version of the tool; this is promising.
  - Ms. Vasquez commented that she would like to expand the program to all criminal departments. Discussion was held regarding the resources needed for expansion; Judge Bonaventure explained that these needs have been discussed with the county, nothing has been agreed upon.
    - Mr. Jeff Wells explained that the county's goal is to get enough staff in place (8 positions) to expand the program; this is a "staff recommendation" at this point and has yet to be approved by the Commission.
    - This may go before the Clark County Commission in August.
  - Discussion was held regarding why so many people are sitting in jail, unable to pay bail.

    - A comment was made that the judges are setting high bails and not releasing; departments are releasing at different rates.
    - There has also been issues with risk assessment tools not being fully completed; some judges are doubting the accuracy of the information and waiting for the 72 hour hearing to make a decision.
  - Mr. Phil Kohn asked how many of the cases scored low risk and commented that he has seen several instances where bail is set for a low risk defendant, he/she cannot pay and the judge will not let him/her out. Mr. Kohn offered to provide documentation of this and commented that he does not believe it is a training issue; there are some judges who just refuse to OR defendants. This is something the Committee needs to look into.
    - Justice Hardesty commented that, regardless of how low bail is set, if defendants cannot pay bail, the bail agencies cannot make money. This is not an issue with the program.
    - Justice Hardesty commented that the question of why low-risk offenders are not being released need to be addressed; we need to "drill into" the numbers.
  - Attendees discussed the need to be able to look at jail populations by risk level and length of stay in order to study this issue.
- Ms. Heather Condon provided a status update on the pilot program in Washoe County. *(See meeting materials for PowerPoint)*
  - Washoe County-specific changes to the current system include:
    - Judicially imposed bail – removed uniform bail schedule
    - Required PC narratives at time of arrest
    - Shared drive for secure document transfer
    - Judges assess pretrial paperwork 7 days a week (PC review, PD appointment, bail assessment)
    - Praxis to decide who can be released and at what supervision level; this provides guidance and what pretrial officers can and cannot do.
  - Overrides for May are at 12% compared to 26% in February.
  - FTA rate has increased to 17%; rearrests decreased to 6%.
  - Pending issues include staffing concerns and outdated case management systems that do not communicate with one another; Ms. Condon is currently working with the county and other courts to secure additional resources and to address case management system concerns, this is an on-going effort.
  - DAS supervision and supervision fees can also be problematic; this is a Washoe-specific issue that Ms. Condon is working to address.
  - Attendees discussed inconsistent setting of bail in Washoe County; some judges OR more than others. Initial discussions regarding the implementation of a bail magistrate system are taking place in the county.
  - Attendees discussed nuisance arrests and the impact on Washoe County's data.
    - There is a difference between one defendant being arrested repeatedly versus several defendants each being arrested once – this needs to be reflected in the data for accuracy.
    - Dr. Austin commented that studies show that texting reminders to defendants can reduce FTA.

    - Mr. Chris Hicks asked for clarification regarding the difference between "rearrest" and "revocation" and commented that it would be valuable to know revocation rates.
    - Mr. Hicks commented that the failure to abide by conditions of release should be taken into consideration; Dr. Austin explained that the NPRA tool does not measure this. Ms. Condon tracks this information so it would be useful to look at.
- Judge Bishop provided a status update on the pilot program in White Pine County.
  - The program is running smoothly in Ely, there have been a few "weird" instances but no patterns; OR motions are helpful for sorting some of these situations out.
  - There have been a few issues with released defendants reoffending, particularly with drug cases. Judge Bishop is working with the drug court to develop a solution using a "life skills" approach for appropriate cases.
  - Overall, better release decisions are being made; this program could be particularly useful in the rural courts because of the smaller caseloads.
  - Attendees discussed dependence upon law enforcement participation; Judge Bishop commented that this has not been an issue so far.
- Dana Hlavac provided a status update on behalf of Las Vegas Municipal Court.
  - Of the 776 defendants screened in the last quarter, 581 were low risk and 169 were moderate.
  - The court has a standing judicial order to release defendants who meet criteria; 10% didn't meet the criteria but were released because the tool indicated they were low risk.
  - 70% bonded, but not clear whether that was before the PC hearing.
  - Under the NPRA tool, the appearance rate for the low risk group has increased to 98% (from 89% on the judicial order).
  - Of the moderate risk group, 20% release under prior judicial order, 3% released under tool and 76% bonded and 93% of those appeared.
  - Mr. Hlavac explained that Las Vegas Municipal Court continues to support the program but has some concerns regarding when defendants bonded and why certain defendants bonded but remained in jail.
  - Attendees discussed the data breakdown in terms of justice courts versus municipal courts; Ms. Condon commented that, at this time, her case management system does not allow for this level of analysis.

III. NPR Assessment Results Update *(See meeting materials for PowerPoint)*

- Dr. James Austin provided an overview of the data collected from the pilot sites since the last Committee meeting.
  - The tool is performing as expected.
  - Tracking FTA and rearrest data needs to be more comprehensive among the pilot sites; Dr. Austin will work with the pilot courts to address this.
  - Jail population has decreased in Washoe County but this could be a seasonality link; population in Clark County appears to be stable but this could change as the program expands to more departments.
  - Two observations/ideas have arisen:
    - Judges questioning why offense severity is not included in the tool – this is because it has very little predictability on FTA and/or re-offense rates. However,

some courts have developed a matrix to help guide this. Dr. Austin is open to moving in this direction if this is something the Committee would like to do.
    - A supervised release program could aid in reducing the long-term jail population.

IV. Pilot Site Program – Concerns, Recommendations, and Next Steps *(See meeting materials for additional information)*

- Ms. Condon commented on the need for additional training for all stakeholders, including the private attorneys.
  - Discussion was held regarding Ms. Condon's ability to request supplemental budget resources; Mr. Jeremy Bosler explained that the budget is flat for all county departments.
- Mr. Bosler expressed concerns regarding an increase in cash bail, inconsistency among judges, confidentiality of tool information, and possible design flaws in the program.
  - Concern was expressed regarding Sparks Justice Court requiring written motion for a bail/ bail hearing; Mr. Bosler commented that this defeats the purpose of the program and extends the timeframe.
  - Mr. Bosler commented that the inclusion of first time domestics and exclusion of first time DUIs is not scientifically supported; some of these instances could be handled by court services (ORs).
  - A suggestion was made that individualized bail decisions be made earlier in the process.
  - Ms. Condon clarified that DUI/domestic first are considered serious misdemeanors in Washoe County and pretrial services can release low and moderate level offenders.
- Ms. Vasquez and Judge Bonaventure commented on the efforts being made to speed up the process and improve PC and initial appearance reviews. The goal is to streamline the process. This approach is modeled after the process used in Maricopa County; Ms. Condon commented that Washoe County is also taking steps to shorten the process time.
- Judge Bishop commented on staffing issues and informed attendees that he is working with the District Court to address the concerns.

V. Subcommittee to Study Bail Schedules – Update/Presentation on Proposed Guidelines *(See meeting materials for additional information and proposed guidelines)*

- Judge Scott Pearson presented the proposed bail guidelines on behalf of the Subcommittee.
  - Attendees discussed the benefit of this in the rural jurisdictions that don't have pretrial services to provide information.
  - There is a lack of consistency and uniformity across the state, this document can provide guidance and mitigate that
  - Judge Bishop commented that it is not feasible for the smaller, rural jurisdictions to follow a process like what Washoe County and Clark County use.
  - Justice Hardesty commented that defense counsel complain that judges are inconsistent in bail setting after reviewing the assessment tool; would it be helpful to offer uniform bail amount guidelines?
  - Justice Hardesty discussed the argument that the defendant should be able to bail out if he/she has the ability to pay and wants to do so; this is a reasonable argument.

- Justice Hardesty commented that he wants the Committee to ask the Nevada Supreme Court to adopt, by rule, the proposed guidelines for statewide use and asked attendees for input.
  - This will not be in lieu of an OR release.
  - Judge Pearson commented on the wide range and inconsistencies of bail practices across the state but expressed concern regarding judges "blindly following" the guidelines rather than making individualized bail decisions.
  - Judge Pearson commented that, should the Nevada Supreme Court make a rule, it should require judges to articulate reasoning behind the money bail they set.
  - Mr. Kohn echoed Judge Pearson's concerns and expressed concern regarding bail stacking; bail needs to be individualized to each defendant or it will lead to a lawsuit. Mr. Kohn commented that he cannot support the proposed bail guidelines without additional safeguards.
  - Judge Higgins commented that this issue presents an opportunity for training and guidelines for use need to be developed.
  - Judge Sattler asked for clarification regarding whether law enforcement will be allowed to modify the bail amounts and explained that there should a be more focused analysis of the defendant between law enforcement, a judge, and the DA; we can't give too much authority to law enforcement with the document's "catch-all" statement. Judge Pearson explained that this "catch-all" applies to those rural counties that do not already have a process for bail review in place and reminded attendees that this document is just a guideline.
  - Jeremy Bosler commented that, given the overly inclusive list of Category B felonies in this state, a bail schedule seems counterintuitive to the theories/goals of the NPRA tool and program.
  - Mr. Bosler commented that there could be efficiencies gained and suggested that attendees read the law review article on the bail project in Marilyn County.
  - Ms. Condon commented that she could provide a list of lawsuits in which bail, fines, and fees issues have been addressed.
  - Judge Tatro commented that a bail schedule can be useful when the judge has little information on the defendant; attendees briefly discussed this process.
- Justice Hardesty expressed concern regarding the inconsistency of bail amounts and practices across the state and commented that what is missing from the discussion is the statutorily imposed obligation on judges to make an assessment on why defendant are not being released. Judges need to articulate reasoning, on the record, in every case; this may significantly impact calendars but it is a statutory requirement.
  - Mr. Kohn expressed concern regarding cases being "pushed through" too quickly.
- Justice Hardesty commented that this document needs additional work; the Committee needs to be thinking about the bail statutes.
- Attendees, in the interest of time, agreed to defer further discussion of this topic until the next meeting.

VI. Other Items/Discussion

- AB136 – Justice Hardesty provided a brief overview of the legislative history of AB136 and commented "on the record" that he was not involved with the Governor's decision to veto the bill, nor did he (or Mr. Graham) speak with the Governor, or the Governor's staff, regarding this bill.
- Continuation of the NPRA Pilot Site Program

- Justice Hardesty asked for a motion to continue the pilot program through December 31, 2017.
- Chief Judge Gonzalez made the motion; Judge Sattler seconded the motion.
- Discussion on the motion:
  - Mr. Hicks reminded attendees of his concerns regarding the state's criminal history database and the NPRA tool's use of conviction data when it should be suing arrest data. If the program is to continue with the current tool, he will be reluctant "no". This is a serious discussion that the Committee needs to have.
  - Judge Tatro will vote "yes" but shares Mr. Hicks' concerns.
  - Chief Judge Gonzalez and Judge Sattler clarified that motion was made based on the use of the current tool.
  - Steve Wolfson commented that he is in support of the continued use of the tool in the pilot program but he has concerns regarding the accuracy of the information begin gathered; the missing criminal history information is a problem.
  - Justice Hardesty informed attendees that the Advisory Commission on the Administration of Justice made a recommendation that the Nevada Legislature enact a stature requiring all criminal history database used within the state to address and fix these data issues. As such, a working group was created to analyze these issues and report to the legislature during the 2019 Legislative Session. In the meantime, this Committee needs to discuss on its own how to better report accurate conviction data.
  - Justice Hardesty suggested a new subcommittee for this Committee to address this concern; membership would include Committee members, pretrial services representatives, and criminal history database technicians/ representatives. Justice Hardesty asked Mr. Hicks and Mr. Wolfson (or their designated representative) to serve on the subcommittee; Justice Hardesty will reach out to others regarding their participation in this subcommittee.
- Ms. Gradick took a roll-call vote on the motion.
  - 23 members were in favor
  - 1 member was against
  - Motion passed

- Mandatory Training
  - Justice Hardesty proposed a motion in which the Committee asks the Nevada Supreme Court to set mandatory education for judges, lawyers, and staff with respect to the use of the NPRA tool.
  - Ms. Vasquez made the motion; the motion was seconded by Mr. Kohn.
  - Discussion on the motion:
    - Mr. Kohn suggested that all groups (attorneys, judges, staff) be included in the same training sessions.
    - Judge Herndon commented on the "cultural shift" of this topic for the judges.
  - Ms. Gradick took a roll-call vote on the motion.
    - 23 members were in favor
    - 1 member abstained
    - Motion passed
- The next meeting will be scheduled for September or October; additional details will be provided at a later date.

VII. Additional Public Comment

- Carson City
  - Thank you, Justice Hardesty, Richard Justin – I'm sorry, I know you all had . . . I had comments all along, but obviously I can't participate because I'm not one of the judges. The first thing I would like to say, if you need a Magistrate in Washoe County I'm probably going to be available; I'll be looking for a job. Secondly, when Anna was talking about the people and you were discussing what questions weren't being asked and what questions were, the first 100 that she let go, those were the ones that we bailed, and if, the next 200, if we had bailed the first 100 we probably could have bailed half of the second 100. The first question that should be asked by Heather and her group is, are you going to bail? I am deeply opposed to the fact that you're moving this, deferring the bail schedules off, I can't address that in the middle of your meeting because it is only for public comment and it needed to be addressed at that moment. But the bail schedules, and my understanding of their history, are only unconstitutional, or, um, difficult, if you don't address them at the 72-hour period if they haven't bailed. Now all of our clientele are available to come back for this assessment study at any given time during this process and we do that in most of the smaller counties, except Washoe County, and you know, even the courts will call me and say "Hey, I want to see your client." You know, that's not a problem. We're not a part of this process so it is very difficult for you to get the 100 years or so experience that we have. This is going to, this deferrence is, until December may put me out of business and I know that is not your intent, but that's just the effect of the program. So, like I said, I'm kind of at a loss for, because I can't jump in in the middle. I was listening to some of the judges and what they said … bail, when Heather said I was going to bail I have to pay $50 as a bond fee. When Heather lets someone go she doesn't get charged anything. Where is my equal justice? When, um, so for the 1,000 people that you let go in May, or 1,500, that costs the courts, the local courts, $75,000 because they didn't get my $50 bond fee for those 1,500 people. When bail is set, I understand that's the whole picture so when OR is the same as bail, and then she has to pay for supervision, that's money bail. So what's the difference between my money bail and her money bail? I'm kind of confused with that. The . . we've had some problems with warrants being set and then they go to jail and the rest of the bail is set and we post the bail and then somebody comes down and changes it after the bail has been set. There is an Eighth Amendment there that isn't being addressed on all warrants and I think it was Judge Tatro who brought it up. If you are addressing the bail on 3rd DUIs they handle that problem in Carson by ordering a mandatory scram before release prior to a . . . on a 3rd DUI. So, like I said, I couldn't write all this down and I wasn't prepared to do it in order the way it should have been. I wish I could have been able to say something at the time when things were coming up, so I'm sorry for that confusion. I haven't been able to participate because of the inherent conflict I had prior to this. This is the first time that I have been able to, or second time I've been available to actually make public comment. Thank you again, Justice Hardesty.

VIII. Adjournment

- Justice Hardesty adjourned the meeting at 5:45 p.m.

TAB 2

Materials Coming Soon

TAB 3

Status Update

February 2018

Nevada Pretrial Risk (NPR) Assessment

Opportunities for Evidence-based Technical Assistance

Deliberative and Pre-decisional

OJP Diagnostic Center Confidentiality Policy

This document is confidential and is intended solely for the use and information of the U.S. Department of Justice (DOJ) and the Las Vegas Metropolitan Police Department, the Nevada Supreme Court Committee to Study Evidence-based Pretrial Release and its partners as part of an intergovernmental engagement between these entities.

The DOJ Office of Justice Programs (OJP) Diagnostic Center considers all information provided to the Diagnostic Center by the requesting state, local or tribal community or organization to be confidential in nature, including any materials, interview responses and recommendations made in connection with the assistance provided through the Diagnostic Center. Information provided to OJP is presented in an aggregated, non-attributed form and will not be discussed or disclosed to anyone not authorized to be privy to such information without the consent of the state, local or tribal requesting executive, subject to applicable laws.

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CNA ANALYSIS & SOLUTIONS

IIR Institute for Intergovernmental Research

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The NPR Assessment was developed, tested and validated using local data and adopted by the Committee. Implementation began September 1, 2016 on a pilot basis in four sites

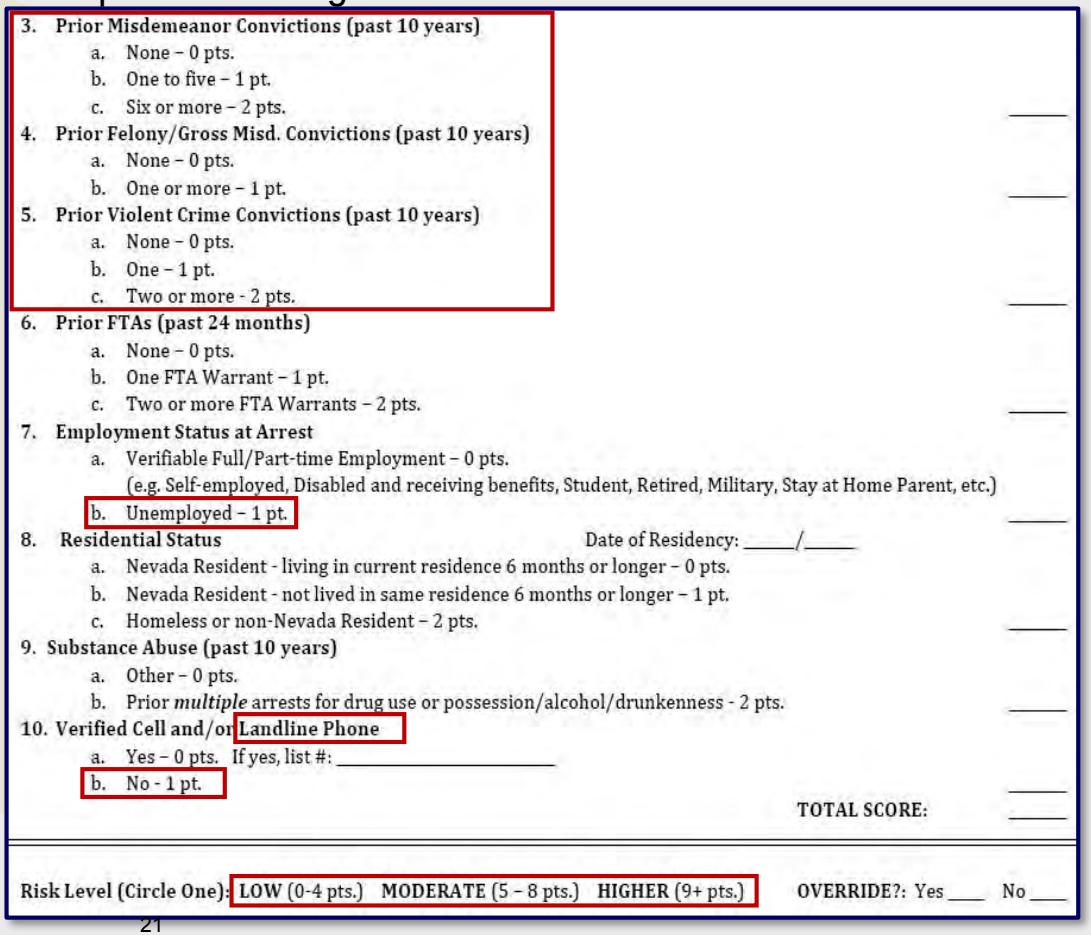
The Diagnostic Center traveled to Reno and Las Vegas in January, 2017 to reviewed proposed modifications and recalibration of the NPR Assessment

Adopted changes include:

- Use misdemeanor convictions as opposed to arrests and adjust weights
- Use felony convictions as opposed to arrests and adjust weights
- Use violent convictions as opposed to arrests and adjust weights
- Reduce unemployment score from 2 points to 1 point
- Add the presence of landline telephone to cell phone factor
- Reduce cell/landline phone score from 2 points to 1 point
- Rescale risk levels as follows:
  - 0 - 4 pts. = Low Risk
  - 5 – 8 pts. = Moderate Risk
  - 9 pts. and above = Higher Risk

Changes produced Version 2 of the NPR Assessment

Snapshot of changes to NPR Assessment: VERSION 2



3. **Prior Misdemeanor Convictions (past 10 years)**
   a. None – 0 pts.
   b. One to five – 1 pt.
   c. Six or more – 2 pts. _____
4. **Prior Felony/Gross Misd. Convictions (past 10 years)**
   a. None – 0 pts.
   b. One or more – 1 pt. _____
5. **Prior Violent Crime Convictions (past 10 years)**
   a. None – 0 pts.
   b. One – 1 pt.
   c. Two or more - 2 pts. _____
6. **Prior FTAs (past 24 months)**
   a. None – 0 pts.
   b. One FTA Warrant – 1 pt.
   c. Two or more FTA Warrants – 2 pts. _____
7. **Employment Status at Arrest**
   a. Verifiable Full/Part-time Employment – 0 pts.
   (e.g. Self-employed, Disabled and receiving benefits, Student, Retired, Military, Stay at Home Parent, etc.)
   b. Unemployed – 1 pt. _____
8. **Residential Status** Date of Residency: _____/_____
   a. Nevada Resident - living in current residence 6 months or longer – 0 pts.
   b. Nevada Resident - not lived in same residence 6 months or longer – 1 pt.
   c. Homeless or non-Nevada Resident – 2 pts. _____
9. **Substance Abuse (past 10 years)**
   a. Other – 0 pts.
   b. Prior ***multiple*** arrests for drug use or possession/alcohol/drunkenness - 2 pts. _____
10. **Verified Cell and/or Landline Phone**
    a. Yes – 0 pts. If yes, list #: _____
    b. No - 1 pt. _____

TOTAL SCORE: _____

Risk Level (Circle One): **LOW** (0-4 pts.) **MODERATE** (5 – 8 pts.) **HIGHER** (9+ pts.) **OVERRIDE?:** Yes ____ No ____

After further discussion, additional modifications were made to adjust for implementation capacity constraints and ability to verify stability factors

Additional modifications include all changes from Version 2 *and* the following:

- Consolidation of employment, residency, cell phone/landline scoring items to mitigating verified stability factors and assign a negative one (-1) point score to each factor
- Rescale risk levels as follows:
  - 0 - 3 pts. = Low Risk
  - 4 – 8 pts. = Moderate Risk
  - 9 pts. and above = Higher Risk
- *Interview, not required*

Changes produced Version 3 of the NPR Assessment

Both Versions 2 & 3 have been tested and are equally valid

Snapshot of changes to NPR Assessment: VERSION 3

3. **Prior Misdemeanor Convictions (past 10 years)**
   a. None – 0 pts.
   b. One to five – 1 pt.
   c. Six or more – 2 pts. _____

4. **Prior Felony/Gross Misd. Convictions (past 10 years)**
   a. None – 0 pts.
   b. One or more – 1 pt. _____

5. **Prior Violent Crime Convictions (past 10 years)**
   a. None – 0 pts.
   b. One – 1 pt.
   c. Two or more - 2 pts. _____

6. **Prior FTAs (past 24 months)**
   a. None – 0 pts.
   b. One FTA Warrant – 1 pt.
   c. Two or more FTA Warrants – 2 pts. _____

7. **Substance Abuse (past 10 years)**
   a. Other – 0 pts.
   b. Prior ***multiple*** arrests for drug use or possession/alcohol/drunkenness - 2 pts. _____

8. **Mitigating Verified Stability Factors (limit of -2 pts. total deduction)**
   a. Employed, Student or Retired (-1) pt.
   b. Nevada Resident - Living in current residence 6 mos. or longer (-1) pt.
   c. Verified Cell Phone/Landline (-1) pt. _____

TOTAL SCORE: _____

Risk Level (Circle One): LOW (0-3 pts.) MODERATE (4 – 8 pts.) HIGHER (9+ pts.) **OVERRIDE?:** Yes ____ No ____

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Data-Driven Justice Solutions

Status Update – Key Findings

Strengthens/Successes

- A recent decline in Las Vegas Municipal and White Pine County jail population
- The NPR Assessment results are now fully automated in three of the four sites and have developed the capacity to assess their results each month
- Washoe County jail population would be higher without the NPR Assessment as the number of bookings have increased but the jail population has not increased
- Re-arrest rates for NPR Assessment releases are lower for all pilot sites when compared to pre-NPR Assessment implementation rates
- The rates for failures to appear (FTA) for NPR Assessment releases are lower for White Pine County and Clark County
- Override rates are below 20 percent for Washoe and Clark County
- Override rates are about 40 percent for Las Vegas Municipal

Challenges

- Since the NPR Assessment pilot implementation, Clark County and Washoe County jail populations have not been significantly impacted
- White Pine County has a limited PC application that needs to be enhanced which will greatly facilitate expansion of NPR Assessment to rural jurisdictions
- The rates for FTA for NPR Assessment releases are higher for Washoe County and Las Vegas Municipal
- The lack of an impact in the Clark County detention populations is linked to a:
  - Small percentage of bookings being scored (only four of ten departments) under the NPR Assessment
  - Large numbers of low and moderate risk defendants not being released by the courts
- Many of the overrides are in the “Other category”

Pilot Site Summaries

Washoe County

- Pretrial Services stopped obtaining contracts and tracking supervised bail cases unless the defendant actually posted the money bail.
- Reno Municipal Court (RMC) assumed supervision for all of their court's new case.
- The four limited jurisdiction courts that assess bail are doing so every day. Judges are using the additional information to release lower risk individuals on own recognizance (OR) release, while requiring money bail and/or supervision conditions for those that present as a higher risk.
- The Diagnostic Center recommends a one-day training session for Judges, DA and Public Defender on the NPR Assessment.

Clark County

- Clark County was only screening felony pretrial cases in 4 of the 10 departments– no misdemeanors.
- Effective January 1, 2018, all10 departments are using NPR Assessments for felony cases.
- The Diagnostic Center recommends adjustments to scoring item #1 so that any bench warrant (BW) for failure to comply is counted.
- The Diagnostic Center recommends authority to release low risk defendants with the exception of certain offenses.

Pilot Site Summaries

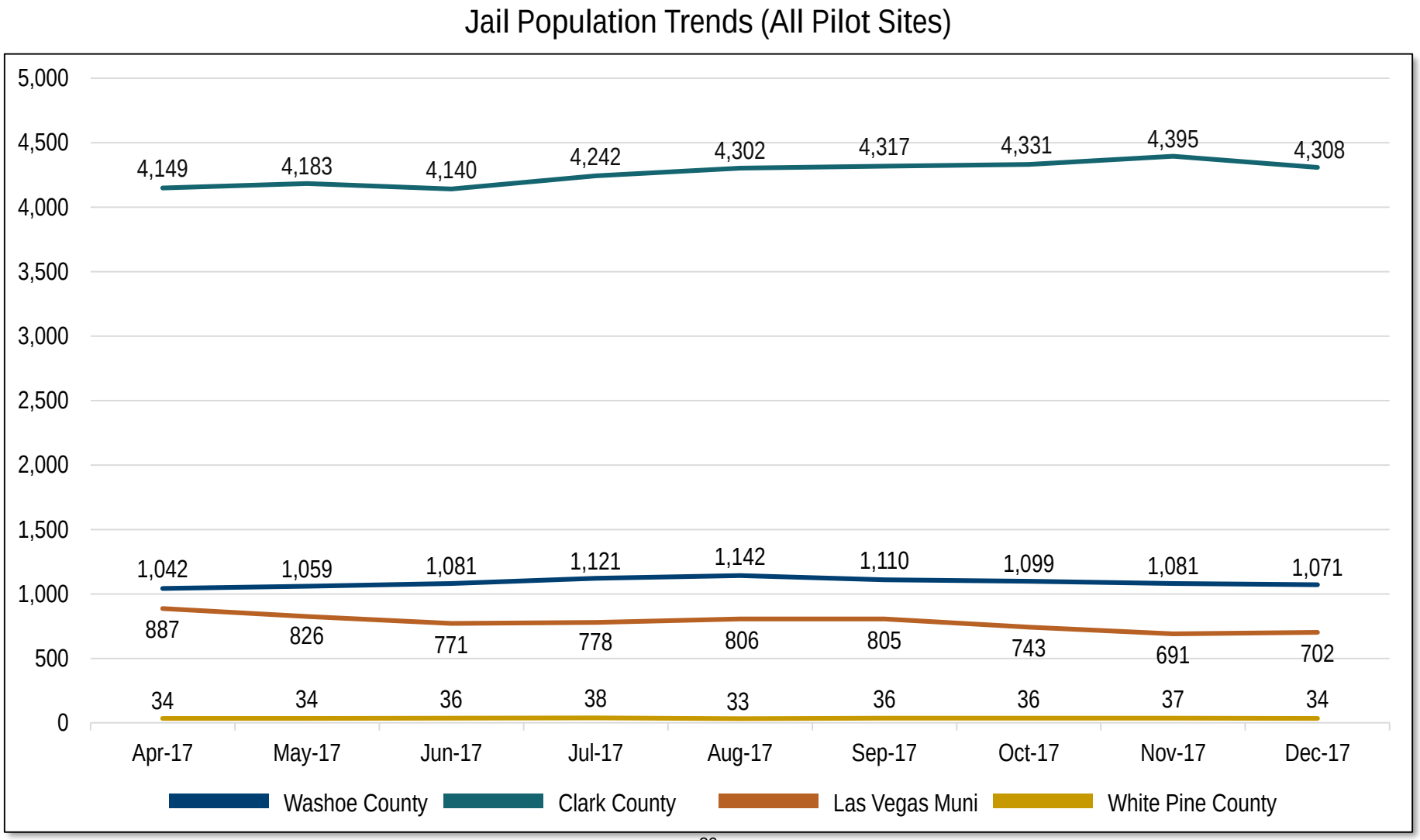
Las Vegas Municipal

- Las Vegas Municipal does not screen for North Las Vegas defendants or Traffic Bench Warrant cases.
- NPR Assessments are utilized on all Las Vegas Municipal Probable Cause cases.
- Las Vegas Municipal's override rate is excessive and needs to be reduced.
- To enhance releases, there needs to be an offer of House Arrest and/or Conditional Release.
- Pretrial services should have the authority to release low risk cases with the exception of certain charges.

White Pine County

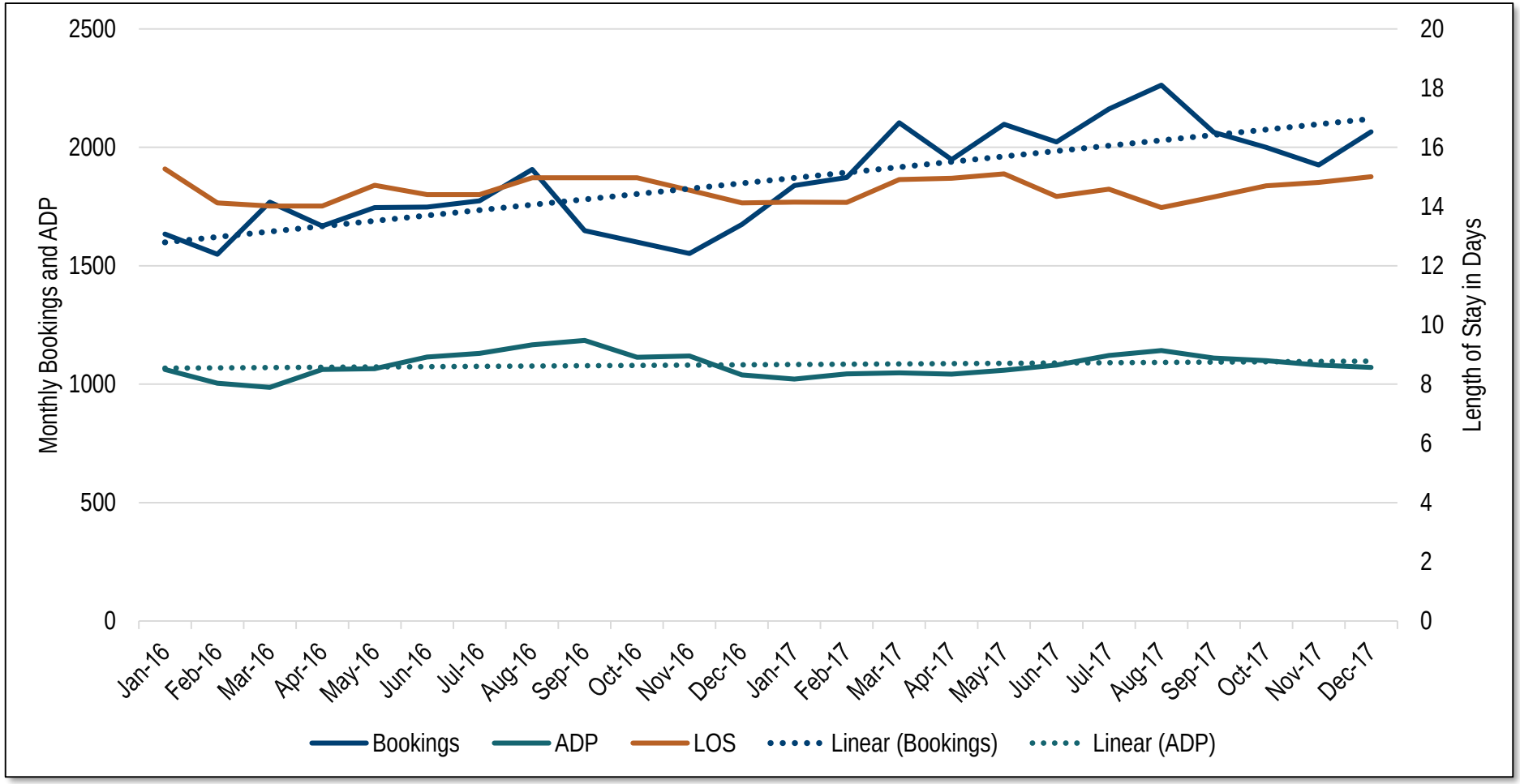
- All criminally charged defendants are being assessed under the NPR Assessment.
- A simple IT application should be developed that mimics the ones being used in the larger sites.
- Once the IT application is developed, rural sites, such as White Pine County, are ripe to implement NPR Assessments.

April – December 2017 Jail Population Trends (All Pilot Sites)



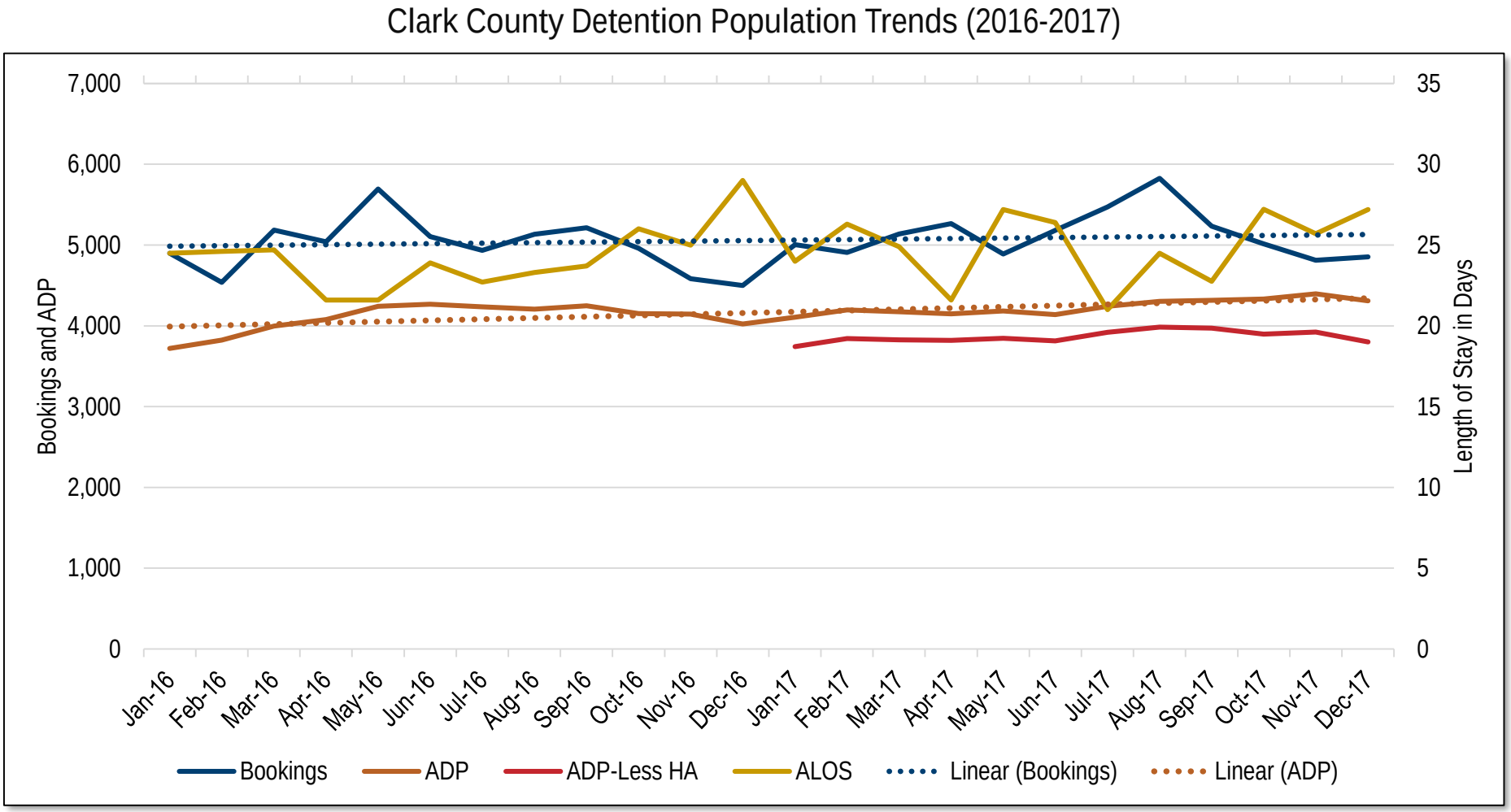
Washoe County

Jail Population Trends (2016 – 2017)



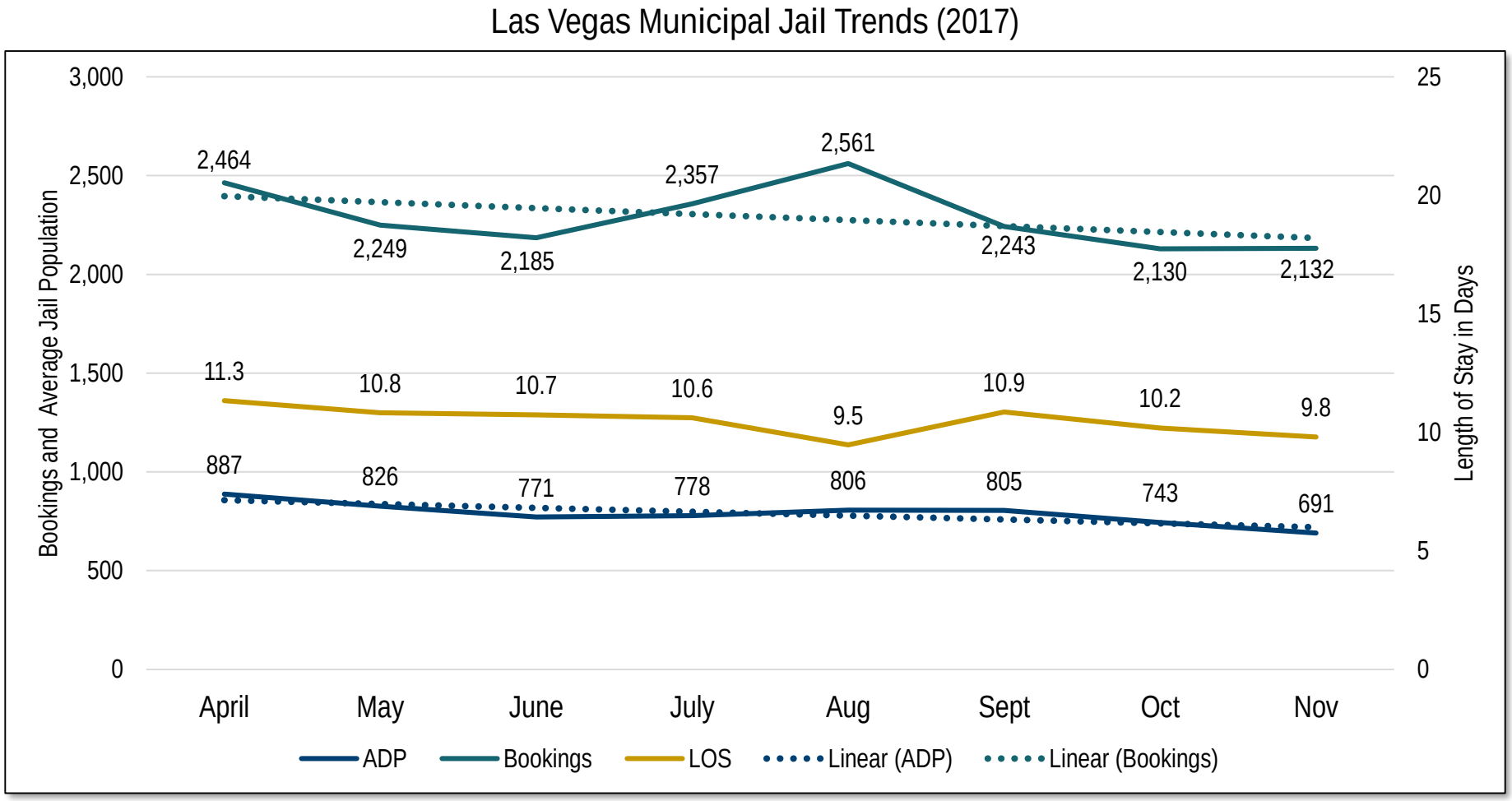
Average Daily Population (ADP); Length of Stay (LOS)

Clark County



Average Daily Population (ADP); Length of Stay (LOS)

Las Vegas Municipal



Average Daily Population (ADP); Length of Stay (LOS)

Pilot Site Monthly Performance Measures

Measure	Washoe County	Clark County	Las Vegas Municipal	White Pine County
Average Monthly Jail Booking	2,030	5,172	2,290	22
Average Monthly NPR Assessments Done	758	575	804	17
Percentage of total Bookings	37%	11%	35%	77%
Total Overrides	17%	12%	40%	-
Failure Rates				
FTAs	14%	14%	23%	6%
New Arrests	5%	11%	1%	6%
Pre-Pilot Failure Rates				
FTAs	9%	28%	16%	19%
New Arrests	12%	16%	3%	23%

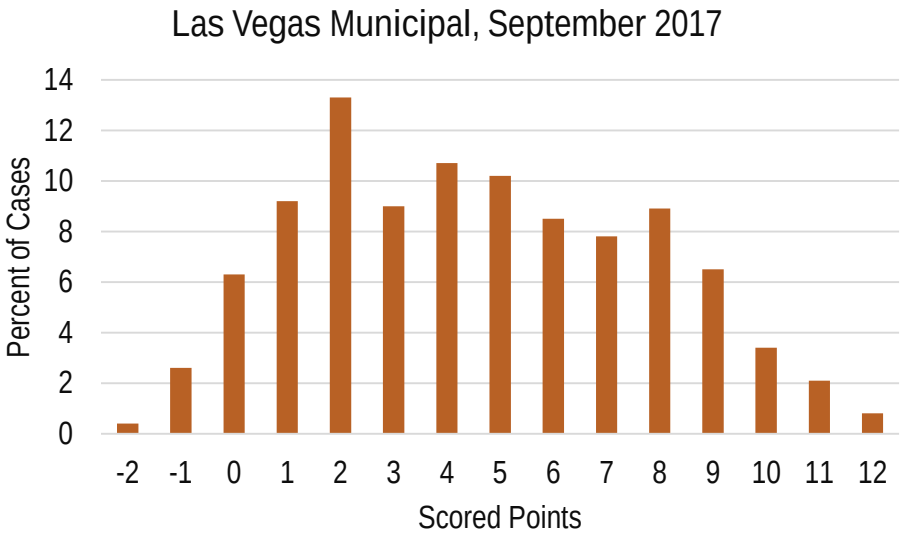
Detailed Monthly Performance Measures – Clark County and Las Vegas Municipal

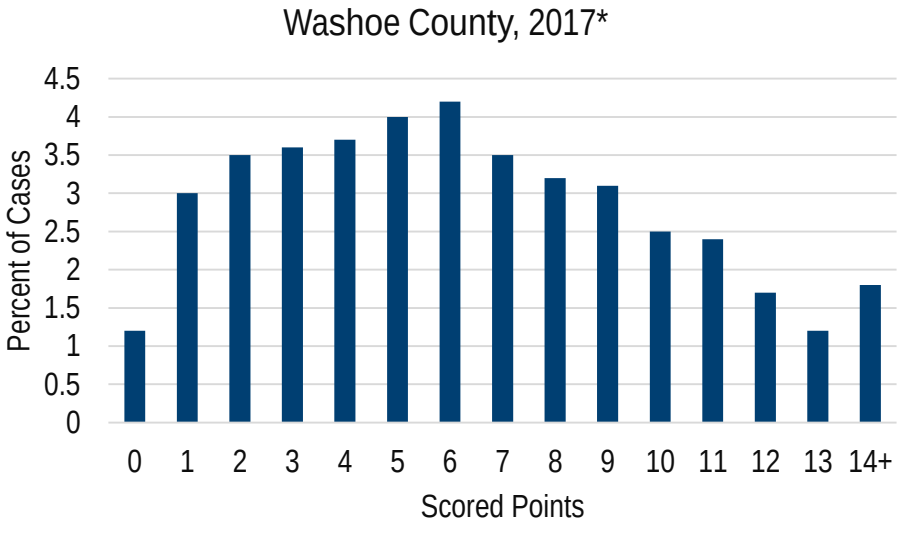
Measure	Clark County	Las Vegas Municipal
Average Monthly Jail Booking	5,172	2,290
Average Monthly NPR Assessments Done	575	804
Percentage of Total Bookings	11%	35%
Screened Cases Released	212	81
Percentage of NPR Assessments Screened Cases Released	37%	10%
Low Risk Released	40%	85%
Moderate Risk Released	35%	15%
Higher Risk Released	31%	0%
Not Released – Low Risk Cases	209	262
Not Released – Moderate Risk Cases	267	234
Total Overrides	12%	40%
FTAs	14%	23%
New Crimes	11%	1%
Total	25%	24%

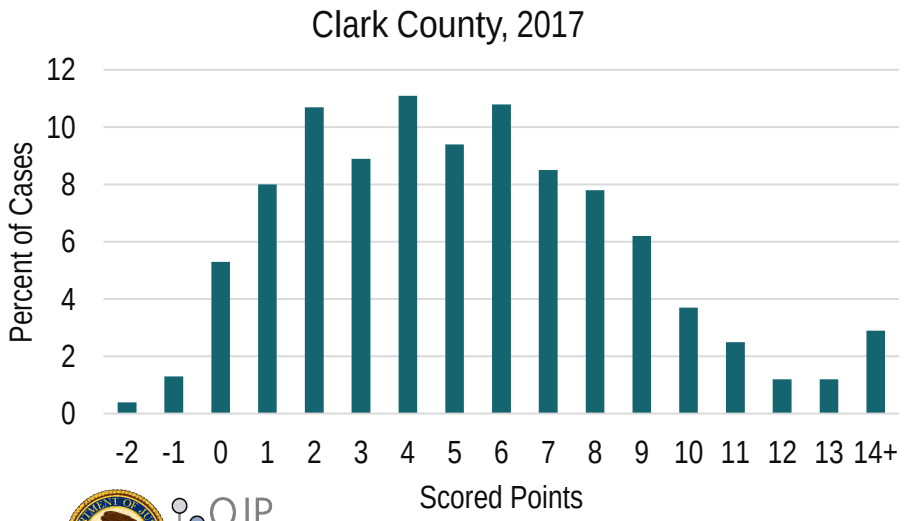
Reasons for Override

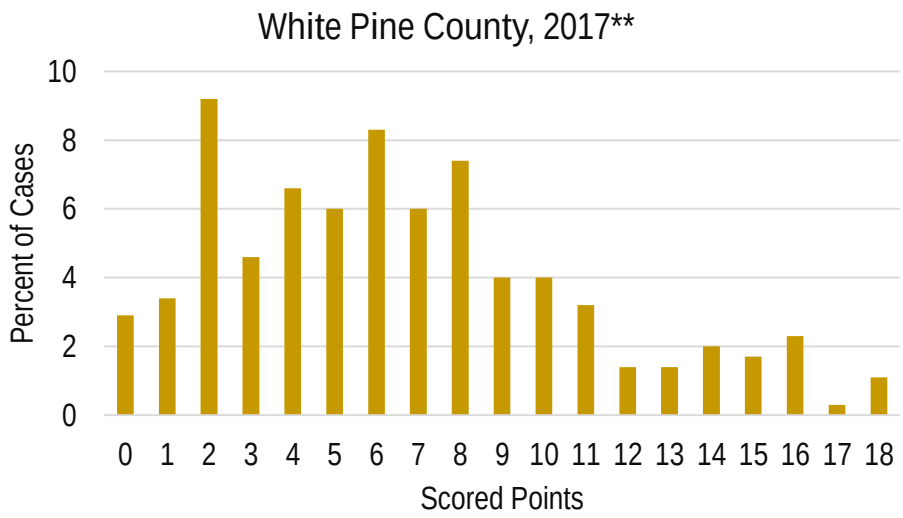
Override Reasons	Clark County	Las Vegas Municipal	Washoe County
No Override	5,936	3,088	14,793
Flight Risk	17	-	85
Gang Member	0		2
Mental Health	2	118	92
Prior Less Severe	2	490	4
Prior More Sever	108	11	195
Other	253	480	987
ICE Detainer	26	515	
Parole/Probation Violation	56		
Pending Felony	45		
Category A Crime	67		
Flight Risk		41	
Possible Danger		241	

Cases by Scored Points









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33

*Missing 57.2 percent of scored points; **Missing 24.1% of scored points

Recommended Next Steps

- Adjust risk NPR to include any BW for pretrial failure to comply with sentence requirements. This adjustment would reduce overrides.
- Develop an IT application for rural counties (60 days).
- Conduct a revalidation study based on the 2017 cases that are automated and can be quickly analyzed (complete in 60 days or by May 1, 2018).
- Ensure representatives critical of the NPR Assessment participate in the re-validation.
- Make appropriate changes in instrument based on re-validation.
- Conduct statewide review of the revised NPR Assessment and implement in all jurisdictions (summer 2018).

OJP Diagnostic Center

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Appendix: Overrides

- Override options on NPR Assessments Versions 2 & 3:
  - Mental Health
  - Disability
  - Gang Member
  - Flight Risk
  - Prior Record more severe than scored
  - Prior Record less severe than scored
  - Other, explain
- Additional overrides included by jurisdiction*:
  - Las Vegas Municipal
    -- Identify Cannot be Determined
    -- Possible Danger to Self or Others per DOA, DPS or other
    -- Mandatory "OTHER" category: DUI, BDV, Active Warrant, Active Protection Order, Violation of Restraining Order, Active or Release is In Effect, Active Parolee or Probationer, Not a Clark County Resident, Stay out of Trouble/Suspended Sentence, Active Detainer
  - Clark County
    -- Serious Felony – Category A Felony
    -- Pending Felony Cases
    -- Fugitive Detainer
    -- Parole or Probation Violations
    -- Immigration Detainer (ICE Detainer)
- Overrides are completed at the assessor's discretion, enabling risk level to move up or down one single level

*Per jurisdictions' NPR Assessment implementation manuals

TAB 4

Central Repository for Nevada Records of Criminal History

Committee to Study Evidence-Based Pretrial Release

February 26, 2018

Mindy McKay
Records Bureau Chief

DISPOSITION BACKFILL HISTORY

In October 2013:

- Total arrest without dispositions = 1,249,731 million
- Only 29 Courts reporting
- By December 2013 received 799,147 dispositions
- Began outreach to request submission of missing dispositions from all courts which resulted in more dispositions adding to the 799,147

Nevada Department of Public Safety
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CURRENT DISPO STATUS

- All 74 courts are reporting
- Eliminated backfill mostly with exception of a few stragglers
- Current on “current” dispos
- Currently 59% complete compared to 21.63% complete in 2014
  - Total arrests as of 02/16/18 = 2,134,004
  - Total arrests without dispositions as of 02/16/18 = 870,495

Nevada Department of Public Safety
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NOW AND FUTURE

- E-Dispo FBI Backfill
- SOR/NSLA boxes
- Records Conversion Clean-Up
- Criminal history record database modernization go-live
- Correlation project
- Fingerprint vault reorganization
- Continued Outreach & Education
- General daily tasks
- Criminal history record database modernization Part 2

Nevada Department of Public Safety
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HISTORY OF COMMITTEES

- NRS 179A.079 in 2005 formally created the Advisory Committee on Nevada Criminal Justice Information Sharing, however, it existed long before 2005 informally
  - Recommend and approve policies and procedures
  - Membership included DPS, Judges Assoc., DA Assoc., Law Enf. Agencies, Admin. Office of the Courts, and Dept. of Prisons
- Northern and Southern Technical Subcommittees
  - Recommend/Communicate policies and procedures
  - Recommend/Communicate system improvements
  - Membership included representatives of the criminal justice user agencies such as law enforcement, prosecuting attorneys and courts
- NCJIS Steering
  - A smaller working group consisting of members from the Northern/Southern Technical Subcommittees
  - Participation in technology projects for systems improvement

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SB277 AND SB35
2017 LEGISLATIVE SESSION

- Created the Subcommittee on Criminal Justice Information Sharing of the Advisory Commission on the Administration of Justice (ACAJ)
- Repealed NRS 179A.079 (the previous Advisory Committee)

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SB277 AND SB35 GOVERNANCE

5. The Subcommittee shall:
(a) Review and evaluate criminal justice information systems, including such systems utilized by local law enforcement agencies and state criminal justice agencies;
(b) Consider potential efficiencies and obstacles of integrating statewide criminal justice information systems;
(c) Review requests from criminal justice agencies regarding the capabilities of the Nevada Criminal Justice Information System that are submitted in the format prescribed by the Subcommittee;
(d) Review technical and operational issues related to the Nevada Criminal Justice Information System and the development of new technologies; and
(e) Evaluate, review and submit a report to the Commission with recommendations concerning such issues.

SB277 AND SB35 GOVERNANCE

1. The Chair of the Subcommittee on Criminal

Justice Information Sharing may appoint working groups to:

(a) Consider specific problems or other matters that are related to and within the scope of the functions of the Subcommittee; and

(b) Conduct in-depth reviews of the impacts of requests for changes to the capabilities of the Nevada Criminal Justice Information System.

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QUESTIONS?

Nevada Department of Public Safety
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TAB 5

NEVADA PRETRIAL RISK ASSESSMENT (NPR) NOTES

1. Does the Defendant have a pending pretrial case at booking?
   - A better question would be "Has the Defendant been arrested on new charges while out of custody on a pending (pretrial) case?
   - A second important question is "Was the defendant previously released on an own recognizance release on THIS case and subsequently failed to appear?"

2. Age at first arrest?
   - This just doesn't seem all that important in the bigger picture.

3. Prior Misdemeanor Convictions (Past 10 years)?
   - The type of misdemeanor conviction matters as it relates to the current charge(s). The NPR needs to be more specific. Prior BDV charges matter to a current BDV charge.
   - To have only one point separate "one to five" versus "six or more" can lead to absurd results if the Defendant has 25 prior convictions in the last 10 years versus the Defendant who only has 1 prior conviction.

4. Prior Felony/Gross Misdemeanor Convictions (Past 10 years)?
   - The type of conviction(s) matters as it relates to the current charge(s). The NPR needs to be more specific. If the Defendant has been arrested for PSV and has multiple priors for PSV, he/she may not be viewed as a "good risk".
   - Again, to have only one point separate "no" felony/gross misdemeanor convictions versus "one or more" felony/gross misdemeanor convictions can lead to absurd results if you are at the low end with one conviction versus the high end with more than five convictions.

5. Prior Violent Crime Convictions (Past 10 years)?
   - It is worth repeating. The type of conviction(s) matters as it relates to the current charge(s) and the danger to the community factor. The NPR needs to be more specific.

6. Prior FTAs Past 24 months?
   - Again, to have only one point separate 1 FTA versus 2 or more leads to many absurd results. The Defendant who has failed to appear 2 times is treated the same as the Defendant who has failed to appear 25 times.

7. Substance Abuse?
   - Considering the reality that the majority of the crime in LV derives from addiction, this factor will almost always come into play.
   - Also, how is "multiple" defined in "prior multiple arrests for drug possession/alcohol/drunkenness"?

8. Is a Risk Assessment scoring (other than providing criminal history and personal info, i.e. address, phone number) necessary for Category A felonies such as Murder, Sexual Assault, etc.?

OVERRIDE REASONS:

- There were originally only four factors listed for override reasons:
  1. Mental Health
  2. Disability
  3. Gang Member
  4. Flight Risk.
- Some important factors that were NOT originally listed specifically as override factors include:
  1. Current charges
  2. Pending cases other than pretrial
  3. Cases currently in warrant
  4. Danger to the community
  5. Residency of the Defendant
  6. Local ties to the community

SHOULD A RISK ASSESSMENT BE COMPLETED WHEN THERE IS ONE OR MORE OF THE FOLLOWING?

1. Parole & Probation Violation Hold
2. ICE Hold
3. Pending Sentencing and in custody on a District Court case
4. Currently serving a sentence in another case
5. Murders

PROPOSED RISK ASSESSMENT FACTORS

1. Has the Defendant been arrested on new charges while out of custody on a pending (pretrial) case?
2. Was the Defendant previously released on an own recognizance release on THIS case and subsequently failed to appear?
3. Does the Defendant have any other pending cases at booking?
4. Does the Defendant have any other cases in warrant at booking?
5. Prior Misdemeanor Convictions?
6. Are any of the prior misdemeanor convictions of the same type as the current case, e.g. BDV?
7. Prior Felony Convictions?
8. Are any of the prior felony convictions of the same type as the current case, e.g. PSV?
9. Prior Violent Convictions?
10. Prior FTAs?

11. Probation Violation Hold?
12. ICE Hold?
13. Nature of current charges, i.e. danger to the community
14. Residency and ties to the community
15. Employment
16. Is adding a "violence flag" as a subjective factor for Pretrial Services, based on the facts of the instant incident, under consideration?

TAB 6

BSL – Basic Supervision Level (see praxis)
MSL – Medium Supervision Level (see praxis)
ESL – Enhanced Supervision Level (see praxis)

- Obey all laws
- No driving unless legal (DUIs & traffic related charges)
- No drugs/alcohol
    - Random alcohol testing – by 11:00 am
        - Preliminary Breath Testing (PBT)
            - Set schedule (i.e. 5 days/week, daily, M/W/F, etc.)
            - 1/week, 2/week, 3/week, 4/week
            - 3/mo, 4/mo
        - ETG (80-hour urine alcohol test)
            - 2/mo
    - Random drug testing (presumptive)
        - Urine/Saliva testing
            - 1/week, 2/week
            - 1/mo, 2/mo
    - Lab Confirmations through Redwood Toxicology – this office will send to the lab for any denials and/or to obtain levels (MJ)
- No contact with alleged victim
- No gambling
- In-person – daily (flight risk), weekly, every other week, set schedule
- Telephone – daily, weekly, every other week, set schedule
- RX meds – regular proof of mental health and pain meds – purposes of drug testing [if valid RX, no violation]
- Inpatient treatment – ordered by the Judge or on defendant's own accord
- Outpatient treatment – saa – regular proof provided by def or agency
- Comply with outside agency (i.e. unrelated court case, CPS, Specialty Courts if multiple active cases, P&P for PSI, etc.)
- Employment proof – this comes into play if they are on random testing – if the def can't make it by 11:00 am, and they are at work and can show regular proof, he/she can test in the evening at the jail - proof can be in-person, faxed or emailed
- Counseling/AA/NA/GA – this may be ordered by the judge, but usually the defendant attends at the request of his attorney or on his/her own accord – we provide a sign-in sheet and keep track each week as well – on some occasions, if they have a positive drug/alcohol test, we will encourage them to go and keep track if they continue – proof can be in-person, faxed or emailed
- Electronic monitoring (through outside agency [Intercept] – def is responsible for costs) – <u>only recommend for certain/higher-risk defendants</u>
    - SCRAM – alcohol monitoring (ankle bracelet)
    - Handheld – alcohol monitoring (random testing throughout the day, every day)
    - House Arrest – confined to a specific location with monitor – if defendant leaves area, alert occurs – also used if judge imposes a curfew
    - GPS – limits defendant's movements and tracks whereabouts – can identify areas defendant is not allowed to go near – alert will occur if non-compliant

NPRA Release & Supervision Praxis

RISK	Less Serious Misdemeanor	Serious Misdemeanor	Most Serious Misdemeanor	Other Felony & Gross Misd.	Serious Felony & Gross Misd.
Low 0-4	Release Reminder Only	Release Reminder Only	Release With Supervision	Release With Supervision	Requires Judicial Review
Mod 5-8	Release Reminder Only	Release With Supervision	Requires Judicial Review	Release With Supervision	Requires Judicial Review
Higher 9+	Release Reminder Only	Requires Judicial Review	Requires Judicial Review	Requires Judicial Review	Requires Judicial Review

- Less Serious Misdemeanor – all not included in Serious or Most Serious. The NPRA is not completed for these charges.
- Serious Misdemeanor – violence (assault, battery), destruction of property (graffiti), DUI 1st, poss. of firearm under the influence of drugs/alcohol
- Most Serious Misdemeanor - domestic violence, child related, TPO/EPO, stalking, harassment, DUI 2nd
- Other Felony/Gross Misdemeanor– all not included on the *Serious Felony List*
- Serious Felony/Gross Misdemeanor – see *Serious Felony List*

Pretrial Supervision Description	Basic Supervision	Medium Supervision	Enhanced Supervision
Orientation/Intake w/in 24 hours of release by phone	✓		
Orientation/Intake w/in 24 hours of release in person		✓	✓
Court reminder	✓	✓	✓
Notification to court of new arrest	✓	✓	✓
Telephone check in after court appearance	✓		
Physical check in after court appearance		✓	✓
Random drug/alcohol testing (if applicable to case)		✓	✓
Electronic alcohol monitoring/daily PBT's (if applicable)			✓
Treatment program (if ordered by court) – after entry of plea		✓	✓
Telephone contact w/Pretrial Office minimum 2 x month		✓	
Telephone contact w/Pretrial Office minimum 1x week			✓
Physical check-in to Pretrial Office minimum 1 x month		✓	
Physical check-in to Pretrial Office minimum 1 x week			✓

* First traffic bench warrants follow the same protocol as the *Less Serious Misdemeanors*, therefore, a NPRA is not completed and Pretrial Services has authority to release.

Release conditions Las Vegas Justice Court

General: Stay out of trouble and make court appearance. Keep current address and phone with PreTrial Services.

Intensive Supervision: Client reports to kiosk weekly or as ordered, receives text messages regarding report days and hearings. System used is AUTOMON.

Electronic Monitoring (EMP) and House Arrest provided by Clark County Detention Center:

Low Level EMP*	Medium Level EMP*	House Arrest
1. No Drug or Alcohol Use 2. Random Drug Testing 3. No Curfew **(unless a Juvenile)** 4. No Movement Restrictions **Unless ordered by the Court** 5. No movement outside Clark County area 6. Monthly office check-ins 7. **Residence NOT required**	1. No Drugs or Alcohol Use 2. Drug Testing 3. Curfew as Stipulated 4. Movement Restrictions (Per Court Order). Examples: a. No Victim Contact (provide address) b. No strip Corridor c. No Casinos 5. Normal Daily Activities 6. No Movement Outside Clark County area 7. **Residence REQUIRED** 8. Random Home Visits	1. Application verification 2. All House Arrest rules Strictly enforced
***Violation of EMP Rules will Be emailed to the judge and Clerk with expected response To be within 24 business hours**	***Violators of EMP Rules will be returned to custody.**	

PRETRIAL SUPERVISION PROGRAM

Type of Risk	Misdemeanor	Domestic Violence Related	DUI Related
LOW	BASIC	Basic	Basic
MODERATE	BASIC	Enhanced	Enhanced
HIGHER	Enhanced	Intensive	Intensive

SUPERVISION DEFINED

Pretrial Supervision Description	Basic (Low)	Enhanced (Moderate)	Intensive (Higher)
NPR Assessment	X	X	X
Criminal History, Background	X	X	X
Court Reminder a week before court date	X	X	X
Maintain address, phone and employment status with PreTrial Services	X	X	X
Notification of New Arrest		X	X
Entry into SCOPE Pretrial Supervision with conditions		X	X
Drug Testing			X
House Arrest – Electronic Monitoring Device			X

White Pine Justice Court – Judge Bishop

My standard for all releases are:

1. Obey all laws
2. Appear for all hearings free from the influence of alcohol or controlled substances
3. Contact counsel once a week and keep counsel advised of current mailing address and phone number

On other cases I have used these conditions on a fairly regular basis:

1. No alcohol or controlled substances absent a lawfully issued RX.
2. Curfew between 7 pm and 7 am
3. Testing for alcohol or drugs at direction of law enforcement on PC or at direction of court (if warranted by case facts)
4. Stay away from victims and/or codefendants
5. Reside at a particular location

On rare cases I have ordered random testing. Maybe 2-3 times since starting, because it costs money. I have considered ankle monitoring, but the cost is high ($200+ per month) and logistics is complicated (i.e. It can take 2-3 days to get the monitor).

Just today I did my first firearm surrender condition.

TAB 7

U.S. Department of Justice
National Institute of Corrections

NATIONAL INSTITUTE OF CORRECTIONS

Measuring What Matters

Outcome and Performance Measures for the Pretrial Services Field

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NATIONAL INSTITUTE OF CORRECTIONS

Measuring What Matters

Outcome and Performance Measures for the Pretrial Services Field

The National Institute of Corrections
Pretrial Executives Network

NIC Accession Number 025172

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Acknowledgments

The National Institute of Corrections' (NIC) Pretrial Executive Network includes directors of established pretrial service programs nationwide. Its mission is to promote pretrial services programming as an integral part of state and local criminal justice systems. Its goals are to make pretrial programming relevant in national criminal justice funding, training, and technical assistance; encourage expanded research in the pretrial field; and identify best and promising practices in the pretrial release and diversion fields.

The Network would like to recognize and thank the following individuals for their contribution to this monograph:

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Foreword

This monograph presents recommended outcome and performance measures and mission-critical data for pretrial service programs. It is hoped that these suggested measures will enable pretrial service agencies to gauge more accurately their programs' effectiveness in meeting agency and justice system goals. The contributors to this monograph believe the recommended elements are definable and measurable for most pretrial service programs and are consistent with established national pretrial release standards and the mission and goals of individual pretrial programs. The monograph defines each measure and critical data element and identifies the data needed to track them. It also includes recommendations for programs to develop ambitious but reasonable target measures. Finally, the monograph's appendix lists examples of outcome and performance measures from three nationally representative pretrial service programs.

SUGGESTED OUTCOME MEASURES AND DEFINITIONS

Appearance Rate: The percentage of supervised defendants who make all scheduled court appearances.

Safety Rate: The percentage of supervised defendants who are not charged with a new offense during the pretrial stage.

Concurrence Rate: The ratio of defendants whose supervision level or detention status corresponds with their assessed risk of pretrial misconduct.

Success Rate: The percentage of released defendants who (1) are not revoked for technical violations of the conditions of their release, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision.

Pretrial Detainee Length of Stay: The average length of stay in jail for pretrial detainees who are eligible by statute for pretrial release.

SUGGESTED PERFORMANCE MEASURES AND DEFINITIONS

Universal Screening: The percentage of defendants eligible for release by statute or local court rule that the program assesses for release eligibility.

Recommendation Rate: The percentage of time the program follows its risk assessment criteria when recommending release or detention.

Response to Defendant Conduct: The frequency of policy-approved responses to compliance and noncompliance with court-ordered release conditions.

Pretrial Intervention Rate: The pretrial agency's effectiveness at resolving outstanding bench warrants, arrest warrants, and capiases.

SUGGESTED MISSION CRITICAL DATA

Number of Defendants Released by Release Type and Condition: The number of release types ordered during a specified time frame.

Caseload Ratio: The number of supervised defendants divided by the number of case managers.

Time From Nonfinancial Release Order to Start of Pretrial Supervision: Time between a court's order of release and the pretrial agency's assumption of supervision.

Time on Pretrial Supervision: Time between the pretrial agency's assumption of supervision and the end of program supervision.

Pretrial Detention Rate: Proportion of pretrial defendants who are detained throughout pretrial case processing.

Contents

Introduction

Performance Measurement: *Assessing progress toward achieving pre-determined goals, including information on the efficiency with which resources are transformed into goods and services (outputs), the quality of those outputs and outcomes, and the effectiveness of operations in terms of their specific contributions to program objectives.*

—National Performance Review, Serving the American Public: Best Practices in Performance Measurement (Washington, D.C.: Executive Office of the President, 1997).

The National Institute of Corrections' (NIC) Pretrial Executive Network includes directors of established pretrial service programs nationwide. The Network's mission is to promote pretrial services programming as an integral part of state and local criminal justice systems. Its goals are to make pretrial programming more prominent in national criminal justice funding, training, and technical assistance; encourage expanded research in the pretrial field; and identify best and promising practices in the pretrial release and diversion fields.

In 2010, the Network identified the need for consistent and meaningful data to track individual pretrial services program performance. Current information on pretrial programming is limited and usually does not describe individual program outcomes.[1] National data specific to pretrial program outcomes and performance would help individual programs measure their effectiveness in achieving their goals and objectives and in meeting the expectations of their justice systems. Consistent with public- and private-sector best practices,[2] pretrial services program outcome measures, performance measures, and mission-critical data would tie into the individual agency's mission, local justice system needs, state and local bail laws, and national pretrial release standards.

In October 2010, the Network commissioned a working group to develop suggested pretrial release outcome and performance measures and mission-critical data. This included identifying performance indicators based on the above-mentioned factors and recommending strategies for programs to develop ambitious but attainable measure targets. The working group relied on the Network's accepted definitions of outcome and performance measures and mission-critical data. They are presented here as follows:

Outcome measure: An indicator of an agency's effectiveness in achieving a stated mission or intended purpose.

Performance measure: A quantitative or qualitative characterization of performance.

Mission-critical data: Supporting data in areas strategically linked to outcome and performance measures. These data track progress in areas and on issues that supplement specific measures.

Scope of Outcome and Performance Measures

A central issue for the Network is whether certain recommended measures—such as appearance and safety rates—are indicators more of overall justice system performance than of the performance of individual programs. Appearance rates depend as much on the number of released defendants, their degrees of risk, and the number of court appearances (potential failure points) set as on the pretrial program's risk assessment and supervision protocols. Moreover, a pretrial services program's recommendation for release

or detention is not binding. In making pretrial release or detention decisions, courts consider other factors (such as strength of the evidence) that are not included in most risk assessment models. None of these external factors is fully under a pretrial program's control. However, the Network believes the measures identified are critical measures of pretrial program success and should be considered as individual agency indicators. Programs should use target measures to recognize and offset these external factors.

Supporting Business Practices

Outcome and performance measures require an organizational structure that supports critical function areas, includes adequate resources for risk assessment and risk management, and fosters strong collaborative relationships within the local criminal justice system and the broader community. For the suggested measures, the Network recommends the key organizational elements for pretrial services programs identified by national standards promulgated by the American Bar Association (ABA)[3] and the National Association of Pretrial Services Agencies (NAPSA).[4] These include:

- Policies and procedures that support the presumption of release under the least restrictive conditions needed to address appearance and public safety concerns.
- Interviews of all detainees eligible for release consideration that are structured to obtain the information needed to determine risk of nonappearance and rearrest and to exercise effective supervision.
- Risk assessment schemes that are based on locally researched content and applied equally and fairly.
- Recommendations for supervision conditions that match the defendant's individual risk level and specific risks of pretrial misconduct.
- Monitoring of defendants' compliance with release conditions and court appearance requirements.
- Graduated responses to defendants' compliance and noncompliance.
- Tracking of new arrests occurring during supervision.
- Court notification of program condition violations and new arrests.
- Timely notice to court of infractions and responses.
- Monitoring of the pretrial detainee population and revisiting release recommendations if defendants remain detained or if circumstances change.

Outcome Measures

Appearance Rate

Appearance rate measures the percentage of supervised defendants who make all scheduled court appearances. This is the most basic outcome measure for pretrial service programs. Nearly all such programs have as part of their mission the goal of maximizing appearance rates among released and supervised defendants. Program assessment and supervision strategies seek to minimize each defendant's risk of nonappearance. Further, state and local bail statutes and provisions encourage court appearance to promote the effective administration of justice and to bolster public confidence in the judicial system. Finally, national standards on pretrial release identify minimizing failures to appear as a central function for pretrial programs.

The recommended data for this outcome measure are cases with a verified pretrial release or placement to the pretrial program and the subset of this population that have no bench warrants or capiases issued for missed scheduled court appearances. Depending on its information management system, the program may also track the appearance rate of various defendant populations—such as those charged with violent crimes or those released conditionally, financially, or on personal recognizance—although the primary group targeted should be defendants released to the agency's supervision.

Pretrial programs should count all cases with issued bench warrants and capiases under this outcome measure, including instances when defendants subsequently return to court voluntarily and are not revoked. The recommended *pretrial intervention* performance measure allows programs to gauge their efforts in resolving warrants. As a supporting business practice, pretrial services programs may also calculate and keep an adjusted appearance rate that considers defendant voluntary returns and warrant surrenders that the program brings about.

Safety Rate

Safety rate tracks the percentage of supervised defendants who are not charged with a new offense during the pretrial stage. A *new offense* is defined here as one with the following characteristics:

- The offense date occurs during the defendant's period of pretrial release.[5]
- It includes a prosecutorial decision to charge.
- It carries the potential of incarceration or community supervision upon conviction.

At least 36 states and the federal judicial system factor a defendant's potential threat to the public or to specific individuals into the pretrial release or detention decision. National pretrial release standards also identify public safety as a legitimate pretrial concern for local justice systems.

The recommended data for this outcome measure are the number of defendants with a verified pretrial release or placement to the pretrial program and the subset of this population with no rearrests on a new offense. Depending on the program's information capabilities, the outcome measure should include recorded local and national arrests. As a supporting business practice, pretrial programs also may track separate safety rates by charge type (for example, misdemeanors, felonies, or local ordinance offenses), severity (violent crimes, domestic violence offenses, or property crimes), or by various defendant populations.

Concurrence Rate

Concurrence rate is the ratio of defendants whose supervision level or detention status corresponds to their assessed risk of pretrial misconduct. Conditions of supervision recommended and imposed do not have to match exactly; however, the overall supervision level should be comparable. For example, a recommendation for release on personal recognizance with no conditions and a subsequent conditional supervision release with a requirement to report to the pretrial services program weekly would not be defined as concurrent. This measure counts only defendants eligible by statute for pretrial release[6] and is presented in the following matrix (exhibit 1):

Exhibit 1. Matrix of Assessment Versus Release Level

ASSESSED LEVEL	RELEASE LEVEL			
	Low	Medium	High	Detention
Low	X			
Medium		X		
High			X	
No Release				X

Concurrence rate is an excellent measure of success in helping courts apply supervision levels that match the defendant's identified risk level. This is a recognized best practice in the criminal justice field. (It is assumed that the individual pretrial program does not overtly attempt to fit its release/detention recommendations to a perceived court outcome.) The measure also complements appearance and safety rates by allowing pretrial programs to track subsequent failure by defendants originally recommended for detention.

The recommended data for this outcome measure are the number of release and detention recommendations and subsequent release and detention outcomes.

Success Rate

Success rate measures the percentage of released defendants who are (1) not revoked for technical violations due to condition violations, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision. The measure excludes defendants who are detained following a guilty verdict and those revoked due to non-pretrial-related holds.

The recommended data for this outcome measure are the total number of defendants released to the program and the subset of this population that experiences no condition violations, failures to appear, or rearrests. Depending on the pretrial program's information system, revocations may show up as subsequent financial release or detention orders.

Pretrial Detainee Length of Stay

Detainee length of stay represents the average length of jail stay for pretrial detainees who are eligible by statute for pretrial release. This is a significant outcome measure for the estimated 27 percent of pretrial programs that are located within corrections departments[7] and that have missions to help control jail populations, and it is a performance measure for other pretrial programs.

The recommended data for this outcome measure are admission and release dates for all pretrial-related jail detentions. *Release* as defined here is the defendant's full discharge from jail custody.

Performance Measures

Universal Screening

Universal screening reflects the percentage of defendants eligible for release by statute or local court rule that a program assesses for release. *Screening* includes any combination of pretrial interview, application of a risk assessment instrument, or measurement against other established criteria for release recommendation or program placement.

This measure conforms to national standards that encourage full screening of release-eligible defendants[8] and state bail statutes that mandate release eligibility for certain defendant groups. When measuring screening, jurisdictions should go beyond initial arrest and court appearance and consider all detainees who become eligible for pretrial release consideration at any point before trial. (These screens may occur at initial arrest or court hearings and be submitted to the court once the defendant becomes eligible for release.)

The recommended data for this performance measure are the total number of release-eligible defendants and the subset of this population that the pretrial program screened.

Recommendation Rate

Recommendation rate reflects how frequently the pretrial program follows its risk assessment criteria when recommending release or detention. There are two potential data sources for this performance measure:

1) The pretrial program's total number of recommendations during a specific time frame and the number of these recommendations that conform to the release or detention level identified by the risk assessment.

2) The percentage of overrides to the risk assessment scheme.

Response to Defendant Conduct

Response to defendant conduct measures how often case managers respond appropriately (by recognized policy and procedure) to compliance and noncompliance with court-ordered release conditions. This measure conforms to national standards for pretrial supervision[9] and evidence-based practices in criminal justice for swift, certain, and meaningful responses to defendant and offender conduct.

Response to defendant conduct requires pretrial programs to have in place clear definitions of compliance and noncompliance with conditions of supervision and procedures outlining appropriate case manager responses. The recommended data for this measure are the number of identified technical violations and the percentage of these violations with a noted appropriate staff response. This includes administrative responses by staff and recommendations for judicial action.

Pretrial Intervention Rate

The *pretrial intervention rate* measures the pretrial program's effectiveness at resolving outstanding bench warrants, arrest warrants, and capiases. The measure tracks the percentage of:

- Defendants with outstanding warrants who self-surrender to the pretrial program, court, or law enforcement after being advised to do so by the pretrial program.
- Arrests brought about by pretrial program staff of supervised defendants with outstanding warrants.

Mission-Critical Data

Number of Defendants Released by Release Type and Condition

The *number of defendants released by release type and condition* tracks the number of defendants released by court-ordered release type, for example, personal recognizance, conditional supervision, or unsecured bond. For releases to the pretrial program, the data also track the frequency of individual release conditions.

Caseload Ratio

The *caseload ratio* is the number of supervised defendants divided by the number of case managers. The data include the pretrial program's overall caseload rates and rates for special populations such as defendants in high-risk supervision units, under specialized calendars, or under high-resource conditions such as electronic monitoring and global positioning surveillance.

Time From Nonfinancial Release Order to Start of Pretrial Supervision

Time from nonfinancial release order to start of pretrial supervision tracks the time between a court's order of release and the pretrial program's assumption of supervision. Data collected include the jail release date for cases involving initial detention or the actual date of the judicial order for defendants already in the community, and the first contact date with the pretrial program following release or the new judicial order.

The issuance of the judicial order is the most accurate indicator of the official start of pretrial agency supervision. However, evidence shows that too few pretrial programs receive timely notification of orders from the court to make this a practical indicator of when the agency first exercises supervision authority over the defendant. Therefore, the Network recommends the first contact date with the pretrial agency as a more realistic data source.

Time on Pretrial Supervision

The *time on pretrial supervision* is measured by the length of time between the pretrial program's assumption of supervision authority and the end of program supervision. Supervision begins with the defendant's first contact with the pretrial program and terminates following case disposition or the issuing of new release or detention requirements.

Pretrial Detention Rate

The *pretrial detention rate* is the proportion of pretrial defendants who are detained throughout pretrial case processing.

Setting Targets

Performance goal: *A target level of an activity expressed as a tangible measurable objective, against which actual achievement can be compared.*

—National Performance Review, *Serving the American Public: Best Practices in Performance Measurement* (Washington, D.C.: Executive Office of the President, 1997).

A *performance target* is a numeric goal for an outcome or performance measure; for example, an appearance rate of 90 percent for all released defendants. It is a specific gauge of performance achieved against performance expected. Well-defined, ambitious, and attainable performance targets can help organizations deliver expected services and outcomes and identify needed programmatic and system strategic changes. Conversely, static or unreasonable targets can encourage lower expectations, thereby minimizing the program's influence as a system partner, or burden organizations with objectives that are inconsistent with its mission and resources.

Adopting the SMART Method

Given variances nationwide in defendant populations, court operations, and justice system practices, the Network believes recommended universal targets for each stated measure is impractical. Instead, the Network recommends that individual programs adopt the SMART (specific, measurable, achievable, realistic, and time-bound) method of setting effective targets.

SPECIFIC

Specific targets are clear and unambiguous. They describe exactly what is expected, when, and how much. For example, a specific target for universal screening would be: "Interview 95 percent of defendants eligible by statute for pretrial release." Because the targets are specific, the pretrial program can easily measure progress toward meeting them.

MEASURABLE

An effective target answers the questions "how much" or "how many." Each target must be a set number or percentage that can be *measured.* Further, each target must be based on existing and retrievable data. Programs must assess their information management capacity to determine a target's feasibility.

ACHIEVABLE

Targets must be within the capacity of the organization to *achieve* while challenging the organization to improve its performance. They should be neither out of reach nor below an acceptable standard. Targets set too high or too low become meaningless and eventually worthless as indicators. The organization's most recent past performance (approximately the past 2 years) usually is a good indicator of what is feasible—at least as a beginning target.

REALISTIC

Realistic targets consider an organization's resources and the areas it actually can influence.

TIME BOUND

Effective targets have *fixed durations*—for example, a calendar or fiscal year—that allow time to achieve or calculate the outcome or performance measure.

Other Recommendations for Targets

- When establishing initial targets, set a minimum target and a stretch target. The minimum target should be one the program believes is the most manageable, whereas the stretch target would serve as the rate the program would strive to accomplish. Programs also can set a minimum target for the first year or two of performance measurement and a stretch target for future years.
- Consider trends to establish a target baseline. If past data exist for performance on a particular measurement, examine those data for trends that can serve as a baseline for setting targets for future performance.
- Use "SWOT" analysis to gauge the program's internal *strengths* and *weaknesses*, as well as its external *opportunities* and *threats*. Consider target rates that can help build on strengths and leverage opportunities as well as minimize weaknesses and threats.
- Get feedback from stakeholders; their expectations can yield insights in setting appropriate targets.
- If available, consider the performance targets of comparable pretrial programs. The appendix to this monograph includes sample outcome and performance measures.
- Consider current or planned internal or external initiatives that may affect established or potential targets.

Notes

1. For example, see T. Cohen and T. Kyckelhahn, *State Court Processing Statistics Data Limitations* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 2010).

2. National Performance Review, *Serving the American Public: Best Practices in Performance Measurement* (Washington, D.C.: Executive Office of the President, 1997); National State Auditors Association, *Best Practices in Performance Measurement: Developing Performance Measures* (Lexington, KY: National State Auditors Association, 2004); Center for Performance Management, *Performance Measurement in Practice* (Washington, D.C.: International City/County Management Association, 2007): National Center for Public Performance, *A Brief Guide for Performance Measurement in Local Government* (Newark, NJ: Rutgers University, 2001).

3. American Bar Association, *Criminal Justice Standards on Pretrial Release: Third Edition* (Washington, D.C.: American Bar Association, 2002).

4. National Association of Pretrial Services Agencies, *Standards on Pretrial Release: Third Edition* (Washington, D.C.: National Association of Pretrial Services Agencies, 2004).

5. This excludes arrest warrants executed during the pretrial period for offenses committed before the defendant's case filing.

6. This excludes defendants detained on statutory holds, probation or parole warrants, or holds and detainers from other jurisdictions.

7. J. Clark and D.A. Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Assistance, 2003).

8. NAPSA Standard X-3; ABA Standard 10-4.2 (A)

9. NAPSA Standard 4.3; ABA Standard 10-1.10 (f)

Appendix A: Examples of Pretrial Release Program Measures

Pretrial Services Agency for the District of Columbia

OUTCOME MEASURES

- Rearrest rates: overall and for violent and drug crimes, for drug users and nonusers.
- Failure to appear (FTA) rates overall and by drug users and nonusers.
- Percentage of defendants remaining on release at the conclusion of their pretrial status without a pending request for removal or revocation due to noncompliance.

PERFORMANCE MEASURES

Risk Assessment

- Percentage of defendants who are assessed for risk of failure to appear and rearrest.
- Percentage of defendants for whom the Pretrial Services Agency (PSA) identifies eligibility for appropriate appearance and safety-based detention hearings.

Supervision

- Percentage of defendants who are in compliance with release conditions at the end of supervision.
- Percentage of defendants whose noncompliance is addressed by PSA either through the use of an administrative sanction or through recommendation for judicial action.

Treatment

- Percentage of referred defendants who are assessed for substance abuse treatment.
- Percentage of eligible assessed defendants placed in substance abuse treatment programs.
- Percentage of defendants who have a reduction in drug usage following placement in a sanctions-based treatment program.
- Percentage of defendants connected to educational or employment services following assessment.
- Percentage of referred defendants who are assessed or screened for mental health treatment.
- Percentage of service-eligible assessed defendants connected to mental health services.

Partnerships

- Number of agreements established and maintained with organizations and/or programs to provide education, employment, or treatment-related services or through which defendants can fulfill community service requirements.

Note: Outcome and performance measure targets are being revised for fiscal years 2011–13.

Multnomah County (Portland, OR) Pretrial Services

OUTCOME MEASURES

- Percentage of interviewed defendants released on their own recognizance who return to court.

PERFORMANCE MEASURES

- Number of days from court referral to the Pretrial Services Program (PSP) to PSP's decision to accept supervision *(Target = 7 Days)*.
- Rate of negative case closures—new arrests or FTA warrants.
- PSP rate of acceptance or denial of defendant supervision.

Kentucky Pretrial Services Department

OUTCOME MEASURES

- Appearance rate *(Target=90%)*.
- Public safety rate *(Target=90%)*.
- Supervision compliance rate *(Target=85%)*.

PERFORMANCE MEASURES

- Investigation rate *(Target=85%)*.
- Verification rate *(Target=85%)*.
- Release rate by risk level:
  - Low *(Target=85%)*.
  - Moderate *(Target=75%)*.
  - High *(Target=50%)*.

- Affidavit of indigence completion rate* *(Target=95%).*
- 24-hour reviews *(Target=100%).*

** The Pretrial Department is mandated by statute to complete affidavits on all defendants that request a public defender.*

MISSION CRITICAL DATA

- Number of pretrial interviews.
- Pretrial interview rate.
- Pretrial release rate.
- Number of defendants who are placed on conditional release.
- Number of defendants who report to the department.
- Number of defendants who are drug tested.
- Risk levels of supervised defendants.
- Defendant-to-case manager ratio.
- Savings to individual counties for department services.
- Number of defendants who receive pretrial diversion.
- Number of diversion community service hours completed.
- Amount of restitution paid to victims through diversion placements.

Appendix B: National Institute of Corrections Pretrial Executive Network

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TAB 8

NJLJ Bail Education Follow up Items

Chief Judge Kevin Higgins, Sparks Justice Court

- ☐ Legislative Items
    - Preventative Detention Statute
    - Unsecured Personal Recognizance Bonds
- ☐ Bail/PC/PD Review Flowchart
- ☐ Collection of cell numbers and/or email addresses for automated notification
    - Discussion with law enforcement to collect information
- ☐ Early provision of all pretrial documents to public defender, including NPRA, booking sheets and probable cause statements
- ☐ Early detention hearings with both DA and PD
- ☐ Pretrial resources for rural courts
- ☐ Review and/or adopt Nevada version ABA Pretrial guidelines
- ☐ Ongoing judicial training
    - Create list serve or website with latest cases and pretrial research
    - PJI University
    - Fundamental legal principles
        - Presumption of Innocence
        - Right to Bail
        - Release Must be the Norm
        - Due Process
        - Equal Protection
        - Excessive Bail and the Concept of Least Restrictive Conditions
        - Bail May Not be Used for Punishment
        - The Bail Process Must Be Individualized
        - The Right to Counsel
        - The Privilege Against Compulsory Self-Incrimination
        - Probable Cause
    - Risk Management
- ☐ Funding and adoption of statewide pretrial case management system
- ☐ Judges take responsibility for granting bail and setting any conditions: not just defaulting to monetary bail.
- ☐ Development of a common vocabulary and terms
- ☐ Judicial Leadership

February 14, 2018 – NJLJ Pretrial Day

I. Nevada Bail Statutes (Judge Simons)
- Overview of NRS 178.484 through 178.548 in Jeopardy game
- Discussion was limited

II. Pretrial Justice: The National Landscape (Megan Guevara)
- Brief overview of PJI (see materials)
- Discussion
  - NV "prime" for advocacy groups to seek 14th amendment litigation
  - Discussion regarding "ability to pay" hearing – there's a difference between determining indigence for defense purposes versus an inability to pay bail
  - Presenter encouraged judges to be aware of the "narrative" they are telling themselves about the people appearing before them; discussion was held regarding personal fear/bias influencing bail and/or conditions
  - Justice Hardesty – there needs to be a way to accurately determine how many people are being jailed statewide simply because they cannot afford bail

III. The Design and Validation of the NPRA
- Overview of the NPRA design and process (see materials)
- Discussion
  - Attendees asked for additional clarification on how the NPRA was validated and how the tool is specific to Nevada.
  - Discussion was held regarding the arrest versus conviction issue and reliability of each as a predicting factor. Dr. Austin reminded attendees that criminal history is only one of many factors the tool looks at.
  - Concern was expressed regarding the impact incorrect information and sealed records could have on the tool's results
  - Attendees asked for clarification regarding whether a defendant's NPRA score is public record and releasable upon request.
  - Discussion was held regarding the violent nature of the crime and whether it should play a stronger role in the final score; Dr. Austin commented that this wasn't a strong predictor during the validation process but the tools will change and evolve over time.
  - Concern was expressed regarding a lack of infrastructure and resources to make this "work" – in both urban and rural jurisdictions
  - Concern was expressed regarding the use of the overrides and whether those completing the tool are properly trained to complete the tool.
  - Discussion was held regarding the cell phone factor; attendees were worried that low income defendants may not have a cell phone and could be unfairly scored
  - Concern was expressed regarding whether the tool "singles out" minorities

THE HISTORY AND PURPOSE OF BAIL

A Discussion With:

Chief Judge Kevin Higgins, Justice of the Peace

Sparks Justice Court

Nevada Judges of Limited Jurisdiction

No. Las Vegas, Nevada

February 14, 2018

The Time's They Are A 'Changing

THE HISTORY AND PURPOSE OF BAIL

- Why we are spending a full day on bail

Some states have constitutional bail systems;
Some states achieve constitutional bail systems; and,
Some states have constitutional bail systems thrust upon them by a federal judge.

-William Shakespeare

PART OF THE SOLUTION

Classes

- History and Purpose of Bail
  - Judge Kevin Higgins, Sparks Justice Court
- Nevada Bail Statutes
  - Judge Mason Simons, Elko Justice and Municipal Courts

PART OF THE SOLTION (Cont.)

Classes

- Pretrial Justice: The National Landscape
  - Ms. Meghan Guevara, Pretrial Justice Institute

- The Design and Validation of the NPRA
  - Dr. James Austin, FJA Institute
  - Ms. Angela Jackson-Castain

PART OF THE SOLUTION (Cont.)

Classes

- Pretrial Release Breakout Discussion – Urban
  - Judge Kevin Higgins, Sparks Justice Court
  - Ms. Heather Condon, Second Judicial District Court, Pretrial Services
- Pretrial Release Breakout Discussion – Rural
  - Judge Steven Bishop, Ely Township Justice Court
  - Ms. Jamie Gradick, Administrative Office of the Courts

RESEARCH SOURCES

- Annotated Constitution of the United States
  - Published by the Library of Congress
  - Every 10 years with pocket parts
  - Now continuously updated
  - Online PDF https://www.congress.gov/constitution-annotated/
  - Apple phone app

112th Congress
2nd Session

SENATE

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No. 112–9

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RESOURCES (Cont.)

- The Georgetown Law Journal Annual Review of Criminal Procedure
- The Magna Carta
- Eighth Amendment to the United States Constitution
- Nevada Constitutional Debates and Proceedings, 1864
- Nevada Constitution

RESOURCES (Cont.)

Three Leading United States Supreme Court Cases

- Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1 (1951)
- Carlson v. Landon, 342 U.S. 524, 74 S.Ct. 525 (1952)
- U.S. v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987)

And one recent California Court of Appeals case:

- In Re Humphrey, ___ Cal.Rptr.3d ___, 2018 WL 55012 (Cal Ct. App.) (2018)

RESOURCES (Cont.)

Monographs and Other Publications

- ABA Standards for Criminal Justice, Pretrial Release, Third Edition, 2007
- The History of Bail and Pretrail Release, Schnacke, et al., Pretrial Justice Institute, 2010
- The Hidden Costs of Pretrial Detention, Lowenkamp, et al., The Arnold Foundation, 2013
- Money as a Criminal Justice Stakeholder: *The Judge's Decision to Release or Detain a Defendant Pretrial,* Timothy R. Schnacke, National Institute of Corrections, U.S. Dept. of Justice, 2014

Resources (Cont.)

Monographs and Other Publications

- Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform, Timothy R. Schnacke, National Institute of Corrections, U.S. Dept. of Justice, 2014
- Moving Beyond Money: A Primer on Bail Reform, Criminal Justice Policy Program, Harvard Law School, 2016
- Trends in State Courts: Fines, Fees and Bail Practices: Challenges and Opportunities, D. Smith et al., National Center for State Courts, 2017
- Various newspaper articles

THE HISTORY OF BAIL

- Idea can be traced back to ancient Rome
- Our understanding derived from 1000 year-old English Roots
- Anglo-Saxon legal process designed to avoid blood feuds through ‘bots,’ a system of payments designed to compensate for grievance

THE HISTORY OF BAIL (Cont.)

- Crimes were private affairs and victims sought remuneration.
- But what if the accused might flee or be unable to pay?
- System created where defendant required to find a surety who would pledge to guarantee both the appearance and payment of the bot. The amount of the pledge, called “bail,” was identical to the worth of the penalty. But the surety wasn’t paid anything and was prohibited from being indemnified.
- Some legal scholars have called this the last entirely rational application of bail.

THE HISTORY OF BAIL (Cont.)

Norman Conquest 1066 and Beyond

- Criminal process moved from private agreements to affairs of the state.
- Capital and corporal punishment replaced fines for all but the least serious offenses.
- Summary mutilations and executions gradually phased out, but corporal punishment increased giving offenders reason to flee.
- Longer and longer lists of non-bailable offenses.

THE HISTORY OF BAIL (Cont.)

- Following widespread corruption in the bail bonding process, the First Statute of Westminster (1275) passed and codified 51 existing laws, many originating in the Magna Carta. Change from traditional Anglo-Saxon custom by establishing three criteria for bailability:
  1. Nature of the offense [some categories not bailable]
  2. Probability of conviction
  3. Criminal history of the accused
- Continued abuses led to the Habeas Corpus Act of 1679 and later the English Bill of Rights of 1689 which stated that “excessive bail ought not be required.”

BAIL IN THE UNITED STATES

- Generally, the colonies applied English law verbatim, but differences in crime rates and beliefs led to more liberal criminal penalties and changes in bail.
- In 1682, Pennsylvania adopted an even more liberal provision in its new constitution providing that “all prisoners shall be Bailable by Sufficient Sureties Unless for Capital Offenses, where the proof is evident or the presumption great.”
- The Pennsylvania law became the model for almost every state constitution adopted after 1776.

BAIL IN THE UNITED STATES (Cont.)

- These provisions were important because the US Constitution has no explicit right to bail and does not have a list of which crimes are bailable; only a prohibition against excessive bail.
- Eighth Amendment

  "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
- The only recorded comment of a Member of Congress during the debates on the adoption of the excessive bail provision of the Constitution were: "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the term excessive bail? Who are to be the judges?"

BAIL IN THE UNITED STATES (Cont.)

- The Judiciary Act of 1789 cured some of the problems by creating an absolute right to bail in non-capital federal criminal cases.
- American laws governing release on bail led to changes in the administration of bail. Under Anglo-Saxon law, persons accused of committing serious offenses, those with lengthy criminal records, and those caught in the act were often summarily executed. Otherwise, those accused of less serious crimes were eligible for pretrial release. Because most persons were released, jails were rarely necessary.

BAIL IN THE UNITED STATES (Cont.)

- In order to be released, the sheriff required a surety or some third-party custodian, a friend, neighbor, or relative to stand in for the accused if he absconded. As the bot system evolved with most crimes punishable by a fine, sureties were allowed to pledge personal or real property if the accused failed to appear.

BAIL IN THE UNITED STATES (Cont.)

- In contrast, unlike English law, the Judiciary Act of 1789 and the constitutions of most states provided an absolute right to have bail set except in capital cases. But the absence of close friends and neighbors in frontier America made it very difficult for most defendants to find a personal custodian acceptable to the courts, especially since the unsettled American frontier was open to any fleeing defendant. This gave rise to commercial bonds, never permitted in England.

NEVADA CONSTITUTION

Constitutional Debate, As Such

- On the third day of the Nevada Constitutional Convention, July 6, 1864, Section 6 of Article 1 was offered and adopted without any comment or debate:

  "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted, or shall witnesses be unreasonably detained."

COMMERCIAL MONEY BAIL

Arbitrary bail amounts plus the growing number of defendants unable to pay or find a personal surety gave rise to a profession unique to American criminal justice, the commercial bail bond industry.

Commercial Money Bail

- A 1927 study of the Chicago bail system found that bail based solely on the alleged offense left about 20 percent of the defendants unable to post bail. It noted that the "present system neither guarantees security to society nor safeguards the rights of the accused. It is lax with those with whom it should be stringent and stringent with those with whom it could be safely less severe."

COMMERCIAL MONEY BAIL (Cont.)

- The two issues concerning money bail are: (1) Its tendency to cause the unnecessary incarceration of defendants who cannot afford to pay for secured bonds, and (2) Its tendency to allow the release of high-risk defendants who should more appropriately be detained without bail.
- As a result, America leads the world in pretrial detention at three times the world average.

UNITED STATES SUPREME COURT CASES

- Stack v. Boyle, 342 U.S. 1 (1951) and Carlson v. Landon, 342 U.S. 524 (1952); both dealt with federal bail issues.
- In Stack, the court wrote:

"The modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of the accused. Bail set at a figure higher than the amount reasonably calculated to fulfill this promise is 'excessive' under the Eighth Amendment." Id. at 5. J. Jackson, concurring.

UNITED STATES SUPREME COURT CASES (Cont.)

- The court reasoned that unless the right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. Id. at 4.
- "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." Id. at 5-6.

UNITED STATES SUPREME COURT CASES (Cont.)

- Four months after its opinion in Stack, the Supreme Court clarified that the right to bail is not absolute.

- In Carlson v. Landon, the court wrote that:

" . . . [T]he bail clause was lifted, with slight changes from the English Bill of Rights Act. In England, that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." Id., 342 U.S. 524, 545-546 (1952).

UNITED STATES SUPREME COURT CASES (Cont.)

- Thus, while the right to bail is a fundamental concept, it is not absolute. Where a bail bond is permitted, there must be an individualized determination using standards designed to set bail bonds at "an amount reasonably calculated" to assure the defendant's return to court; when the purpose of a money bail bond is only to prevent flight, the monetary amount must be set at a sum designed to meet that goal, no more.

PREVENTATIVE DETENTION

- Long unresolved was the issue of whether preventative detention, the denial of bail to an accused, unconvicted defendant because it is feared that if released he will be a danger to the community, is constitutional. In 1984, Congress authorized preventative detention in federal criminal proceedings.

Preventative Detention

- In United States v. Solerno, the Supreme Court upheld the preventative detention provisions of the Bail Reform Act of 1984 against a facial challenge under the Eighth Amendment. They found that bail was not limited to preventing flight. "We reject the proposition that the Eighth Amendment categorially prohibits the government from perusing other admittedly compelling interests through the regulation of pretrial release." Id., 481 U.S. 739, 753 (1988).

PREVENTATIVE DETENTION (Cont.)

- "The only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." Id. at 754.
- "[D]etention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or the community which no condition of release can dispel satisfies this requirement." Id. at 755.

THE NEED FOR PRETRIAL IMPROVEMENTS

- Pretrial release and detention have always been concerned with risk: pretrial misbehavior by commission of a new crime and failure to appear. One hundred percent detention = everyone appears and no new crimes.
- Famously, Sir William Blackstone in his Commentaries on the Law of England wrote, “It is better that ten guilty persons escape than an innocent man suffer.”

THE NEED FOR PRETRIAL IMPROVEMENTS (Cont.)

- Justice Jackson wrote in his concurrence in Stack that "Admission to bail always involves a risk . . . A calculated risk which the law takes as the price of our system of punishment." Stack at 8.
- Allowing the money bail system to decide who stays in jail and who gets out is simply a way for judges to abdicate their responsibility to make these decisions and avoid any risk by doing so.
- As of 2014, 61 per cent of jail populations nationally are classified as pretrial defendants.

FUNDAMENTAL LEGAL PRINCIPLES

- The Presumption of Innocence

  Justice Marshall's dissent in Solerno stated, "[T]he very pith and purpose of [the Bail Reform Act of 1984] is an abhorrent limitation on the presumption of innocence." Solerno at 762-763.

- The Right to Bail

  United States and Nevada Constitutions

  American law contemplates a presumption of release

- Release Must be the Norm

  "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Solerno at 755.

FUNDAMENTAL LEGAL PRINCIPLES (Cont.)

- Due Process

  Substantive and Procedural

- Equal Protection

  In Girffin v. Illinois, which dealt with a defendant's ability to purchase a transcript required for appellate review, Justice Black wrote: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. 12, 19 (1956).

  "[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court." Brandy v. U.S., 82 S.Ct. 11, 13 (1961).

FUNDAMENTAL LEGAL PRINCIPLES (Cont.)

- Excessive Bail and the Concept of Least Restrictive Conditions

"When financial conditions are warranted, the least restrictive conditions principle requires that an unsecured bond be considered first."

American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release (2007), Std. 10-1.4(c) (commentary) at 43-44.

FUNDAMENTAL LEGAL PRINCIPLES (Cont.)

- Bail May Not Be Used For Punishment

"The Court of Appeals properly relied on the Due Process Clause, rather than the Eighth Amendment, in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished." Bell v. Wolfish, 441 U.S. 520, 535 (1979).

- The Bail Process Must Be Individualized

"Each defendant stands before the bar of justice as an individual." Justice Jackson concurring in Stack, 342 U.S. 1, 9 (1951).

FUNDAMENTAL LEGAL PRINCIPLES (Cont.)

- The Right to Counsel

"[A] criminal defendant's initial appearance before a judicial officer, where he learns of the charges against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the attachment of the Sixth Amendment right to counsel." Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008).

- The Privilege Against Compulsory Self-Incrimination

Fifth Amendment to the Constitution

FUNDAMENTAL LEGAL PRINCIPLES (Cont.)

- Probable Cause

In County of Riverside v. McLaughlin, the Supreme Court ruled that suspects who are arrested without a warrant must be given a probable cause hearing within 48 hours. 500 U.S. 44 (1991).

A COMMON VOCABULARY

- Bail is defined in terms of release, as a process of conditional release. BAIL IS NOT MONEY. The purpose of bail is not to provide assurance of appearance and public safety – that is the purpose of the conditions of bail or limitations of pretrial release.
- The purpose of bail is to effectuate and maximize release.
- There is “bail,” a process of release, and “no bail,” a process of detention.

JUDICIAL LEADERSHIP

- Bail is a judicial function, and the history of bail in America has consistently demonstrated that judicial participation will likely mean the difference between pretrial improvement and pretrial stagnation.
- Judges alone are the individuals who must ensure the balance of bail – maximizing release while maximizing public safety and court appearances.
- Ongoing training on bail and pretrial release.

In Re Humphrey, ___ Cal.Rptr.3d ___ (2019), 2019 WL 550512

- Forty years ago, then Governor Brown said in his State of the State that bail constituted a "tax on poor people in California. Thousands and thousands of people languish in the jails of this state even though they have been convicted of no crime. Their only crime is that they cannot make the bail that our present system requires."
- He urged the Legislature to adopt proper standards for a just and fair bail system.
- The Legislature did not respond.

In Re Humphrey

- In her 2016 State of the Judiciary Address, the Chief Justice told the Legislature that it cannot continue to ignore “the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor.”
- This time the Legislature replied.

In Re Humphrey

- " . . . [A]lthough the prosecutor presented no evidence that non-monetary conditions of release could not sufficiently protect victim or public safety, and the trial court found the petitioner suitable for release on bail, the court's order, by setting bail in an amount it was impossible for petitioner to pay, effectively constituted a *sub rosa* detention order lacking the due process protections constitutionally required . . . ."

In Re Humphrey

- "Bearden and its progeny 'stand for the general proposition that when a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release. . .'" Id at 11, (citations omitted).

In Re Humphrey

". . . a defendant may not be imprisoned solely due to poverty and that rigourous procedural safeguards are necessary to assure the accuracy of determinations that an arrestee is dangerous and that detention is required due to the absence of less restrictive alternatives sufficient to protect the public." Id at 18.

In Re Humphrey

"But the problem this case presents does not result for the sudden application of a new and unexpected judicial duty; it stems instead from the enduring unwillingness of our society, including the courts (citation omitted) to correct a deformity in our criminal justice system that close observers have long considered a blight on the system." Id at 23.

What's Next?

- NPRA
- Review of pilot program
- Possible legislative action
  - Personal recognizance bonds
  - No bail pretrial detention
- Possible constitutional amendments
- Ongoing education and training
- Judicial Leadership

Mr. Bob Dylan

THE HISTORY OF BAIL AND PRETRIAL RELEASE

UPDATED SEPTEMBER 24, 2010

TIMOTHY R. SCHNACKE,

MICHAEL R. JONES,

CLAIRE M. B. BROOKER

THE HISTORY OF BAIL AND PRETRIAL RELEASE[1]

A. INTRODUCTION

While the notion of bail has been traced to ancient Rome,[2] the American understanding of bail is derived from 1,000-year-old English roots. A study of this "modern" history of bail reveals two fundamental themes. First, as noted in June Carbone's comprehensive study of the topic, "[b]ail [originally] reflected the judicial officer's prediction of trial outcome."[3] In fact, bail bond decisions are all about prediction, albeit today about the prediction of a defendant's probability of making all court appearances and not committing any new crimes. The science of accurately predicting a defendant's pretrial conduct, and misconduct, has only emerged over the past few decades, and it continues to improve. Second, the concept of using bail bonds as a means to avoid pretrial imprisonment historically arose from a series of cases alleging abuses in the pretrial release or detention decision-making process. These abuses were originally often linked to the inability to predict trial outcome, and later to the inability to adequately predict court appearance and the commission of new crimes. This, in turn, led to an over-reliance on judicial discretion to grant or deny a bail bond and the fixing of some money amount (or other condition of pretrial release) that presumably helped mitigate a defendant's pretrial misconduct. Accordingly, the following history of bail suggests that as our ability to predict a defendant's pretrial conduct becomes more accurate, our need for reforming how bail is administered will initially be great, and then should diminish over time.

B. ANGLO-SAXON ROOTS

To understand the bail system in medieval England, one must first understand the system of criminal laws and penalties in place at that time. The Anglo-Saxon legal process was created to provide an alternative to blood feuds to avenge wrongs, which often led to wars. As Anglo-Saxon law developed, wrongs once settled by feuds (or by outlawry or "hue and cry," both processes allowing the public to hunt down and deliver summary justice to offenders) were settled through a system of "bots," or payments designed to compensate grievances.[4] Essentially, crimes were private affairs (unlike our current system of prosecuting in the name of the state) and suits brought by persons against other persons typically sought remuneration as the criminal penalty. In a relatively small number of cases, persons who were considered to be a danger to society ("false accusers," "persons of evil repute," and "habitual criminals,") along with persons caught in the act of a crime or the process of

1 While much of the text in this section is attributed to its source by footnote, any un-attributed statements were derived primarily from the following sources: F. Pollock & F. Maitland, *The History of English Law* (2d Ed. 1898) [hereinafter Pollock & Maitland]; Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II,* 113 Univ. Pa. L. Rev. 959, 1125 (1965) [hereinafter Foote]; Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976) [hereinafter Thomas]; Gerald P. Monks, *History of Bail* (1982); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syracuse L. Rev. 517 (1983) [hereinafter Carbone]; Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement,* 1 Res. in Corrections, Issue 3:1; Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juszkiewicz, *The Pretrial Services Reference Book,* Pretrial Servs. Res. Ctr. (Dec. 1999) [hereinafter Lotze, et al.]; Marie VanNostrand, *Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (Crime & Just. Inst., Nat'l Inst. of Corrections (2007)) [hereinafter VanNostrand]; and material found on the Pretrial Justice Institute's website, at http://www.pretrial.org/. Carbone, in turn, cites to E. De Haas, *Antiquities of Bail* (1940), as well as to Pollock & Maitland for additional "thorough studies on the origins of bail." All links to websites are current to September 23, 2010.

2 *See* Lotze, et al., *supra* note 1, at 2 n. 3.

3 Carbone, *supra* note 1, at 574.

4 *Id.* at 519-20.

escaping, were either mutilated or summarily executed.[5] All others were presumably considered to be "safe," so the issue of a defendant's potential danger to the community if released was not a primary concern.

Nevertheless, the Anglo-Saxons *were* concerned that the accused might flee to avoid paying the bot, or penalty, to the injured (as well as a "wite," or payment to the king). Prisons were "costly and troublesome," so an arrestee was usually "replevied *(replegiatus)* or mainprised *(manucaptus)*," that is, "he was set free so soon as some sureties *(plegii)* undertook *(manuceperunt)* or became bound for his appearance in court."[6] Thus, a system was created in which the defendant was required to find a surety who would provide a pledge to guarantee both the appearance of the accused in court and payment of the bot upon conviction. The amount or substantive worth of that pledge, called "bail" (akin to a modern money bail bond), was identical to the amount or substantive worth of the penalty. Thus, if an accused were to flee, the responsible surety would pay the entire amount to the private accuser, and the matter was done.

According to Carbone, "[t]he Anglo-Saxon bail process was perhaps the last entirely rational application of bail."[7] Because the amount of the pledge was identical to the amount of the fine upon conviction, the system accounted for the seriousness of the crime and fulfilled the debt owed if the accused did not appear for trial. All prisoners facing penalties payable by fine were bondable, and the bail bond was perfectly linked to the outcome of trial – money for money.

C. THE NORMAN CONQUEST TO 1700

The system became significantly more complex after the Norman Conquest, beginning in 1066:

> In the period following the Norman invasion, criminal justice gradually became an affair of the state. Criminal process could be initiated by the suspicions of a presentment jury as well as the sworn statements of the aggrieved. Capital and other forms of corporal punishment replaced money fines for all but the least serious offenses, and the delays between accusation and trial lengthened as itinerant royal justices administered local justice.[8]

Summary mutilations and executions were gradually phased out, but the overall use of corporal punishment increased, giving many offenders a greater incentive to flee. System delays also caused many persons to languish in primitive jails, and the un-checked discretion given to judges and magistrates to release defendants led to instances of corruption and abuse. Moreover, as the penalties changed, ideas about which persons should be bondable also shifted. The first to lose any right to bail whatsoever were persons accused of homicide, followed by persons accused of "forest offenses" (i.e., violating the royal forests), and finally a catch-all discretionary category of persons ac-

5 *See id.* at 520-521, and accompanying notes.

6 Pollock & Maitland, *supra* note 1, at 584. Indeed, even those unable to pay the "bot" were typically handed over to the victim for either execution or enslavement. Carbone, *supra* note 1, at 521 n. 18. If they fled, they were declared "outlaws," subject to immediate justice from whoever tracked them down. Apparently, however, certain offenses were considered to be "absolutely irreplevisable," requiring some form of prison to house the offenders. *See* Pollock & Maitland, *supra* note 1, at 584-85.

7 Carbone, *supra* note 1, at 520.

8 *Id*. at 521 (footnotes omitted).

cused "of any other *retto* [wrong] for which according to English custom he is not *replevisable* [bailable]."[9]

In medieval England, magistrates rode a circuit from county (shire) to county to handle cases. The shire's reeve (now known as the sheriff) was given the duty of holding individuals accused of crimes until the magistrate arrived. Because of the broad discretion given to these sheriffs to hold persons pretrial, bail administration varied from county to county, and instances of abuse became more frequent. Indeed, "[b]ail law developed in the twelfth and thirteenth centuries as part of an assertion of royal control over the authority of the sheriffs," which had grown increasingly corrupt.[10]

Following exposure of widespread abuse in the bail bond-setting process, Parliament passed the first Statute of Westminster, which assembled and codified 51 existing laws – many originating from the Magna Carta – and which covered, among other things, bail. Importantly, the Statute departed from traditional Anglo-Saxon customs by establishing three criteria to govern bailability: (1) the nature of the offense (categorizing offenses that were and were not bailable); (2) the probability of conviction (requiring the sheriff to examine all of the evidence and to measure such variables as whether or not the accused was held on "light suspicion"); and (3) the criminal history of the accused, often referred to as the bad character or "ill fame" of the accused. According to Carbone, "[i]n defining the criteria to govern bail, the Statute of Westminster rearticulated rather than abandoned the conclusion of the Anglo-Saxons that the bail process must mirror the outcome of the trial. Despite the overlapping and conflicting concerns of the statute's criteria, each criterion can be reduced to a simple standard: the seriousness of the offense offset by the likelihood of acquittal."[11] Indeed, this standard governed English bail bond determinations for the next five centuries.

During that 500-year period, Parliament occasionally passed legislation defining the bailability of crimes not mentioned in the Statute of Westminster. Mostly, however, Parliament focused on adding safeguards to the bail process to protect persons from political abuse and local corruption. For example, due to the vague nature of the terms "ill fame" and "light suspicion," as applied by local justices of the peace, in 1486 Parliament required the approval of two justices, rather than one, to release a prisoner and to certify the bailment at the next judicial session. In 1554, Parliament required that the bail bond decision be made in open session, that both justices be present, and that the evidence that was weighed be recorded in writing, essentially introducing the notion of a preliminary hearing into the law.

Over time, additional abuses led to additional reforms. For example, bailability under the Statute of Westminster was initially based on a recitation of a formal charge. Nevertheless, in 1627, King Charles I successfully ordered local judges to hold five knights with no charge, circumventing the Statute, as well as provisions in the Magna Carta upon which the Statute was based. Parliament responded by passing the Petition of Right, prohibiting detention by any court without a charge. In 1676, an individual known only as Jenkes was arrested and held for two months on a charge that, by law, required admittance to bail. Jenkes' case, and cases like it, ultimately led to Parliament's passage of the Habeas Corpus

9 *Id.* at 523 (internal quotation and footnote omitted).

10 *Id.* at 522 n. 29.

11 *Id.* at 526.

Act of 1679, which established procedures to prevent long delays before a bail bond hearing was held. This reform was only a minor hurdle for some of the stubborn and unruly judges of that time, who learned that the monetary amount of a bail bond could also be used to detain a defendant indefinitely. According to Foote, "[t]he Act of 1679 stopped the procedural runaround to which Jenkes had been subjected, but by setting impossibly high bail the judges erected another obstacle to thwart the purpose of the law on pretrial detention."[12] Addressing this matter, the English Bill of Rights of 1689, accepted by William and Mary as they assumed the throne, stated that "excessive bail ought not be required," a phrase similar to that found in the Eighth Amendment to the U.S. Constitution.

D. BAIL IN THE UNITED STATES

Caleb Foote summarized the state of English law on bail at the time of American Independence as follows:

> [A]s the English protection against pretrial detention evolved it came to comprise three separate but essential elements. The first was the determination of whether a given defendant had the right to release on bail, answered by the Petition of Right, by a long line of statutes which spelled out which cases must and which must not be bailed by justices of the peace or (in the early period) by sheriffs, and by the discretionary power of the judges of the king's bench to bail any case not bailable by the lower judiciary. Second was the simple, effective habeas corpus procedure which was developed to convert into reality rights derived from legislation which could otherwise be thwarted. Third was the protection against judicial abuse provided by the excessive bail clause of the Bill of Rights of 1689.[13]

Generally, the early colonies applied English law verbatim, but differences in beliefs about criminal justice (including the belief that the English laws were unnecessarily confusing), differences in colonial customs, and even differences in crime rates between England and the colonies led to more liberal criminal penalties and, ultimately, changes in the laws surrounding the administration of bail. Even before some of England's later reforms, in 1641 Massachusetts passed its Body of Liberties, creating an unequivocal right to bail for non-capital cases, and re-writing the list of capital cases.[14] In 1682, "Pennsylvania adopted an even more liberal provision in its new constitution, providing that 'all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.'"[15] The Pennsylvania language introduced consideration

12 Foote, *supra* note 1, at 967.

13 *Id.* at 968.

14 It is noted that the substantive criminal law of this period of time is often considered barbaric by today's standards. For example, despite the relatively liberal bail law in Massachusetts, along with homicide that Colony still punished by death (and therefore made unbailable) the offenses of idolatry, witchcraft, blasphemy, cursing or smiting a parent, and stubbornness or rebelliousness on the part of a son against his parents. *See id.* at 981. Moreover, many persons were imprisoned by the colonies for simply being impoverished: "In 1788, a year before Congress was to consider what was to become the eighth amendment, Massachusetts enacted legislation which . . . provided for compulsory work in houses of correction for, *inter alia,* 'all rogues, vagabonds and idle persons . . . common railers or brawlers, such as neglect their callings or employment, misspend what they earn, and do not provide for themselves for the support of their families . . . and of . . . vagrant, strolling and poor people.'" *Id.* at 990. By 1830 there were roughly three times as many persons imprisoned for debt as were imprisoned for crime. *Id.* at 991.

15 Carbone, *supra* note 1, at 531 (quoting 5 American Charters 3061, F. Thorpe ed. 1909) (footnotes omitted).

of the evidence for capital cases, and, "[a]t the same time, Pennsylvania limited imposition of the death penalty to 'willful murder.' The effect was to extend the right to bail far beyond the Massachusetts Body of Liberties and far beyond English law."[16] The Pennsylvania law was quickly copied, and as the country grew "the Pennsylvania provision became the model for almost every state constitution adopted after 1776."[17]

This is especially important, given that the United States Constitution itself only explicitly covers the right of habeas corpus in Article 1, Section 9, and the prohibition against "excessive bail" in the Eighth Amendment, which has been traced back to the 1776 Virginia Declaration of Rights.[18] There is no explicit right to bail in the U.S. Constitution, and the Constitution does not define which crimes are bailable, nor which defendants can be detained.[19] Nevertheless, also before the first Congress in the spring and summer of 1789 was Section 33 of the Judiciary Act, which granted an absolute right to bail in non-capital federal criminal cases.[20] To Foote, "advancing the basic right governing pretrial practice in the form of a statute while enshrining the subsidiary protection ensuring fair implementation of that right in the Constitution itself" was an anomaly that Congress likely did not recognize.[21] Still, through the Judiciary Act, the federal government joined a number of states, which, through their respective constitutions, provided a right to bail for nearly all defendants. Accordingly, at least in the federal justice system, "[p]rinciples of the early American bail system – set forth in the Judiciary Acts of 1789 and the U.S. Constitution's Eighth Amendment – were: (1) Bail should not be excessive, (2) A right to bail exists in non-capital cases, and (3) Bail is meant to assure the appearance of the accused at trial."[22]

E. THE PRACTICAL ADMINISTRATION OF BAIL IN ENGLAND AND AMERICA

As American law governing release on bail bonds was being established, cultural differences between the colonies and England also led to changes in the administration of bail. As discussed previously, under the Anglo-Saxon system of laws persons accused of committing serious offenses, persons with lengthy criminal histories, and those caught in the act of committing an offense were often summarily executed. For less serious crimes, the Anglo-Saxon system provided for pretrial release. This was partly due

16 *Id.* at 531-32 (footnotes omitted).

17 *Id.* at 532.

18 Article 1, Section 9 of the United States Constitution states that "[T]he privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." The Eighth Amendment to the Constitution states that "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

19 Professor Foote argues that the founding fathers meant to include a right to bail provision, such as that found in the Statute of Westminster, but inadvertently left it out. *See* Foote, *supra* note 1, at 971-989.

20 The Judiciary Act provided a detailed organization of the federal judiciary that the constitution had sketched in only general terms. Section 33 of that Act read: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law."

21 Foote, *supra* note 1, at 972.

22 Spurgeon Kennedy, D. Alan Henry, John Clark, & Jolanta Juszkiewicz, *Pretrial Release and Supervision Program, Training Supplement,* Pretrial Servs. Res. Ctr. (Wash. D.C., 1997), at 2 [hereinafter Kennedy, et al.].

to the fact that the magistrates tasked with hearing these cases traveled from county to county, and were often only present in a particular locality a few months of the year. Because most persons were released, jails were rarely necessary, and those that did exist were primitive.

Under the Anglo-Saxon system of pretrial release, the sheriffs relied on a surety, or some third party custodian who was usually a friend, neighbor, or family member, to agree to stand in for the accused if he absconded. As the bot system evolved, with penalties for most crimes payable by fine, sureties were allowed to pledge personal or real property in the event the accused failed to appear. Before the Norman invasion, the pledge matched the potential monetary penalty perfectly. After the invasion, however, with increased use of corporal punishment, it became frequently more difficult to assign the amount that ought to be pledged, primarily because assigning a monetary equivalent to either corporal punishment or imprisonment is largely an arbitrary act.[23] Moreover, the threat of corporal punishment led to increasing numbers of offenders who refused to stay put. As noted by Carbone, these changes in the substantive criminal law, as well as other factors such as procedural delays, led to complexities that required a "new equation" between pretrial release and the criminal sanctions:

> The accused threatened with loss of life or limb had a greater incentive to flee than the prisoner facing a money fine, and judicial officers possessed no sure formula for equating the amount of the pledge or the number of sureties with the deterrence of flight. At the same time, the growing delays between accusation and trial increased the importance of pretrial release and the opportunities for abuse and corruption. The determination of whom to release became a far more complicated issue then calculating the amount of the bot.[24]

The colonies faced these same complications, with some additions. As noted by author Wayne H. Thomas, Jr.:

> First, unlike English law, the Judiciary Act of 1789 and the constitutions of most states provided for an absolute right to have bail set except in capital cases. Second, the absence of close friends and neighbors in frontier America would have made it very difficult for the court to find an acceptable personal custodian for many defendants, and, third, the vast unsettled American frontier provided a ready sanctuary for any defendant wanting to flee. Commercial bonds, never permitted in England, were thus a useful device in America.[25]

F. THE RISE OF THE COMMERCIAL MONEY BAIL BONDSMAN

Arbitrary money bail bond amounts, coupled with a growing number of defendants who were unable to pay them (either by themselves or with the help of friends or relatives), combined to give birth to a profession unique to the field of American criminal justice – the commercial money bail bond industry. There is some debate on when, exactly, this profession got its start.

23 According to one commercial bail bondsman website, "Bonds are . . . an arbitrary number set for court appearance, and are not normally lowered over time." http://www.austinbailbonds.net/faq/. The arbitrary nature of bail bond amounts is typically overlooked or even ignored by actors in the criminal justice system because more meaningful alternatives have not been pursued.

24 Carbone, *supra* note 1, at 522.

25 Thomas, *supra* note 1, at 11-12.

Taylor v. Taintor,[26] the U.S. Supreme Court case that is commonly cited as the authority for bail bondsmen to act as bounty hunters, was decided in 1872, but it is not clear that the sureties in that case were acting in a commercial capacity. It is commonly believed that the first true commercial money bail bondsmen, persons acting as sureties by pledging money or property to fulfill money bail bond conditions for a criminal defendant in court, were Peter and Thomas McDonough in San Francisco, who began underwriting bonds as favors to lawyers who drank in their father's bar. When these brothers learned that the lawyers were charging their clients fees for these bonds, the brothers began to charge as well. By 1898, the firm of McDonough Brothers, established as a saloon, found its business niche by underwriting bonds for defendants who faced charges in the nearby Hall of Justice, or police court. The company, which became known as "The Old Lady of Kearny Street," rose and fell in only fifty years, leaving a legacy prototypical of the growing commercial surety industry. In an account of the firm's demise, Time Magazine reported the following:

> The Old Lady helped San Francisco be what many a citizen wanted it to be – a wide open town. She furnished bail by the gross to bookmakers and prostitutes, kept a taxi waiting at the door to whisk them out of jail and back to work. But she was also a catalyst that brought underworld and police department into an inevitably corrupt amalgam. At her retirement the San Francisco Chronicle waxed nostalgic: 'The Old Lady . . . will take to her rocking chair, draw her shawl about her . . . .' But many a citizen thought simply: 'Good riddance.'[27]

With a growing number of defendants facing increasingly higher money bail bond amounts, the professional bail bond industry flourished in America. If anyone ever saw these businesses as problematic, however, it was rarely reported. Nevertheless, by the 1920s Arthur L. Beeley studied records of the Municipal and Criminal Court of Cook County, Illinois, and in 1927 published his landmark study, *The Bail System in Chicago,"* which publicized the inequities of the bail system and explored the possibility of using alternatives to surety bail to effectuate pretrial release."[28] As Thomas recounts:

> Beeley found that bail amounts were based solely on the alleged offense and that about 20 percent of the defendants were unable to post bail. He also noted that professional bondsmen played too important a role in the administration of the criminal justice system and reported a number of abuses by bondsmen, including their failure to pay off on forfeited bonds. Beeley concluded that 'in too many instances, the present system . . . neither guarantees security to society nor safeguards the right of the accused.' It is 'lax with those with whom it should be stringent, and stringent with those with whom it could safely be less severe.' Among Beeley's recommendations were a greater uses of summons to avoid unnecessary arrests and the inauguration of fact-finding investigations so that bail determinations could be tailored to the individual.[29]

26 83 U.S. 366 (1872).

27 *The Old Lady Moves On* (Aug. 18, 1941), found, at http://www.time.com/time/printout/0,8816,802159,00.html.

28 Thomas, *supra* note 1, at 13, citing Arthur L. Beeley, *The Bail System in Chicago* (Chicago: Univ. of Chicago Press, 1927; reprinted 1966).

29 *Id*. at 13-14.

G. STACK V. BOYLE AND CARLSON V. LANDON

Little happened in the history of bail and the pretrial process between 1927 and 1951, the year the Supreme Court decided *Stack v. Boyle,* the first major Supreme Court case concerning issues in the administration of bail.[30] In that case, a number of federal defendants moved the trial court to reduce their money bail bond amounts on the ground that they were excessive under the Eighth Amendment. In support of their motion, the defendants submitted proof of their financial resources, family ties, health, and prior criminal records. It was undisputed that the money bail bonds set for each of the defendants was fixed in a sum much higher than that usually imposed for offenses with like penalties. The government produced no evidence relating to these four defendants, and rested its case on the fact that four other persons previously convicted of the same crimes had forfeited their bail bonds. The defendants' motions were denied, and the case was ultimately reviewed by the United States Supreme Court.

In its opinion, the Court held the government's actions unconstitutional, writing that "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act."[31] Specifically, the Court wrote as follows:

> The modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.[32]

Because the government produced no evidence to justify why the money bail bond amount for each of the defendants was higher than that usually fixed for similar crimes, the Court remanded the case to the trial court for new bail bond hearings.

Being the first expression of the Supreme Court's views on bail, the case is known for more than just its holding. First, the Court articulated the reasons for a federal right to bail:

> [f]rom the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[33]

Second, the case includes ample language to support the notion that bail should only be based on an individualized assessment of each defendant. The Court wrote as follows:

> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure, are to be applied in each case to each defendant.[34]

30 *Stack v. Boyle,* 342 U.S. 1 (1951).

31 *Id*. at 6.

32 *Id.* at 5.

33 *Id.* at 4 (internal citations omitted).

34 *Id.* at 5, 6. In addition to granting a right to bail, at that time Rule 46 also required the bail bond to be set to "insure

This notion was amplified by Justice Jackson in his frequently quoted concurrence to the opinion, which eloquently summarized his position on individualized bail assessments:

> It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation, and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46(c). Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge, defendants do not lose their separateness or identity. While it might be possible that these defendants are identical in financial ability, character, and relation to the charge -- elements Congress has directed to be regarded in fixing bail -- I think it violates the law of probabilities. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.[35]

Four months after *Stack,* however, the Supreme Court clarified that the traditional right to freedom before conviction in the federal system was not, in fact, absolute. In *Carlson v. Landon,* the Court wrote that,

> [t]he bail clause was lifted, with slight changes, from the English Bill of Rights Act. In England, that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.[36]

With these two cases, the Supreme Court established that while a right to bail is a fundamental precept of the law, it is not absolute, and its parameters must be determined by federal and possibly state legislatures. Where a bail bond is permitted, however, there must be an individualized determination using standards designed to set the bail bond at "an amount reasonably calculated" to assure the defendant's return to court; when the purpose of a money bail bond is only to prevent flight, the monetary amount must be set at a sum designed to meet that goal, and no more.

H. EMPIRICAL STUDIES AND THE MANHATTAN BAIL PROJECT

Empirical studies on the administration of bail, akin to Arthur Beeley's 1927 study, continued after *Stack* and *Carlson.* In 1954, Caleb Foote examined the Philadelphia bail system and demonstrated fundamental inequities in bail bond setting prac-

the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." *Id.* at 6 n. 3.

35 *Id.* at 9.

36 *Carlson v. Landon,* 342 U.S. 524, 545-46 (1952) (footnotes omitted).

tices.[37] At the time, Foote observed that for minor offenses, bail bonds were generally based solely on police evidence. For major offenses, a bail bond was set based on the District Attorney's recommendation approximately 95% of the time. Moreover, Foote observed that those who remained in detention pretrial were mostly poor and unable to raise the bond amount. Finally, Foote found that those defendants who were unable to pay their money bail bond amounts were more likely to be convicted and to receive higher sentences than those defendants who were able to pay their money bail bond amounts. Other studies in the 1950s and early 1960s showed similar outcomes, and laid the foundation for the bail reform movement of the 1960s:

> [these] studies had shown the dominating role played by bondsmen in the administration of bail, the lack of any meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because bail, even in modest amounts, was beyond their means. The studies also revealed that bail was often used to 'punish' defendants prior to a determination of guilt or to 'protect' society from anticipated future conduct, neither of which is a permissible purpose of bail; that defendants detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.[38]

Perhaps the most notable of these studies, and one of the first to explore alternatives to release on financial conditions (money bail bonds), was conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in October of 1961. That study, named the Manhattan Bail Project, was designed "to provide information to the court about a defendant's ties to the community and thereby hope that the court would release the defendant without requiring a bail bond [i.e., release on the defendant's own recognizance]."[39] The success of the program quickly became evident:

> In its first months the Project recommended only 27 percent of their interviews for release. After almost a year of successful operation, with the growing confidence of judges, the Project recommended nearly 45 percent of arrestees for release. After three years of operation, the percentage grew to 65 percent with the Project reporting that less than one percent of releases failed to appear for trial.[40]

The project generated national interest in bail reform, and within two years programs modeled after the Manhattan Bail Project were launched in St. Louis, Chicago, Tulsa, Washington D.C., Des Moines, and Los Angeles.

I. RISING DISSATISFACTION WITH COMPENSATED SURETIES

In Illinois, dissatisfaction with the commercial money bail bond system in Chicago led to state legislation in 1963 known as the Illinois Ten Percent Deposit Plan. Under this plan, Illinois

37 Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 Univ. of Pa. L. Rev. 1031-1079 (1954).

38 Thomas, *supra* note 1, at 15.

39 *Id.* at 4.

40 Lotze, et al., *supra* note 1, at 4; *see also* Thomas, *supra* note 1, at 4-6.

retained the use of money bail bonds as the predominant form of release, but eliminated the need for commercial money bail bondsman:

> Under this legislation, the 10 percent bonding fee that had previously been paid to the bondsman was to be paid to the court, which was now required to release the defendant on less than full bond. Moreover, the fee paid to the court, unlike the fee paid to a bondsman, is refunded to the defendant upon completion of the case, less a small service fee.[41]

By 1963 the courts, too, were also questioning the desirability of a system that was based on secured bonds and dominated by commercial money bail bondsmen, who had, in turn, become the focus of numerous inquiries into their often-abusive and corrupt practices.[42] As one court explained:

> The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety – who, in their judgment, is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The Court and the Commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.[43]

41 Thomas, *supra* note 1, at 7 (footnote omitted); *see also Id.* at 183-89. For a more detailed description of the Illinois plan, *see The National Conference on Bail and Criminal Justice, Proceedings and Interim Report,* at 240-246 (Washington, D.C. April 1965). The Illinois system was upheld as constitutional against Due Process and Equal Protection challenges in *Schilb v. Kuebel,* 404 U.S. 357 (1971).

42 *See* Thomas, *supra* note 1, at 15-16.

43 *Pannell v. U.S.*, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion).

J. THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE

Statements such as the one quoted above got the attention of U.S. Attorney General Robert Kennedy, who in March of 1963 instructed all United States Attorneys to recommend the release of defendants on their own recognizance "in every practicable case."[44] He then convened the National Conference on Bail and Criminal Justice in May of 1964, bringing together over 400 judges, prosecutors, defense lawyers, police, bondsmen, and prison officials to present "for analysis and discussion specific and workable alternatives to [money] bail based on the experience of the Manhattan Bail Project and some others which followed in its wake."[45] Opened with statements by Kennedy and Chief Justice Earl Warren, the Conference analyzed topics involving release on recognizance, release on police summons, setting high money bail bonds to prevent pretrial release for public safety purposes (so-called "preventative detention"), pretrial release based on money or other conditions generally, and pretrial release of juveniles. Attorney General Kennedy closed the conference with the following statement:

> For 175 years, the right to bail has not been a right to release, it has been a right merely to put up money for release, and 1964 can hardly be described as the year in which the defects in the bail system were discovered.
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> ****
>
> What has been made clear today, in the last two days, is that our present attitudes toward bail are not only cruel, but really completely

44 *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965), at 297.

45 *Id.* at XIV.

> illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?[46]

K. 1960S BAIL REFORM

Also in 1964, on the eve of the National Bail Conference, Senator Sam Ervin introduced a series of bills designed to reform bail practices in the federal courts. Hearings on the bills ultimately led to passage, in 1966, of the Federal Bail Reform Act. This Act, the first major reform of the federal bail system since the Judiciary Act of 1789, contained the following provisions: (1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) conditional pretrial release with conditions imposed to reduce the risk of failure to appear; (3) restrictions on money bail bonds, which the court could impose only if non-financial release options were not enough to assure a defendant's appearance; (4) a deposit money bail bond option, allowing defendants to post a 10% deposit of the money bail bond amount with the court in lieu of the full monetary amount of a surety bond; and (5) review of bail bonds for defendants detained for 24 hours or more.[47] Generally, the Act provided that non-capital defendants were to be released pending trial on their personal recognizance or on "personal bonds" unless the judicial officer determined that these incentives would not adequately assure their appearance at trial. In those cases, the judge was to choose the least restrictive alternatives from a list of conditions designed to secure appearance. Those charged with a capital offense, or who were convicted and were awaiting sentencing or appeal, were given a different standard that included public safety: they were to be released unless the judge had reason to believe that they might flee or be a danger to the community.

After passage of the Federal Bail Reform Act of 1966, many states passed similar statutes. By 1971, at least 36 states had enacted statutes authorizing the release of defendants on their own recognizance. By 1999, "virtually every state [had] established by statute or case law the practice of pretrial supervised release."[48]

Moreover, by 1965, fifty-six jurisdictions reported operational bail projects modeled after the Manhattan Bail Project, and two statewide projects were reported to be operating in New Jersey and Connecticut. According to Thomas,

> [t]he procedure adopted for the release of defendants prior to trial in each of these jurisdictions was the written promise to appear. No money was required to secure such release. Although in limited use prior to the Vera experiment, written promises to appear became much more widely used as a result of the Manhattan Bail Project. The terminology varied from one jurisdiction to another, but whether it was known as own recognizance (O.R.), personal recognizance, pretrial parole, nominal bond, personal bond, or unsecured appearance bond, the result was the same. The defendant was released without posting money bail. In theory, the mechanisms differed; for example, nominal bond required the defendant to post one dollar. In practice, however,

46 *Id*. at 296.

47 *See* Lotze, et al, *supra* note 1, at 5. The Act was codified at 18 U.S.C. §§ 3141-3151.

48 *The Supervised Pretrial Release Primer,* Pretrial Servs. Res. Ctr. (BJA, August 1999).

> this was usually never posted. Also, unsecured appearance bonds, in theory, required the defendant to pay the full bond amount should he fail to appear, but this was rarely more than an idle threat. Likewise, most own recognizance releases involved criminal penalties for failure to appear, but these too were rarely enforced. The result was that defendants were released on their personal promises to appear, and this alone proved a sufficient guarantee of their appearance in court. Defendants released on O.R. appeared as well as or better than those on money bail. The Manhattan Bail Project reported a failure to appear rate of less than seven-tenths of 1 percent.[49]

The gradual change from bail projects fashioned after the Vera experiment to contemporary pretrial services programs began in the District of Columbia. Although the Bail Reform Act of 1966 specified factors to be considered in releasing defendants pretrial, it left unclear who should gather the necessary information. Pretrial services agencies, beginning with the District of Columbia Bail Agency, evolved to fill in this gap. In 1968, "[t]he D.C. Bail Agency assumed much greater responsibility in seeing that bail practices were carried out as mandated. In addition to interviewing, collecting background information, verifying information, [and] producing reports and recommendations to the court, the Pretrial Services programs began supervising defendants on various release conditions."[50]

L. PROFESSIONAL STANDARDS

With interest growing in bail reform and more attention being given to the pretrial release decision, professional organizations began issuing standards designed to address relevant bail and pretrial release, detention, and supervision issues at a national level. The American Bar Association (ABA) was first, with its *Standards Relating to the Administration of Criminal Justice* in 1968,[51] followed by the National Advisory Commission on Criminal Justice Standards and Goals,[52] the National District Attorneys Association (NDAA), with its *National Prosecution Standards,*[53] and the National Association of Pretrial Services Agencies (NAPSA), with its *Performance Standards and Goals for Pretrial Release.*[54] Initially, each of these sets of professional standards were based on reforms codified in the 1966 federal act, and each reflected the view that the current bail system was flawed, primarily due to its emphasis on money bail bonds and commercial sureties. In its first expression on the topic, the ABA stated:

> [t]he bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise – that risk of financial loss is necessary to prevent defendants from fleeing prosecution – is itself of doubtful validity. The requirement that virtually every defendant

49 Thomas, *supra* note 1, at 25.

50 *History of Pretrial Services Programs,* at http://www.pretrial.org/PretrialServices/HistoryOfPretrialRelease/Pages/default.aspx.

51 *See American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) [hereinafter ABA Standards].

52 *National Advisory Commission on Criminal Justice Standards and Goals* (*Corrections, Courts*) (1973).

53 *See National Prosecution Standards (2d Ed.),* Nat'l Dist. Atty's Assoc. (1991) [hereinafter Prosecution Standards]. The NDAA has released a third edition to its standards, albeit to members only through its website found at http://www.ndaa.org/.

54 *See Standards on Pretrial Release (3rd Ed),* Nat'l Assoc. of Pretrial Servs. Agencies (Oct. 2004), at 11-12 [hereinafter NAPSA Standards].

> must post bail causes discrimination against defendants and imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependents on welfare.[55]

Though virtually identical to the 1966 Bail Reform Act, these standards added input on two important issues: (1) potential danger to the community as a factor that should be considered by the judicial officer in making his decision (so-called preventative detention), and (2) abolition of surety bail for profit as an option.

(i) Preventative Detention

The first of these issues, often referred to as the issue of "preventative detention" of arrestees who are considered threats to society, had been recognized as a common, albeit secretive practice for some time. Addressing the National Conference on Bail and Criminal Justice in 1964, one commenter noted:

> [w]hile we lack a statistical statement of the problem, it is apparent: (1) that many factors other than those which indicate the likelihood of flight are considered in the setting of bail; and (2) that bail is used, in current practice, to detain individuals in custody – not for assuring their appearance at trial – but rather because of the belief that the defendant, if allowed to go free, is likely to commit additional crimes or is apt to intimidate witnesses or victims.[56]

The elusive nature of this issue is apparent in the following statement, written in 1967: "[a]lthough it has never been proven, there have been repeated suggestions that the bail setter often sets bail with the intention of keeping a defendant in jail to protect society or a certain individual. That this manipulation of the bail system takes place is practically unprovable, since the bail setter has such wide discretion."[57] In the literature, persons often describe this practice as furthering a "sub rosa" purpose of bail, since the purpose of bail bonds until this time had always been only to assure the appearance of a defendant at trial.

Indeed, deterring flight was so ingrained as the sole purpose of bail that Congress left appearance of the defendant at trial as the sole standard for weighing the bail bond decision in the Federal Bail Reform Act. Thus, in non-capital cases the 1966 law did not expressly permit a judge to consider the defendant's future dangerousness or community safety during the release decision. The District of Columbia was particularly critical of this aspect of the Bail Reform Act, which allowed the release of potentially dangerous non-capital suspects. Moreover, this criticism found an audience with the Nixon administration, an administration that had campaigned on a law-and-order platform. A proposed amendment to the Bail Reform Act to allow for preventative detention was voted down. Nevertheless, as a compromise in 1970, Congress changed the 1966 Act as it applied to persons charged with crimes in the District of Columbia to allow judges to consider dangerousness to the community, along with risk of flight, in setting bail bonds in non-capital cases.[58]

55 American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release – Approved Draft, 1967* (New York: American Bar Association, 1968), at 1 (reprinted in ABA Standards, *supra* note 50, at 31).

56 *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965), at 151 (statement of Herman Goldstein, Executive Director to the Superintendent of Police – Chicago, Ill.).

57 John V. Ryan, *The Last Days of Bail,* 58 J. of Crim. Law, Criminology, and Police Sci., 542, at 548 (1967) (footnote omitted).

58 District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

This was the beginning of a vigorous debate over whether or not community safety should be formally recognized as a factor for judges to weigh in setting bail bonds. This particular debate, the debate over preventative detention, would continue until passage of the Comprehensive Crime Control Act of 1984, which is discussed later in this paper.

(ii) Compensated Sureties

The second issue raised in the newly adopted professional standards concerned abolition of compensated sureties. Increased use of non-financial release options during the period of bail reform in the 1960s reduced the courts' reliance on commercial money bail bondsmen. Over time, the courts and others realized that the administration of bail using commercial sureties was fundamentally flawed, and began to openly oppose the compensated surety system. The 2007 edition of the ABA standards provides the rationale for its long-standing position against compensated sureties:

> There are at least four strong reasons for recommending abolition of compensated sureties. First, under the conventional money bail system, the defendant's ability to post money bail through a compensated surety is completely unrelated to possible risks to public safety. A commercial bail bondsman is under no obligation to try to prevent criminal behavior by the defendant. Second, in a system relying on compensated sureties, 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 the required fee and post the necessary collateral. Third, decisions of bondsmen – including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond – are made in secret, without any record of the reasons for these decisions. Fourth, the compensated surety system discriminates against poor and middle-class defendants, who often cannot afford the non-refundable fees required as a condition of posting bond or do not have assets to pledge as collateral. If they cannot afford the bondsmen's fees and are unable to pledge the collateral required, these defendants remain in jail even though they may pose no risk of failure to appear in court or risk of danger to the community.[59]

Today, as it was in 1968, the ABA's call for abolition of compensated sureties is adamant: "[T]heir role is neither appropriate nor necessary and the recommendation that they be abolished is without qualification."[60]

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59 ABA Standards, *supra* note 51, at 45 (footnote omitted).

60 Id. at 46. Best practice standards are common to a number of justice-related fields, but in the area of pretrial release, the ABA Standards stand out. Their preeminence is based, in part, on the fact that they "reflect[] a consensus of the views of representatives of all segments of the criminal justice system," which includes prosecutors, defense attorneys, academics, and judges, as well as various groups such as the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Attorneys General, the U.S. Department of Justice, the Justice Management Institute, and other notable pretrial scholars and pretrial agency professionals. See Marcus, *The Making of the ABA Criminal Justice Standards*, 23 Crim. Just. No. 4 (Winter 2009).

More significant, however, is the justice system's use of the ABA Criminal Justice Standards as important sources of authority. The ABA's Standards have been either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100

M. BAIL REFORM THROUGH THE 1970S

"Despite its impressive beginning, however, the bail reform movement waned considerably in the late 1960s. Many of the early own-recognizance release programs ceased operating, and those that remained often had tenuous financial and official support."[61] A good example is found in the creation of the Harris County, Texas, Pre-Trial Release Agency, which became a focus of attention when a federal court acted to remedy "severe and inhumane overcrowding of inmates" at the Harris County jail.[62] The federal court, recognizing the Agency's strong fundamental premise and great expectations at its creation in 1972, nevertheless found it to be "foundering," "deficient," and "ineffective" in 1975. The reasons for this were many, including harassment and sabotage by the money bail bondsmen, the Agency's inefficient physical placement, its lack of effective internal practices, and its lack of an adequate budget, personnel, training, and supervision. One of the biggest barriers to the Agency's success, however, was its reliance on methods that were largely subjective and often arbitrary. As the court noted, "[t]he largest impediment to prompt, efficacious operation of pretrial release is the agency's use of, and total reliance upon, a subjective standard of evaluation of each interviewee. That is, the 'gut' reaction of the interviewer is used to determine whether a defendant is a good risk for release on recognizance."[63] To remedy this particular situation, the court ordered the Agency to adopt an objective point system for evaluating release on recognizance, "designed with a view towards reducing to a minimum the refusing of 'PR' bonds on 'hunches.'"[64]

The movement toward more and increasingly efficient pretrial services agencies has continued through the 1970s to the present. By 2003, the Bureau of Justice Assistance estimated that pre-

law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts, including the Colorado Supreme Court, had used the Standards to implement new court rules. *Id.* According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, "[t]he Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects." *Id.* (internal quotation omitted).

The ABA's process for creating and updating the Standards is "lengthy and painstaking," but the Standards finally approved by the ABA House of Delegates (to become official policy of the 400,000 member association) "are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process, either individually or as representatives of their respective associations, and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions over three or more years." *Id.*

Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the ABA Standards use both to provide rationale for its recommendations. For example, in recommending that commercial sureties be abolished, the ABA relies on numerous critiques of the money bail system going back nearly 100 years, various social science experiments, law review articles, and various state statutes providing for its abolition. In recommending a presumption of release on recognizance and that money not be used to protect public safety, the ABA relies on United States Supreme Court opinions, findings from the Vera Study (the most notable social science experiment in the field), discussions from the 1964 Conference on Bail and Criminal Justice, Bureau of Justice Statistics data, as well as the *absence* of evidence, i.e., "the absence of any relationship between the ability of a defendant to post a financial bond and the risk that the defendant may pose to public safety." ABA Std. 10-5.3 (a) (commentary).

61 Thomas, *supra* note 1, at 8.

62 *See Alberti v. Sheriff of Harris County,* 406 F. Supp. 649 (S.D. Tex. 1975).

63 *Id.* at 665.

64 *Id.* at 683.

trial services agencies were operational in over 300 jurisdictions in the United States.[65] Moreover, the federal system showed substantial progress toward bail reform in the 1970s. Because the 1966 Bail Reform Act contained no mechanism for gathering background information on defendants, in 1974 Congress created 10 pilot pretrial agencies within the federal courts to provide judges with the information necessary to make release decisions.[66] "[These] agencies, following and expanding on approaches initially developed by pretrial services projects in State court systems, developed strong support from judges and magistrates in the pilot districts."[67] Ultimately, after testimony from federal magistrates that neither defense counsel nor prosecutors were able to provide them with the information necessary to make an informed bail bond decision, Congress passed the Pretrial Services Act of 1982, which expanded the pilot program by establishing pretrial service agencies in virtually all of the federal district courts.[68]

N. THE BAIL REFORM ACT OF 1984

While pretrial services programs found their footing in the wake of the 1966 Act, a new debate over the administration of bail began to emerge. "The 1970s ushered in a new era for the bail reform movement, one characterized by heightened public concern over crime, including crimes committed by persons released on a bail bond. Highly publicized violent crimes committed by defendants while released pretrial prompted calls for more restrictive bail policies and led to growing dissatisfaction with laws that did not permit judges to consider danger to the community in setting release conditions."[69] The Bail Reform Act of 1966 had only narrowly addressed public safety. Under the Act, persons charged with *capital* offenses or awaiting sentence or appeal could be detained if the court found that "no one condition or combination of conditions will reasonably assure that the person will not flee or pose a danger to any other person or the community."[70] Nevertheless, judges were not authorized to consider danger to the community for any other bailable defendants.

After Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970, the first bail law in the country to make community safety an equal consideration to future court appearance in bail bond setting, many states drafted bail laws that also addressed future dangerousness and preventative detention. In 1984, Congress addressed the issue in the federal courts with its passage of the Comprehensive Crime Control Act of 1984.[71] Chapter I contained the Bail Reform Act of 1984, codified at 18 U.S.C. Sections 3141-3156, which amended the 1966 Act to include consideration of danger in order to address "the alarming problem of crimes committed by persons on release."[72] The

65 *See* John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington D.C.: BJA, 2003), at 2 [hereinafter Clark & Henry, *Programming*].

66 The pilot agencies were created in Title II of the Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, 18 U.S.C. § § 3161-74.

67 Barry Mahoney, Bruce D. Beaudin, John A. Carver III, Daniel B. Ryan, and Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential,* Nat'l Inst. of Just. (Washington D.C. 2001), at 6 [hereinafter, Mahoney, et al.].

68 Pretrial Services Act of 1982, Pub. L. No. 97-267, Sect. 2, 96 Stat. 1136 (codified at 18 U.S.C. § 3152. For articles reflecting on the 25th anniversary of the Act, *see* Federal Probation (Admin. Office U.S. Courts, Sept. 2007).

69 *The Supervised Pretrial Release Primer,* Pretrial Servs. Res. Ctr. (BJA, August 1999), at 5.

70 Former 18 U.S.C. § 3148.

71 Pub. L. No. 98-473, 98 Stat. 1976 (1984).

72 *U.S. v. Salerno,* 481 U.S. 739, 742 (1987) (quoting S. Rep.

1984 Act mandates "pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[73] The Act further provides that if, after a hearing, "the judicial officer finds 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, such judicial officer shall order the detention of the person before trial."[74] The Act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.[75]

In *United States v. Salerno,* the United States Supreme Court upheld the 1984 Act's preventative detention language against facial due process and eighth amendment challenges. After reviewing the Act's procedures by which a judicial officer evaluates the likelihood of future dangerousness, the Court wrote, "[w]e think these extensive safeguards suffice to repel a facial challenge," and "[g]iven the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment."[76] Responding to the argument that the Act violated the Eighth Amendment, the Court concluded:

> Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.[77]

Prior to *Salerno,* the ABA had endorsed limited preventative detention in its revised Standards. After *Salerno,* both the NAPSA and the Prosecution Standards were revised to include public safety as a legitimate purpose of the pretrial release decision. By 1999, it was reported that at least 44 states and the District of Columbia had statutes that included public safety, as well as risk of failure to appear, as an appropriate consideration in the pretrial release decision.[78] Nevertheless, the need for improvement in this area is still evident. As noted in the ABA's current version of its *Standards for Criminal Justice,*

> although many states have revised their bail statutes to allow consideration of risk to public safety, no states have yet adopted a system that calls for the type of careful scrutiny of information about the defendant's background

98-225, p. 3, 1983).

73 18 U.S.C. § 3142 (b).

74 *Id.* § 3142 (e).

75 *See id.*

76 *Salerno,* 481 U.S., at 752.

77 *Id.* at 754-55.

78 *See* Lotze, *et. al., supra* note 1, at 12.

> and financial circumstances that was recommended in the [previous] Standards. On the contrary, it is common in many jurisdictions – especially ones that have no pretrial services program – for decisions about pretrial detention or release to be made with little or no information about the financial circumstances of the defendant or other factors relevant to assessing the nature of any risk presented by the defendant's release. Often, the decisions are made in hurried initial appearance proceedings in which the defendant is without counsel.
>
> * * * *
>
> Major improvements in pretrial processes are needed and are clearly feasible. A number of jurisdictions have established systems for gathering relevant and objective information about defendants' backgrounds and about the appropriateness of particular conditions for individual defendants, making release decisions based on such information, and successfully managing defendants on release through comprehensive pretrial services. In four states and the District of Columbia, bail bonding for profit has been completely or substantially eliminated.[79]

Specifically, Cohen & Reaves report that Illinois, Kentucky, Oregon, and Wisconsin do not allow commercial bail bonds, and the District of Columbia, Maine, and Nebraska allow these bonds but rarely use them.

In 1987, the Government Accounting Office studied the impact of the Bail Reform Act of 1984, as compared to the previous Act of 1966. In its report, the GAO found:

> (1) a larger percentage of defendants were detained during their pretrial period under the new law; (2) under the old law defendants were detained because they did not pay the set bail, while under the new law 51 percent were detained for lack of bail money and 49 percent were detained because they were considered a danger risk; (3) the new law left open to interpretation whether the money bail could be set at an amount that the defendant was unable to pay; (4) most of the defendants qualified for the rebuttable-presumption-of-danger provision were indicted for drug offenses that had imprisonment terms of 10 years or more; (5) the new law did not require federal prosecutors to seek pretrial detention of all defendants who met the rebuttable presumption criteria; (6) defendants released on bail who failed to appear for judicial proceedings totaled 2.1 percent under the old law and 1.8 percent under the new law; (7) defendants who were arrested for committing new crimes totaled 1.8 percent under the old law and 0.8 percent under the new law; and (8) although most court officials felt that the new bail law was more direct and honest because it allowed the system to label defendants as dangerous, they were concerned about the amount of time involved in attending detention hearings.[80]

These findings are enlightening to the federal system, as well as to the various state and local jurisdictions creating or modifying preventative detention provisions.

79 ABA Standards, *supra* note 51, at 32-33.

80 *Criminal Bail: How Bail Reform is Working in Selected District Courts,* GAO Report No. GGD-88-6 (Oct. 23, 1987) (press release), at 1.

O. JAIL CROWDING

One of the most significant developments affecting the administration of bail in the last 20 years is undoubtedly jail crowding. As noted by the U.S. Department of Justice's National Institute of Corrections, jail crowding "can create serious management problems," can "compromise the safety of inmates and staff," can result in the "loss of system integrity," and "can even lead to system fragmentation."[81]

Moreover, as noted by the ABA, in addition to any negative consequences to the defendant that are caused by unnecessary pretrial detention (e.g., loss of job, strained family relations), "such detention, often very lengthy, leads directly to overcrowded jails and ultimately to large expenditures of scarce public resources for construction and operation of new jail facilities."[82]

In 1984, officials responding to a National Institute of Justice survey described jail crowding as "the most pressing problem facing criminal justice systems in the United States."[83] In 2000, a Bureau of Justice Assistance monograph reported that "jail crowding continues to be a nationwide problem. This is somewhat surprising because in the intervening years [between 1985 and 1999] there was a boom in the construction of correctional facilities in many parts of the country and a decline in crime through the entire United States."[84] By 2006, the nation's jail population totaled over 750,000 inmates, and local jail facilities operated at about 94% of their rated capacity.[85] Moreover, "[s]ince 2000, the number of unconvicted inmates held in local jails has been increasing. As of June 30, 2006, 62 percent of inmates held in local jails were awaiting court action on their current charge, up from 56 percent in 2000."[86] Another study of felony defendants in 75 of the most populous counties in the U.S. found that 38% of all defendants charged with a felony were held in confinement until the disposition of their court case.[87]

The cost of housing these pretrial inmates has become prohibitive (as much as $65 to $100 per inmate per day, or nearly $24,000 to $36,500 per inmate per year), and the cost to build new facilities is also high (as much as $75,000 to $100,000 per bed).[88] With only three realistic alternatives for alleviating a crowded jail facility (reduce bookings, reduce inmate lengths of stay, or build a new facility with more beds), many jurisdictions simply cannot continue to tolerate inefficient bail administration practices that exacerbate the crowding problem.

Today, jail crowding remains a legitimate, if not compelling purpose for jurisdictions to

81 Bennett & Lattin, *Jail Capacity Planning Guide, A Systems Approach* (NIC No. 022722, Nov. 2009) available at http://nicic.gov/Library/022722.

82 ABA Standards, *supra* note 51, at 33.

83 *National Assessment Program: Assessing Needs in the Criminal Justice System* (Washington, DC: Abt Assoc. for the Nat'l Inst. of Just., Jan. 1984), at 4.

84 *A Second Look at Alleviating Jail Crowding; A Systems Perspective* (BJA, 2000), at 1.

85 *See* William J. Sabol, Todd D. Minton, and Paige M. Harrison, *Prison and Jail Inmates at Midyear 2006* (BJS 2007), at 5, 7 [hereinafter Sabol].

86 *Largest Increase in Prison and Jail Inmate Populations Since Midyear 2000,* (BJS Press Release, June 28, 2007); *See* also Sabol et al., *supra* note 85, at 6

87 *See* Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, 1990-2004*, U.S. Dep't of Just. Office of Just. Programs, Bureau of Just. Stats. (Nov. 2007) at 2 [hereinafter Cohen & Reaves].

88 Of course, construction and management costs to build new jail facilities can vary widely based on a number of factors, and calculation of an accurate average jail bed cost can be elusive. *See* Alan R. Beck, *Misleading Jail Bed Costs,* at http://www.justiceconcepts.com/cost.htm.

reduce their reliance on the traditional money bail system. In the recent article, *The Impact of Money Bail on Jail Bed Usage* (American Jails, July/August 2010),[89] author John Clark presents the most recent Bureau of Justice Statistics data showing: (1) that jail populations, and especially pretrial inmate populations, have continued to rise even as reported crime has gone down; (2) that the growth in pretrial inmate populations is being driven by the use of money bail; and (3) that money bail adds significantly to a defendant's length of stay in the jail, and sometimes means that the defendant will not be released at all prior to case adjudication. The author concludes that "[i]n looking for ways to reduce correctional populations to better manage costs, the pretrial population must have a prominent place in any discussions. And at the forefront of those discussions must be the changing of reliance on money bail."

P. MONEY BAIL BONDSMEN v. PRETRIAL SERVICES AGENCIES

Increased judicial reliance on personal recognizance bonds and on pretrial services agencies for supervision of released inmates has generated friction between these agencies and members of the commercial surety industry. During the mid-1990s, money bail bond organizations, including the National Association of Bail Insurance Companies ("NABIC") and various state bail organizations, worked with the American Legislative Exchange Council ("ALEC," an organization consisting of "state legislators and conservative policy advocates," including corporations and trade associations such as NABIC and the American Bail Coalition) to create an initiative titled "Strike Back!" Strike Back was an aggressive and concerted effort to eliminate pretrial services agencies (termed "free bail" agencies and "criminal welfare programs" in the commercial surety industry literature) and release on personal recognizance bond to promote the interests of the commercial surety industry. These efforts were opposed in the mid 1990s by organizations such as the Pretrial Services Resource Center (now known as the Pretrial Justice Institute),[90] and have been countered since by pretrial services and other justice organizations, which continue to call for the abolition of compensated sureties. In the years leading up to 2009-2010, money bail bondsmen have promoted their interests somewhat more passively through repeated reference to two studies, one examining failure to appear rates, fugitive rates, and capture rates for felony defendants released on cash bond, deposit bond, own recognizance, and surety bond,[91] and the other a comparison of pretrial release options in large California counties.[92]

Q. 2009-2010 DEVELOPMENTS

Most recently, jurisdictions across the United States have become significantly more interested in the topic of bail and pretrial release. This renewed interest has been amplified in 2009 to 2010, as manifested by the following relevant bail-related events in several categories.

89 Available from the American Jail Association, at http://www.aja.org/advertising/jailmagazine/default.aspx.

90 *See, e.g.,* Spurgeon Kennedy & D. Alan Henry, *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision,* Pretrial Servs. Res. Ctr. (July 1994, edited and reprinted in 1996) [hereinafter Kennedy & Henry]. The 1996 reprint is available online through the Pretrial Justice Institute, at http://www.pretrial.org/Docs/Documents/commsuretybail.doc.

91 Eric Helland & Alexander Tabarrok, *Public versus Private Law Enforcement: Evidence from Bail Jumping,* 47 J. of L. and Econ. 93 (2004).

92 Michael K. Block, *The Effectiveness and Cost of Secured and Unsecured Pretrial Release in California's Large Urban Counties: 1990-2000,* found online, at http://www.suretyoneinc.com/sorpts/TheEffectivenessPreTrialRelease..pdf.

Pretrial Risk Assessments

In April of 2009, the U.S. Department of Justice issued its document titled "Pretrial Risk Assessment in the Federal Court – For the Purposes of Expanding the Use of Alternatives to Detention," a report on the pretrial services function in the federal court system from an evidence-based perspective.[93] The study's stated purpose was to (1) identify statistically significant and policy relevant predictors of pretrial outcomes in order to identify federal defendants who are suitable for pretrial release without jeopardizing community safety or judicial integrity, and (2) develop recommendations for the use of funding that supports the federal judiciary's alternatives to detention program.

This study coincided with the creation of a Federal Pretrial Risk Assessment, which was developed by Dr. Christopher Lowenkamp to provide a consistent and valid method of predicting risk of failure to appear, new criminal arrests, and technical violations for the federal court system.[94]

For similar reasons, the State of Virginia revalidated its statewide pretrial risk assessment instrument in May of 2009,[95] and other jurisdictions across the United States are currently looking at ways to either create or incorporate existing validated risk assessments into their practices. For example, throughout 2009 several Colorado counties representing roughly 85% of the State's population continued their work on the Colorado Improving Supervised Pretrial Release project. That project aims to develop a similar validated pretrial risk assessment for use in the Colorado courts, as well as evidence-based supervision protocols that match pretrial release supervisory techniques to each defendant's specific risk profile in order to lessen his or her risk to public safety and for failure to appear for court.[96]

National Crime Commission

In April 2009, U.S. Senator Jim Webb introduced his bill to establish the National Criminal Justice Commission Act, which would be tasked with a top-to-bottom review of all areas of the criminal justice system, including federal, state, local, and tribal government's criminal justice costs, practices, and policies.[97] On July 27, 2010, the House version passed, and on August 5, 2010, it was placed with the Senate version on the Senate legislative calendar.

The National Association of Counties

In October of 2009, the National Association of Counties (NACo), the only national organization that represents county governments in the United States, took a major step toward bail reform by adding to their Justice and Public Safety Platform, among other things, recommendations for county policies "ensuring" (1) pretrial investigation and assessment, and (2) least restrictive bail bond conditions, including release on recognizance, nonfinancial supervised release, and also preventative

93 VanNostrand, Marie, and Gena Keebler, *Pretrial Risk Assessment in the Federal Court,* found at http://nicic.gov/Library/023758.

94 *See Introduction to Special Issue on Assessing Pretrial Risk in the Federal Courts,* 73 Federal Probation 2 (Sept. 2009).

95 For a copy, as well as other documents associated with the Virginia pretrial risk assessment, go to http://www.dcjs.virginia.gov/corrections/riskAssessment/?menuLevel=5&mID=12.

96 *See* Michael R. Jones and Sue Ferrere, *Improving Pretrial Assessment and Supervision in Colorado,* Topics in Community Corrections (U.S. Dept. of Just., Nat'l Inst. of Corr. 2008), at 13.

97 For the language of the bill, as well as related materials, including news articles, go to http://webb.senate.gov/issuesandlegislation/criminaljusticeandlawenforcement/Criminal_Justice_Banner.cfm.

detention.[98] Notably, in the section on Bail Practices and Release Options, NACo now recommends that states enact defendant-based percentage bail laws,[99] and that States and localities make greater use of such non-financial pretrial release options such as citation release and release on recognizance where there is a reasonable expectation that public safety will not be threatened.

Finally, and perhaps most relevant to those jurisdictions examining their current bail practices in light of the law and national standards, the platform states as follows: "NACo recommends that all counties establish a written set of policies and procedures aligned with state statute, national professional standards, and best practices on the pretrial release decision."[100]

The Pretrial Justice Institute

In the last two years, the Pretrial Justice Institute, the only national nonprofit organization "dedicated to ensuring informed pretrial decision-making for safe communities,"[101] released a number of relevant documents and reports, including: (1) "A Framework for Implementing Evidence-Based Practices in Pretrial Services"; (2) its annual survey of pretrial services programs; (3) "Jail Population Management: Elected County Official's Guide to Pretrial Services" (with the Bureau of Justice Assistance and the National Association of Counties); and (4) "Understanding the Findings from the Bureau of Justice Statistics [BJS] Report, 'Pretrial Release of Felony Defendants in State Court.'"[102]

This last document is particularly interesting because of its effect. It was drafted in response to for-profit bail bond industry claims that certain national statistics produced by BJS demonstrated that "commercial bail is the most effective method of pretrial release."[103] For several reasons, the PJI document concluded that this statement was erroneous, and that the national statistics could not be used to determine effectiveness.[104] The PJI document sparked a debate that went unsettled until, in March of 2010, BJS itself released a document supporting PJI's position by advising persons not to use its statistics for causal associations, and specifically warning that "evaluative statements about the effectiveness of a particular program in preventing pretrial misconduct may be misleading."[105] Despite the warning, however, the for-profit bail bondsmen have continued using the national statistics for both causal associations and evaluative statements.

Pretrial Services Agencies v. Commercial Bail Bondsmen – Part II

98 NACo, *Justice and Public Safety (09-10),* at 4, found at http://www.naco.org/legislation/policies/Documents/Justice%20and%20Public%20Safety/JPS_platform_09-10.pdf.

99 For several reasons, many national bail experts believe that percentage bail laws only foster a flawed, money based bail system, and that better alternatives exist to help indigent defendants.

100 NACo, *Justice and Public Safety (09-10),* at 8, found at http://www.naco.org/legislation/policies/Documents/Justice%20and%20Public%20Safety/JPS_platform_09-10.pdf.

101 PJI website, found at http://www.pretrial.org/AboutPJI/Pages/default.aspx.

102 For these and other documents, go to http://www.pretrial.org/Resources/Pages/archived%20publishedresearch.aspx.

103 *Id., Understanding the Findings,* at n. ii.

104 Other authors have also noted the misuse of these national statistics by commercial bail bondsmen, and have given independent assessments of limitations associated with using those statistics. *See Jones, Brooker, and Schnacke, A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District,* available through the Jefferson County, Colorado Criminal Justice Planning Unit, found at http://jeffco.us/cjp/index.htm.

105 *See State Court Processing Statistics Data Limitations,* at http://bjs.ojp.usdoj.gov/content/pub/pdf/scpsdl_da.pdf.

In August of 2009, the National Association of Pretrial Services Agencies released *The Truth About Commercial Bail Bonding in America*.[106] This particular document was apparently drafted to counter a fairly strong and concerted effort by national for-profit bail bonding interests to promote commercial sureties and demote professional pretrial services agencies.[107] One of those interests, the Allegheny Casualty, International Fidelity, and Associated Bond Company ("AIA"), countered with a booklet entitled *Taxpayer Funded Pretrial Release, A Failed System,* which was designed to "point out the critical performance differentials between government and private sector bail bonding."[108]

Throughout 2009, the struggle between commercial sureties and pretrial services agencies took place mostly in state legislatures, with intense fights in several states. In Virginia, the for-profit bail bond industry unsuccessfully lobbied for passage of a bill that would: (1) significantly limit judicial discretion by requiring financial bonds in every criminal case unless the defendant was identified as indigent; and (2) reduce state funding for Virginia's pretrial services programs.[109]

In Florida, a bill that would prohibit those with money from being released to any entity but a for-profit bail bondsman failed to pass, as did a late amendment designed to prohibit supervised non-financial release for most felony defendants.[110] This failed legislative effort did not deter for-profit bail bond interests in that State, who continue to press their cause to county commissioners, judges, and sheriffs.

In Georgia, for-profit bail bonding interests successfully backed a bill that reduced the types of defendants who may be released to a pretrial services program with electronic monitoring.[111]

In November 2010, Washington State citizens will be asked to vote on a legislatively-referred constitutional amendment to enable that State to broaden its preventative detention provisions. The changes in law were precipitated by the 2009 killing of four police officers by an Arkansas parolee released on a $190,000.00 surety bond.[112]

Most recently, national bail bond interests have helped local bail bondsmen in Colorado craft "Proposition 102," a citizen initiative for the November 2010 election that would force judges wanting to authorize pretrial supervision to also add up-front money conditions to virtually all pretrial defendants' bail bonds. According to the

106 Found at http://www.napsa.org/publications/napsafandp1.pdf.

107 Many of the documents, videos, press releases, and related links promoted by the commercial bail bonding industry can be found at https://www.aiasurety.com/, the home page to the Allegheny Casualty, International Fidelity, and Associated Bond companies.

108 The booklet can be ordered from AIA through its website at https://www.aiasurety.com/home/pretrialtruth.aspx.

109 *See Bail bill would punish defendants for not being poor* (Feb. 2, 2010) found at http://articles.dailypress.com/2010-02-02/news/dp-local_tamara_0203feb03_1_pretrial-defendants-bank-account; *Bondsmen battle government program* (Jan. 28, 2010) found at http://fredericksburg.com/News/FLS/2010/012010/01282010/524141/index_html.

110 *See Battle over bail bonds* (April 13, 2010) found at http://www.miamiherald.com/2010/04/13/1576502/battle-over-bail-bonds.html; *Pretrial release targeted by bail bond lobby and Florida legislators* (March 27, 2010) found at http://www.tampabay.com/news/courts/criminal/article1083146.ece.

111 *See* Georgia HB 306, found at http://www.legis.ga.gov/legis/2009_10/fulltext/hb306.htm.

112 *See* at http://ballotpedia.org/wiki/index.php/Washington_Judge_Bail_Authority_Amendment_(2010); *see also Four days in May set stage for Sunday's tragedy,* at http://seattletimes.nwsource.com/cgi-bin/PrintStory.pl?document_id=2010392869&zsection_id=2003925728&slug=shootingjustice01m&date=20091201

Colorado Legislative Council Staff, the neutral and objective research entity of the Colorado General Assembly, Proposition 102 would cost Colorado taxpayers millions of dollars a year if it is passed.[113]

Proponents of Proposition 102 have written publicly that they are concerned with public safety and dedicated to decreasing crime and reducing recidivism. This should be contrasted, however, with quotes found in a recent news story by 9News (KUSA-TV in Denver), which exposed bail bondsmen for using technicalities and other unethical strategies to be exonerated from bail bonds whenever defendants fail to appear. As the story noted, "[The bail agent] said his allegiance is not to the courts and the justice system, but rather to the insurance company. 'My job is to protect the insurance company from the loss . . . It's not a greed thing, we just don't want to pay.'"[114]

These particular examples represent only a small portion of the overwhelming number of bills and initiatives concerning bail and pretrial release that were introduced throughout the country in the last two years, further testifying to the importance of the subject, as well as to the intensity of the fight.[115]

According to the Americans for the Preservation of Bail, the fight is indeed a national one, in which that group has vowed to "advance the responsible use of commercial bail," "expose[] pretrial services (sic) radical social agenda," "build coalitions in states . . . to identify threats to Commercial Bail," and to "[t]ake the fight against government run criminal welfare nationwide!"[116]

The commercial bail bond industry's national agenda has been manifested mostly through the work of Jerry Watson, Chief Legal Officer of AIA, past head of the American Bail Coalition, and past chairman of ALEC.[117] Both ALEC and the for-profit bail bonding industry have attempted to push nationally a model bill titled the "Citizens Right to Know: Pretrial Release Act," which would place numerous (and in most cases, additional) reporting requirements on pretrial services agencies.[118] In support of this and other bills, in April 2010, AIA and ALEC sent copies of the publication, *Taxpayer Funded Pretrial Release – A Failed System*,[119] to 2,500 legislators across the country.

The contentiousness of the national debate can be seen through countless news articles, editori-

113 Copies of the proposition's language are available through Jefferson County, Colorado, Criminal Justice Planning Unit, found at http://jeffco.us/cjp/index.htm.

114 *Justice delayed while some fugitives run free, bondsmen pocket fees,* found at http://www.9news.com/rss/article.aspx?storyid=139626. Mike Donovan, proponent of Colorado Ballot Initiative 92 (now Proposition 102), recently posted Bail USA's official response to the story, in which he stated that he didn't believe bail agents were doing anything wrong, and that, instead, the courts were making "serious mistakes."

115 For an updated list of all legislation relevant to bail and pretrial release across the country, go to https://www.aiasurety.com/home/resources/legislative-log.aspx. It is believed that Oregon will consider a bill to reinstate commercial bail bonding in that state in its next legislative session.

116 Go to http://www.preservebail.com/.

117 Mr. Watson's close affiliation with ALEC may foster the distribution of potentially misleading information. In a recent speech, Watson stated that he drafted an article questioning the efficacy of pretrial release agencies, but "got [ALEC] to print it as an ALEC piece because we didn't want it to come from a bail bonding organization – we wanted it to look like it came from some neutral, political source." *See The Bail Agent's Perfect Storm – Conclusion,* found at http://www.channels.com/search?search_box=AIA+&search_type=Episode#/search?search_box=AIA+&search_type=Episode at 27:52.

118 *See The State Factor, Criminals on the Streets – A Citizen's Right to Know* (Jan. 2009) found at http://www.alec.org/am/pdf/sfbailbondjan09.pdf.

119 *See supra* note 108.

als, and advertisements highlighting the struggle between for-profit bail bondsmen and professional pretrial release agencies throughout 2009 and 2010. Perhaps the most widely disseminated report was a three-part National Public Radio piece in January 2010 on problems associated with the American money bail system.[120]

Other Organizations

Organizations typically considered as being outside of the ongoing struggle between commercial sureties and pretrial services agencies also released several relevant documents throughout 2009 and into 2010. In November 2009, the National Institute of Corrections (NIC) of the U.S. Department of Justice published its "Jail Capacity Planning Guide: A Systems Approach."[121] In that document, the authors stress the need for an understanding of the interactive effects of criminal justice system policies and practices on jail planning, and suggest that system leaders combine data analysis with a qualitative review of such things as bail policies and adherence to national standards. In discussing specific jail population management strategies, the authors highlight the need for more purposeful booking decisions and early assignment of defense counsel to help manage pretrial inmate populations, and point to pretrial services programs as "indispensable component[s] of an efficient criminal justice system."[122]

The same month, the American Jail Association published "69 Ways to Save Millions" in its American Jails Magazine.[123] The article summarizes strategies gleaned from interviews with jail administrators across the United States on how to operate jails within budgets without compromising public safety, including strategies to review and revise bail and pretrial release policies. In the same edition of that magazine, author and NIC consultant Mark Cunniff emphasizes the need for agencies to undertake jail impact studies when implementing new program or policy initiatives in the criminal justice system.

In the NIC sponsored article titled, "A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems,"[124] the authors cite to research demonstrating, among other things, the dangers of over-supervision of lower risk offenders as a possible cause for recidivism, and to "promising" research by John Goldkamp and Michael Gottfredson showing that judges using bail guidelines were more consistent in their use of release on recognizance than judges who did not use bail guidelines.[125]

Temple University Professor John Goldkamp's research, in particular, has special relevance to jurisdictions undertaking serious bail reform as he continues to publish articles on: (1) the lack of any empirical basis showing a relation between money and pretrial misconduct; (2) the abundance of empirical research showing that money is the primary reason for pretrial detention (except, perhaps, in the District of Columbia and the Federal systems, where it is rarely used); and

120 Transcripts and audio recordings of this report are available from the Jefferson County Criminal Justice Planning Unit, found at http://jeffco.us/cjp/index.htm.

121 David M. Bennett and Donna Lattin, *Jail Capacity Planning Guide: A Systems Approach,* available at http://nicic.org/Downloads/PDF/Library/022722.pdf.

122 *Id.* at 10.

123 Found at http://nicic.org/Library/024189.

124 *See* National Institute of Corrections, *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (Center for Effective Policy, Pretrial Justice Institute, Justice Management Institute, and the Carrey Group, May 2010) at 9 n.13, found at http://nicic.gov/Library/024372.

125 *Id.* at 43, 48.

(3) the need to engage judges centrally in the bail reform process through study and review of actual practices, followed by formulation of, or agreement on, judicial policies concerning bail and pretrial release.

Finally, on June 7, 2010, the American Probation and Parole Association published a resolution supporting pretrial supervision services, in part because those agencies base their decisions on likelihood of court appearance and community safety considerations, as opposed to for-profit bail bondsmen, who make decisions based primarily on monetary considerations.

Crime and the Economy

The backdrop for all of these events, initiatives, and research has been (1) the foundering economy, and (2) the overall decrease in crime. Known widely as the late 2000s global recession, the significant deceleration of economic activity has had an impact on criminal justice systems generally, and particularly on various criminal justice actors, including for-profit bail bondsmen and defendants. According to author John Clark, "the riddle of the indigent defendant in the bail system" has been around for as long as money has been used as security.[126] Nevertheless, the recession has added complication to the already difficult requirement in many states to assess a defendant's financial condition for purposes of bail.[127] And yet, despite this recession, crime in the United States dropped dramatically in 2009, marking the third straight year of declines.[128]

126 Clark, John, *Solving the Riddle of the Indigent Defendant in the Bail System,* found at http://www.pretrial.org/Docs/Documents/Solving%20the%20Riddle.pdf.

127 *See, e.g.,* § 16-4-105 (1) (c) of the Colorado Revised Statutes.

128 See Crime rates down for third year, despite recession, found at http://abcnews.go.com/Politics/wireStory?id=10727789.

While many remain wary that the economy may create some longer term increase in crime, the current reduction has at least allowed criminal justice systems to focus on non-crisis driven improvements.

R. CONCLUSION

Overall, the history of bail and pretrial release shows steady but slow progress toward the realization of an ideal system of bail administration based on accurate predictions of court appearance and the commission of new crime. To many, however, the history of bail shows only that true bail reform has not been completely attained.

An internet query will uncover a multitude of quotes about the topic of history, from pithy to scathingly sarcastic. However, we leave you with one relevant to the underlying theme of prediction in the field of pretrial release. "History teaches everything, including the future," wrote Alphonse Marie Louis de Prat de Lamartine, the French writer, poet, and politician. If he is right, then perhaps a solid historical background can, in fact, teach us something about the future of bail and pretrial release in the United States – a future molded by those who are dedicated to repeating historical successes, while avoiding its failures.

Timothy R. Schnacke, Michael R. Jones, and Claire M. B. Brooker are currently employed in the Jefferson County, Colorado, Criminal Justice Planning Unit.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." -- *United States v. Salerno,* 481 U.S. 739, 755 (1987) (Rehnquist, C.J., for the Court).

Fundamentals of Bail

A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform

National Institute of Corrections

U.S. Department of Justice
National Institute of Corrections

Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform

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National Institute of Corrections

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Preface

Achieving pretrial justice is like sharing a book – it helps when everyone is on the same page. So this document, "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Justice," is primarily designed to help move America forward in its quest for pretrial reform by getting those involved in that quest on the same page. Since I began studying, researching, and writing about bail I (along with others, including, thankfully, the National Institute of Corrections) have seen the need for a document that figuratively steps back and takes a broader view of the issues facing America when it comes to pretrial release and detention. The underlying premise of this document is that until we, as a field, come to a common understanding and agreement about certain broad fundamentals of bail and how they are connected, we will see only sporadic rather than widespread improvement. In my opinion, people who endeavor to learn about bail will be most effective at whatever they hope to do if their bail education covers each of the fundamentals – the history, the law, the research, the national standards, and its terms and phrases.

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Executive Director

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Cherise Fanno Burdeen and the National Association of Pretrial Services Agencies, through the helpful assistance of John Clark and Ken Rose, provided invaluable input on the draft, and Spurgeon Kennedy saved the day with his usual excellent editorial assistance. Also, I am especially grateful to my friend Dan Cordova and his staff at the Colorado Supreme Court Law Library. Their extraordinary expertise and service has been critical to everything I have written for the past seven years. Special thanks, as well, go to my friend and mentor, Judge Truman Morrison, who continues daily to teach and inspire me on issues surrounding bail and pretrial justice.

I would also like to thank my dear friend and an extraordinary criminal justice professor, Eric Poole, who patiently listened and helped me to mold the more arcane concepts from the paper. Moreover, I am also indebted to my former boss, Tom Giacinti, whose foresight and depth of experience in criminal justice allowed him to forge a path in this generation of American bail reform.

Finally, I give my deepest thanks and appreciation to Claire Brooker (Jefferson County, Colorado) and Mike Jones (Pretrial Justice Institute), who not only inspired most of the paper, but also acted (as usual) as my informal yet indispensable editors. It is impossible to list all of their contributions to my work, but the biggest is probably that Claire and Mike have either conceived or molded – through their intellectual and yet practical lenses – virtually every thought I have ever had concerning bail. If America ever achieves true pretrial justice, it will be due to the hard work of people like Claire Brooker and Mike Jones.

Executive Summary

Pretrial justice in America requires a common understanding and agreement on all of the component parts of bail. Those parts include the need for pretrial justice, the history of bail, the fundamental legal principles underlying bail, pretrial research, the national standards on pretrial release and detention, and how we define our basic terms and phrases.

Why Do We Need Pretrial Improvements?

If we can agree on why we need pretrial improvements in America, we are halfway toward implementing those improvements. As recently as 2007, one of the most frequently heard objections to bail reform was the ubiquitous utterance, "If it ain't broke, don't fix it." That has changed. While various documents over the last 90 years have consistently pointed toward the need to improve the administration of bail, literature from this current generation of pretrial reform gives us powerful new information from which we can articulate exactly why we need to make changes, which, in turn, frames our vision of pretrial justice designed to fix what is most certainly broken.

Knowing that our understanding of pretrial risk is flawed, we can begin to educate judges and others on how to embrace risk first and mitigate risk second so that our foundational American precept of equal justice remains strong. Knowing that the traditional money-based bail system leads both to unnecessary pretrial detention of lower risk persons and the unwise release of many higher risk persons, we can begin to craft processes that are designed to correct this illogical imbalance. Knowing and agreeing on each issue of pretrial justice, from infusing risk into police officer stops and first advisements to the need for risk-based bail statutes and constitutional right-to-bail language, allows us as a field to look at each state (or even at all states) with a discerning eye to begin crafting solutions to seemingly insoluble problems.

The History of Bail

Knowing the history of bail is critical to understanding why America has gone through two generations of bail reform in the 20th century and why it is currently in a third. History provides the contextual answers to virtually every question raised at bail. Who is against pretrial reform and why are they against it? What makes this generation of pretrial reform different from previous generations? Why did America move from using unsecured bonds administered through a personal surety system to using mostly secured bonds administered through a commercial surety system and when, exactly, did that happen? In what ways are our current constitutional and statutory bail provisions flawed? What are historical solutions to the dilemmas we currently see in the field of pretrial? What is bail, and what is the purpose of bail? How do we achieve pretrial justice? All of these questions, and more, are answered through knowledge of the history of bail.

For example, the history tells us that bail should be viewed as "release," just as "no bail" should be viewed as detention. It tells us that whenever (1) bailable defendants are detained, or (2) unbailable defendants (or those whom we feel should be unbailable) are released, history demands a correction to ensure that, instead, bailable defendants are released and unbailable defendants are detained. Knowledge of this historical need for correction, by itself, points to why America is currently in a third generation of pretrial reform.

The history also tells us that it is the collision of two historical threads – the movement from an unsecured bond/personal surety system to a secured bond/commercial surety system colliding with the creation and nurturing of a "bail/no bail" dichotomy, in which bailable defendants are released and unbailable defendants are detained – that has led to the acute need for bail reform in the last 100 years. Thus, the history of bail instructs us not only on relevant older practices, but also on the important lessons from more recent events, including the first two generations of bail reform in America in the 20th century. It tells us how we can change state laws, policies, and practices so that bail can be administered in a lawful and effective manner, thereby greatly diminishing, if not avoiding altogether, the need for future reform.

The Legal Foundations of Pretrial Justice

The history of bail and the law underlying the administration of bail are intertwined (with the law in most cases confirming and solidifying the history), but the law remains as the framework and boundary for all that we do in the pretrial field. Unfortunately, however, the legal principles underlying bail are uncommon in our court opinions; rarely, if ever, taught in our law schools and colleges; and have only recently been resurrected as subjects for continuing legal education. Nevertheless, in a field such as bail, which strives to follow "legal and evidence-based practices," knowledge of the fundamental legal principles and why they matter to the administration of bail is crucial to pretrial justice in America. Knowing "what works" – the essence of following the evidence in any particular field – is not enough in bail. We must also know the law and how the fundamental legal principles apply to our policies and practices.

Each fundamental principle of national applicability, from probable cause and individualization to excessiveness, due process, and equal protection, is thus a rod by which we measure our daily pretrial practices so that they further the lawful goals underlying the bail process. In many cases, the legal principles point to the need for drastic changes to those practices. Moreover, in this generation of bail reform we are beginning to learn that our current state and local laws are also in need of revision when held up to the broader legal foundations. Accordingly, as changing concepts of risk are infused into our knowledge of bail, shedding light on practices and local laws that once seemed practical but now might be considered irrational, the fundamental legal principles rise up to instruct us on how to change our state constitutions and bail statutes so that they again make sense.

Pretrial Research

The history of bail and the law intertwined with that history tell us that the three goals underlying the bail process are to maximize release while simultaneously maximizing court appearance and public safety. Pretrial social research that studies what works to effectuate all three of these goals is superior to research that does not, and as a field we must agree on the goals as well as know the difference between superior and inferior research.

Each generation of bail reform in America has had a body of literature supporting pretrial improvements, and while more research is clearly needed (in

all genres, including, for example, social, historical, and legal research) this generation nonetheless has an ample supply from which pretrial practitioners can help ascertain what works to achieve our goals. Current research that is highly significant to today's pretrial justice movement includes research used to design empirical risk assessment instruments and to gauge the effectiveness of release types or specific conditions on pretrial outcomes.

The National Standards on Pretrial Release

The pretrial field benefits significantly from having sets of standards and recommendations covering virtually every aspect of the administration of bail. In particular, the American Bar Association Standards, first promulgated in 1968, are considered not only to contain rational and practical "legal and evidence-based" recommendations, but also to serve as an important source of authority and have been used by legislatures and cited by courts across the country.

As a field we must recognize the importance of the standards and stress the benefits from jurisdictions holding up their practices against what most would consider to be "best" practices. On the other hand, we must recognize that the rapidly evolving pretrial research may ultimately lead to questioning and possibly even revising those standards.

Pretrial Terms and Phrases

A solid understanding of the history of bail, the legal foundations of bail, the pretrial research, and the national standards means, in many jurisdictions, that even such basic things as definitions of terms and phrases are in need of reform. For example, American jurisdictions often define the term "bail" in ways that are not supported by the history or the law, and these improper definitions cause undue confusion and distraction from significant issues. As a field seeking some measure of pretrial reform, we must all first agree on the proper and universally true definitions of our key terms and phrases so that we speak with a unified voice.

Guidelines for Pretrial Reform

Pretrial justice in America requires a complete cultural change from one in which we primarily associate bail with money to one in which we do not. But cultural change starts with individuals making individual decisions to act. It may seem daunting, but it is not; many persons across America have decided to follow the

research and the evidence to assess whether pretrial improvements are necessary, and many of those same persons have persuaded entire jurisdictions to make improvements to the administration of bail. What these persons have in common is their knowledge of the fundamentals of bail. When they learn the fundamentals, light bulbs light, the clouds of confusion part, and what once seemed impossible becomes not only possible, but necessary and seemingly long overdue.

This document is designed to help people come to the same epiphany that has led so many to focus on pretrial reform as one of the principle criminal justice issues facing our country today. It is a resource guide written at a time when the resources are expanding exponentially and pointing in a single direction toward reform. More importantly, however, it represents a mental framework – a slightly new and interconnected way of looking at things – so that together we can finally and fully achieve pretrial justice in America.

Introduction

It is a paradox of criminal justice that bail, created and molded over the centuries in England and America primarily to facilitate the release of criminal defendants from jail as they await their trials, today often operates to deny that release. More unfortunate, however, is the fact that many American jurisdictions do not even recognize the paradox; indeed, they have become gradually complacent with a pretrial process through which countless bailable defendants are treated as unbailable through the use of money. To be paradoxical, a statement must outwardly appear to be false or absurd, but, upon closer examination, shown to be true. In many jurisdictions, though, a statement such as, "The defendant is being held on $50,000 bail," a frequent tagline to any number of newspaper articles recounting a criminal arrest, seems to lack the requisite outward absurdity to qualify as paradoxical. After all, defendants are "held on bail" all the time. But the idea of being held or detained on bail is, in fact, absurd. An equivalent statement would be that the accused has been freed and is now at liberty to serve time in prison.

Recognizing the paradox is paramount to fully understanding the importance of bail, and the importance of bail cannot be overstated. Broadly defined, the study of bail includes examining all aspects of the non-sentence release and detention decision during a criminal defendant's case.[1] Internationally, bail is the subject of numerous treaties, conventions, rules, and standards. In America, bail has been the focus of two significant generations of reform in the 20th century, and appears now to be firmly in the middle of a third. Historically speaking, bail has existed since Roman times and has been the catalyst for such important criminal jurisprudential innovations as preliminary hearings, habeas corpus, the notion of "sufficient sureties," and, of course, prohibitions on pretrial detention without charge and on "excessive" bail as foundational to our core constitutional rights. Legally, decisions at bail trigger numerous foundational principles, including

[1] A broad definition of the study of criminal bail would thus appropriately include, and has in the past included, discussion of issues occasionally believed to be outside of the bail process, such as the use of citations in order to avoid arrest altogether or pretrial diversion as a dispositional alternative to the typical pretrial release or detention/trial/adjudication procedure. A broad definition would certainly include discussions of post-conviction bail, but because of fundamental differences between pretrial defendants and those who have been convicted, that subject is beyond the scope of this paper. For purposes of this paper, "bail" will refer to the pretrial process.

due process, the presumption of innocence, equal protection, the right to counsel, and other key elements of federal and state law. In the realm of criminal justice social science research, bail is a continual source of a rich literature, which, in turn, helps criminal justice officials as well as the society at large to decide the most effective manner in which to administer the release and detention decision. And finally, the sheer volume and resulting outcomes of the decisions themselves – decisions affecting over 12 million arrestees per year – further attest to the importance of bail as a topic that can represent either justice or injustice on a grand scale.

Getting Started – What is Bail? What is Bond?

Later in this paper we will see how the history, the law, the social science research, and the national best practice standards combine to help us understand the proper definitions of terms and phrases used in the pretrial field. For now, however, the reader should note that the terms "bail" and "bond" are used differently across America, and often inaccurately when held up to history and the law. In the 1995 edition to his Dictionary of Modern Legal Usage, Bryan Garner described the word "bail" as a "chameleon-hued" legal term, with strikingly different meanings depending on its overall use as a noun or a verb. And indeed, depending on the source, one will see "bail" defined variously as money, as a person, as a particular type of bail bond, and as a process of release. Occasionally, certain definitions will conflict with other definitions or word usage even within the same source. Accordingly, to reflect an appropriate legal and historical definition, the term "bail" will be used in this paper to describe a process of releasing a defendant from jail or other governmental custody with conditions set to provide reasonable assurance of court appearance or public safety.

The term "bond" describes an obligation or a promise, and so the term "bail bond" is used to describe the agreement between a defendant and the court, or between the defendant, a surety (commercial or noncommercial), and the court that sets out the details of the agreement. There are many types of bail bonds – secured and unsecured, with or without sureties, and with or without other conditions – that fall under this particular definition. Later we will also see how defining types of bonds primarily based on their use of money in the process (such as a "cash" bond or a "personal recognizance bond") is misleading and inaccurate.

This paper occasionally mentions the terms "money bail," and the "traditional money bail system." "Money bail" is typically used as a shorthand way to describe the bail process or a bail bond using secured financial conditions (which

necessarily includes money that must be paid up-front prior to release). The two central issues concerning money bail are: (1) its tendency to cause unnecessary incarceration of defendants who cannot afford to pay secured financial conditions either immediately or even after some period of time; and (2) its tendency to allow for, and sometimes foster, the release of high-risk defendants, who should more appropriately be detained without bail.

The "traditional money bail system" typically describes the predominant American system (since about 1900) of primarily using secured financial conditions on bonds administered through commercial sureties. More broadly, however, it means any system of the administration of bail that is over-reliant on money, typically when compared to the American Bar Association's National Standards on Pretrial Release. Some of its hallmarks include monetary bail bond schedules, overuse of secured bonds, a reliance on commercial sureties (for-profit bail bondsmen), financial conditions set to protect the public from future criminal conduct, and financial conditions set without consideration of the defendant's ability to pay, or without consideration of non-financial conditions or other less-restrictive conditions that would likely reduce risk.

Sources and Resources: Black's Law Dictionary (9th ed. 2009); Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press, 2nd ed. 1995); Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011).

The importance of bail foreshadows the significant problems that can arise when the topic is not fully understood. Those problems, in turn, amplify the paradox. A country founded upon liberty, America leads the world in pretrial detention at three times the world average. A country premised on equal justice, America tolerates its judges often conditioning pretrial freedom based on defendant wealth – or at least on the ability to raise money – versus important and constitutionally valid factors such as the risk to public and victim safety. A country bound by the notion that liberty not be denied without due process of law, America tolerates its judges often ordering de-facto pretrial detention through brief and perfunctory bail hearings culminating with the casual utterance of an arbitrary and often irrational amount of money. A country in which the presumption of innocence is "axiomatic and elementary" [2] to its administration of criminal justice and foundational to the right to bail,[3] America, instead, often projects a presumption of guilt. These issues are exacerbated by the fact that the type of pretrial justice a person gets in this country is also determined, in large part, on where he or she is, with some jurisdictions

[2] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

[3] *See Stack v. Boyle*, 342 U.S. 1, 4 (1951).

endeavoring to follow legal and evidence-based pretrial practices but with others woefully behind. In short, the administration of bail in America is unfair and unsafe, and the primary cause for that condition appears simply to be: (1) a lack of bail education that helps to illuminate solutions to a number of well-known bail problems and (2) a lack of the political will to change the status quo.

> *"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."*
>
> Nelson Mandela, 1995

Fortunately, better than any other time in history, we have now identified, and in many cases have actually illustrated through implementation, solutions to the most vexing problems at bail. But this knowledge is not uniform. Moreover, even where the knowledge exists, we find that jurisdictions are in varying stages of fully understanding the history of bail, legal foundations of bail, national best practice recommendations, terms and phrases used at bail, and legal and evidence-based practices that fully implement the fair and transparent administration of pretrial release and detention. Pretrial justice requires that those seeking it be consistent with both their vision and with the concept of pretrial best practices, and this document is designed to help further that goal. It can be used as a resource guide, giving readers a basic understanding of the key areas of bail and the criminal pretrial process and then listing key documents and resources necessary to adopt a uniform working knowledge of legal and evidence-based practices in the field.

Hopefully, however, this document will serve as more than just a paper providing mere background information, for it is designed, instead, to also provide the intellectual framework to finally achieve pretrial justice in America. As mentioned previously, in this country we have undertaken two generations of pretrial reform, and we are currently in a third. The lessons we have learned from the first two generations are monumental, but we have not fully implemented them, leading to the need for some "grand unifying theory" to explore how this third generation can be our last. In my opinion, that theory comes from a solid consensus understanding of the fundamentals of bail, why

they are important, and how they work together toward an idea of pretrial justice that all Americans can embrace.

The paper is made up of seven chapters designed to help jurisdictions across America to reach consensus on a path to pretrial justice. In the first chapter, we will briefly explore the need for pretrial improvements as well as the reasons behind the current generation of reform. In the second chapter, we will examine the evolution of bail through history, with particular emphasis on why the knowledge of certain historical themes is essential to reforming the pretrial process. In the third chapter, we will list and explain fundamental legal foundations underpinning the pretrial field. The fourth chapter will focus on the evolution of empirical pretrial research, looking primarily at research associated with each of the three generations of bail reform in America in the 20th and 21st centuries.

The fifth chapter will briefly discuss how the history, law, and research come together in the form of national pretrial standards and best practice recommendations. In the sixth chapter, we will further discuss how bail's history, law, research, and best practice standards compel us to agree on certain changes to the way we define key terms and phrases in the field. In the seventh and final chapter, we will focus on practical application – how to begin to apply the concepts contained in each of the previous sections to lawfully administer bail based on best practices. Throughout the document, through sidebars, the reader will also be introduced to other important but sometimes neglected topics relevant to a complete understanding of the basics of bail.

Direct quotes are footnoted, and other, unattributed statements are either the author's own or can be found in the "additional sources and resources" sections at the end of most chapters. In the interest of space, footnoted sources are not necessarily listed again in those end sections, but should be considered equally important resources for pretrial practitioners. Throughout the paper, the author occasionally references information that is found only or various websites. Those websites are as follows:

The American Bar Association: http://www.americanbar.org/aba.html;

The Bureau of Justice Assistance: https://www.bja.gov/;

The Bureau of Justice Statistics: http://www.bjs.gov/;

The Carey Group: http://www.thecareygroup.com/;

The Center for Effective Public Policy: http://cepp.com/;

The Crime and Justice Institute: http://www.crj.org/cji;

The Federal Bureau of Investigation Crime Reports: http://www.fbi.gov/about-us/cjis/ucr/ucr;

Human Rights Watch: http://www.hrw.org/;

Justia: http://www.justia.com/;

The Justice Management Institute: http://www.jmijustice.org/;

The Justice Policy Institute: http://www.justicepolicy.org/index.html;

NACo Pretrial Resources, http://www.naco.org/programs/csd/Pages/PretrialJustice.aspx;

The National Association of Pretrial Services Agencies: http://napsa.org/;

The National Criminal Justice Reference Service: https://www.ncjrs.gov/;

The National Institute of Corrections, http://nicic.gov;

The National Institute of Justice: http://www.nij.gov/Pages/welcome.aspx;

The Pretrial Justice Institute: http://www.pretrial.org/;

The Pretrial Services Agency for the District of Columbia, http://www.psa.gov/;

The United States Census Bureau, http://www.census.gov/;

The Vera Institute of Justice: http://www.vera.org/;

The Washington State Institute for Public Policy: http://www.wsipp.wa.gov/.

Chapter 1: Why Do We Need Pretrial Improvements?

The Importance of Understanding Risk

Of all the reasons for studying, identifying, and correcting shortcomings with the American system of administering bail, two overarching reasons stand out as foundational to our notions of freedom and democracy. The first is the concept of risk. From the first bail setting in Medieval England to any of a multitude of bail settings today, pretrial release and detention has always been concerned with risk, typically manifested by the prediction of pretrial misbehavior based on the risk that any particular defendant will not show up for court or commit some new crime if released. But often missing from our discussions of pretrial risk are the reasons for why we allow risk to begin with. After all, pretrial court appearance rates (no failures to appear) and public safety rates (no new crimes while on pretrial release) would most certainly hover near 100% if we could simply detain 100% of defendants.

The answer is that we not only allow for risk in criminal justice and bail, we demand it from a society that is based on liberty. In his Commentaries on the Laws of England (the eighteenth century treatise on the English common law used extensively by the American Colonies and our Founding Fathers) Sir William Blackstone wrote, "It is better that ten guilty persons escape than that one innocent suffer,"[4] a seminal statement of purposeful risk designed to protect those who are governed against unchecked despotism. More specifically related to bail, in 1951, Justice Robert H. Jackson succinctly wrote, "Admission to bail always involves a risk . . . a calculated risk which the law takes as the price of our system of justice."[5] That system of justice – one of limited government powers and of fundamental human rights protected by the Constitution, of defendants cloaked with the presumption of innocence, and of increasingly arduous evidentiary hurdles designed to ensure that only the guilty suffer punishment at the hands of the state – inevitably requires us to *embrace* risk at bail as fundamental to maintaining our democracy. Our notions of equality, freedom, and the rule of law demand that we embrace risk, and embracing risk requires us

[4] William Blackstone, *Commentaries on the Laws of England*, Book 4, ch. 27 (Oxford 1765-1769).

[5] *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

to err on the side of release when considering the right to bail, and on "reasonable assurance," rather than complete assurance, when limiting pretrial freedom.

Despite the fact that risk is necessary, however, many criminal justice leaders lack the will to undertake it. To them, a 98% court appearance rate is 2% too low, one crime committed by a defendant while on pretrial release is one crime too many, and detaining some large percentage of defendants pretrial is an acceptable practice if it avoids those relatively small percentage failures. Indeed, the fears associated with even the smallest amount of pretrial failure cause those leaders to focus first and almost entirely on mitigating perceived risk, which in turn leads to unnecessary pretrial detention.

> *"All too often our current system permits the unfettered release of dangerous defendants while those who pose minimal, manageable risk are held in costly jail space."*
>
> Tim Murray, Pretrial Justice Institute, 2011

But these fears misapprehend the entire concept of bail, which requires us first to embrace the risk created by releasing defendants (for the law presumes and very nearly demands the release of bailable defendants) and then to seek to mitigate it only to reasonable levels. Indeed, while the notion may seem somewhat counterintuitive, in this one unique area of the law, everything that we stand for as Americans reminds us that when court appearance and public safety rates are high, we must at least consider taking the risk of releasing more defendants pretrial. Accordingly, one answer to the question of why pretrial improvements are necessary, and the first reason for correcting flaws in the current system, is that criminal justice leaders must continually take risks in order to uphold fundamental precepts of American justice; unfortunately, however, many criminal justice leaders, including those who administer bail today, often fail to fully understand that connection and have actually grown risk averse.

The Importance of Equal Justice

The second foundational reason for studying and correcting the administration of bail in America is epitomized by a quote from Judge Learned Hand uttered during a keynote address for the New York City Legal Aid Society in 1951. In his

speech, Judge Hand stated, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[6] Ten years later, the statement was repeated by Attorney General Robert Kennedy when discussing the need for bail reform, and it became a foundational quote in the so-called "Allen Committee" report, the document from the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice that provided a catalyst for the first National Conference on Bail and Criminal Justice in 1964. Judge Hand's quote became a rallying cry for the first generation of American bail reform, and it remains poignant today, for in no other area of criminal procedure do we so blatantly restrict allotments of our fundamental legal principles. Like our aversion to risk, our rationing of justice at bail is something to which we have grown accustomed. And yet, if Judge Hand is correct, such rationing means that our very form of government is in jeopardy. Accordingly, another answer for why pretrial improvements are necessary, and a second reason for correcting flaws in the current system, is that allowing justice for some, but not all Americans, chips away at the founding principles of our democracy, and yet those who administer bail today have grown content with a system in which justice capriciously eludes persons based on their lack of financial resources.

Arguably, it is America's aversion to risk that has led to its complacency toward rationing pretrial justice. That is because bail, and therefore the necessary risk created by release, requires an in-or-out, release/no release decision. As we will see later in this paper, since at least 1275, bail was meant to be an in-or-out proposition, and only since about the mid to late 1800s in America have we created a process that allows judges to delegate that decision by merely setting an amount of up-front money. Unfortunately, however, setting an amount of money is typically not a release/no release decision; indeed, it can often cause both unintended releases and detentions. Setting money, instead, creates only the illusion of a decision for when money is a precondition to release, the actual release (or, indeed, detention) decision is then made by the defendant, the defendant's family, or perhaps some third party bail bondsman who has analyzed the potential for profit. This illusion of a decision, in turn, has masked our aversion to risk, for it appears to all that some decision has been made. Moreover, it has caused judges across America to be content with the negative outcomes of such a non-decision, in which pretrial justice appears arbitrarily rationed out only to those with access to money.

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[6] *See* The Legal Aid Society website at http://www.legal-aid.org/en/las/thoushaltnotrationjustice.aspx.

Negative Outcomes Associated with the Traditional Money Bail System

Those negative outcomes have been well-documented. Despite overall drops in total and violent crime rates over the last 20 years, jail incarceration rates remain high – so high, in fact, that if we were to jail persons at the 1980 incarceration rate, a rate from a time in which crime rates were actually higher than today, our national jail population would drop from roughly 750,000 inmates to roughly 250,000 inmates. Moreover, most of America's jail inmates are classified as pretrial defendants, who today account for approximately 61% of jail populations nationally (up from approximately 50% in 1996). As noted previously, the United States leads the world in numbers of pretrial detainees, and detains them at a rate that is three times the world average.

Understanding Your Jail Population

Knowing who is in your jail as well as fundamental jail population dynamics is often the first step toward pretrial justice. Many jurisdictions are simply unaware of who is in the jail, how they get into the jail, how they leave the jail, and how long they stay, and yet knowing these basic data is crucial to focusing on particular jail populations such as pretrial inmates.

A jail's population is affected not only by admissions and lengths of stay, but also by the discretionary decisionmaking by criminal justice officials who, whether on purpose or unwittingly, often determine the first two variables. For example, a local police department's policy of arresting and booking (versus release on citation) more defendants than other departments or to ask for unusually high financial conditions on warrants will likely increase a jail's number of admissions and can easily add to its overall daily population. As another example, national data has shown that secured money at bail causes pretrial detention for some defendants and delayed release for others, both increasing the lengths of stay for that population and sometimes creating jail crowding. Accordingly, a decision by one judge to order mostly secured (i.e., cash or surety) bonds will increase the jail population more than a judge who has settled on using less-restrictive means of limiting pretrial freedom while mitigating pretrial risk.

Experts on jail population analysis thus advise jurisdictions to adopt a systems perspective, create the infrastructure to collect and analyze system data, and collect and track trend data not only on inmate admissions and lengths of stay, but also on criminal justice decisionmaking for policy purposes.

Sources and Resources: David M. Bennett & Donna Lattin, *Jail Capacity Planning Guide: A Systems Approach* (NIC, Nov. 2009); Cherise Fanno Burdeen, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* (NACo/BJA/PJI, 2009); Mark A. Cunniff, *Jail Crowding: Understanding Jail Population Dynamics,* (NIC, Jan. 2002); Robert C. Cushman, *Preventing Jail Crowding: A Practical Guide* (NIC, 2nd ed., May 2002); Todd D. Minton, *Jail Inmates at Midyear- 2012 Statistical Tables*, (BJS, 2013 and series). **Policy Documents Using Jail Population Analysis:** Jean Chung, *Baltimore Behind Bars, How to Reduce the Jail Population, Save Money and Improve Public Safety* (Justice Policy Institute, Jun. 2010); Marie VanNostrand, *New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population* (Luminosity/Drug Policy Alliance, Mar. 2013).

These trends are best explained by the justice system's increasing use of secured financial conditions on a population that appears less and less able to afford them. In 2013, the Census Bureau announced that the poverty rate in America was 15%, about one in every seven persons and higher than in 2007, which was

just before the most recent recession. Nevertheless, according to the Bureau of Justice Statistics, the percentage of cases for which courts have required felony defendants to post money in order to obtain release has increased approximately 65% from 1990 to 2009 (from 37% to 61% of cases overall, mostly from the large increase in use of surety bonds), and the amounts of those financial conditions have steadily risen over the same period.

Unnecessary Pretrial Detention

The problem highlighted by these data comes from the fact that secured financial conditions at bail cause unnecessary pretrial detention. In a recent and rigorous study of 2,000 Colorado cases comparing the effects between defendants ordered to be released on secured financial conditions (requiring either money or property to be paid in advance of release) and those ordered released on unsecured financial conditions (requiring the payment of either money or property only if the defendant failed to appear and not as a precondition to release), defendants with unsecured financial conditions were released in "statistically significantly higher" numbers no matter how high or low their individual risk.[7] Essentially, defendants ordered to be released but forced to pay secured financial conditions: (1) took longer to get out of jail (presumably for the time needed to gather the necessary money or to find willing sureties) and (2) in many cases did not get out at all. In short, using secured bonds leads to the detention of bailable defendants by delaying or preventing pretrial release. These findings are consistent with comparable national data; indeed, the federal government has estimated the percentage of felony defendants detained for the duration of their pretrial period nationally to be approximately 38%, and the percentage of those defendants detained simply due to the lack of money to be approximately 90% of that number.

There are numerous reasons to conclude that anytime a bailable defendant is detained for lack of money (rather than detained because of his or her high risk for pretrial misbehavior), that detention is unnecessary. First, secured money at bail is the most restrictive condition of release – it is typically the only precondition to release itself – and, in most instances, other less-restrictive alternatives are available to respond to pretrial risk without the additional financial condition. Indeed, starting in the 1960s, researchers have demonstrated that courts can use alternatives to release on money bonds that have acceptable

[7] Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, 12 (PJI 2013).

outcomes concerning risk to public safety and court appearance. Second, the money itself cannot serve as motivation for anything until it is actually posted. Until then, the money merely detains, and does so unequally among defendants resulting in the unnecessary detention of releasable inmates. This problem is exacerbated by the fact that the financial condition of a bail bond is typically arbitrary; even when judges are capable of expressing reasons for a particular amount, there is often no rational explanation for why a second amount, either lower or higher, might not arguably serve the same purposes. Third, money set with a purpose to detain is likely unlawful under numerous theories of law, and is also unnecessary given the Supreme Court's approval of a lawful detention scheme that uses no money whatsoever. Financial conditions of release are indicators of decisions to release, not to detain; accordingly, any resulting detention due to money bonds used outside of a lawful detention process makes that money-based detention unnecessary or potentially unlawful. Fourth, no study has ever shown that money can protect the public. Indeed, in virtually every American jurisdiction, financial conditions of bail bonds cannot even be forfeited for new crimes or other breaches in public safety, making the setting of a money bond for public safety irrational. Given that irrationality, any pretrial detention resulting from that practice is per se unnecessary.

Fifth, ever since 1968, when the American Bar Association openly questioned the basic premise that money serves as a motivator for court appearance, no valid study has been conducted to refute that uncertainty. Instead, the best research to date suggests what criminal justice leaders have long suspected: secured money does not matter when it comes to either public safety or court appearance, but it is directly related to pretrial detention. This hypothesis was supported most recently by the Colorado study, mentioned above, which compared outcomes for defendants released on secured bonds with outcomes for defendants released on unsecured bonds. In 2,000 cases of defendants from all risk categories, this research showed that while having to pay the money up-front led to statistically significantly higher detention rates, whether judges used secured or unsecured money bonds did not lead to any differences in court appearance or public safety rates.

A sixth reason for concluding that bailable defendants held on secured financial conditions constitutes unnecessary pretrial detention is that we know of at least one jurisdiction, Washington D.C., that uses virtually no money at all in its bail setting process. Instead, using an "in or out," "bail/no bail" scheme of the kind contemplated by American law, the District of Columbia releases 85-88% of all defendants – detaining the rest through rational, fair, and transparent detention

procedures – and yet maintains high court appearance (no FTA) and public safety (no new crime) rates. Moreover, that jurisdiction does so day after day, with all types of defendants charged with all types of crimes, using almost no money whatsoever.

Unnecessary pretrial detention is also suggested whenever we look at the adjudicatory outcomes of defendants' cases to see if they are the sorts of individuals who must be absolutely separated from society. When we look at those outcomes, however, we see that even though we foster a culture of pretrial detention, very few persons arrested or admitted to jail are ultimately sentenced to significant incarceration post-trial. Indeed, only a small fraction of jail inmates nationally (from 3-5%, depending on the source) are sent to prison. In one statewide study, only 14% of those defendants detained for the *entire duration* of their case were sentenced to prison. Thirteen percent had their cases dismissed (or the cases were never filed), and 37% were sentenced to noncustodial sanctions, including probation, community corrections, or home detention. Accordingly, over 50% of those pretrial detainees were released into the community once their cases were done. In another study, more than 25% of felony pretrial detainees were acquitted or had their cases dismissed, and approximately 20% were ultimately sentenced to a noncustodial sentence. Clearly, another disturbing paradox at bail involves the dynamic of releasing presumptively innocent defendants back into the community only after they have either pleaded or been found guilty of a particular crime.

In addition, and as noted by the Pretrial Justice Institute (PJI), these statistics vary greatly across the United States, and that variation itself hints at the need for reform. According to PJI:

> Looking at the counties individually shows the great disparity in pretrial release practices and outcomes. In 2006, pretrial release rates ranged from a low of 31% in one county to a high of 83% in another. Non-financial release rates ranged from lows of zero in one county, 3% in another, and 5% in a third to a high of 68%.[8]

[8] *Important Data on Pretrial Justice* (PJI 2011).

Different Laws/Different Practices

Bail laws are different among the states, often due to the extent to which those states have fully embraced the principles and practices evolving out of the two previous generations of bail reform in the 1960s and 1980s. Even in states with similar laws, however, pretrial practices can nonetheless vary widely. Indeed, local practices can vary among jurisdictions under the same state laws, and, given the great discretion often afforded at bail, even among judges within individual jurisdictions. Disparity beyond that needed to individualize bail settings can rightfully cause concerns over equal justice, through which Americans can be reasonably assured that the laws will not have widely varying application depending on their particular geographical location, court, or judge.

Normally, state and federal constitutional law would provide adequate benchmarks to maintain equal justice, but with bail we have an unfortunate scarcity of language and opinions from which to gauge particular practices or even the laws from which those practices derive. Fortunately, however, we have best practice standards on pretrial release and detention that take fundamental legal principles and marry them with research to make recommendations concerning virtually every issue surrounding pretrial justice. In this current generation of pretrial reform, we are realizing that both bail practices and the laws themselves – from court rules to constitutions – must be held up to best practices and the legal principles underlying them to create bail schemes that are fair and applied somewhat equally among the states.

The American Bar Association's (ABA's) Criminal Justice Standards on Pretrial Release can provide the benchmarks that we do not readily find in bail law. When followed, those Standards provide the framework from which pretrial practices or even laws can be measured, implemented, or improved. For example, the use of monetary bail schedules (a document assigning dollar amounts to particular charges regardless of the characteristics of any individual defendant) are illegal in some states but actually required by law in others. There is very little law on the subject, but the ABA standards (using fundamental legal principles, such as the need for individuality in bail setting as articulated by the United States Supreme Court), research (indicating that release or detention based on individual risk is a superior practice to any mechanism based solely on charge and wealth), and logic (the standards call schedules "arbitrary and inflexible") reject the use of monetary bail schedules, thus suggesting that any state that either mandates or permits their use should consider statutory amendment.

Sources and Resources: *American Bar Association Standards for Criminal Justice – Pretrial Release* (3rd ed. 2007).

Pretrial detention, whether for a few days or for the duration of the case, imposes certain costs, and unnecessary pretrial detention does so wastefully. In a purely monetary sense, these costs can be estimated, such as the comparative cost of incarceration (from $50 to as much as $150 per day) versus community supervision (from as low as $3 to $5 per day). Given the volume of defendants and their varying lengths of stays, individual jails can incur costs of millions of dollars per year simply to house lower risk defendants who are also presumed innocent by the law. Indeed, the United States Department of Justice estimates that keeping the pretrial population behind bars costs American taxpayers roughly 9 billion dollars per year. Jails that are crowded can create an even more costly scenario for taxpayers, as new jail construction can easily reach $75,000 to $100,000 per inmate bed. Added to these costs are dollars associated with lost wages, economic mobility (including intergenerational effects), possible welfare costs for defendant families, and a variety of social costs, including denying the defendant the ability to assist with his or her own defense, the possibility of imposing punishment prior to conviction, and eroding justice system credibility due to its complacency with a wealth-based system of pretrial freedom.

Perhaps more disturbing, though, is research suggesting that pretrial detention alone, all other things being equal, leads to harsher treatment and outcomes than pretrial release. Relatively recent research from both the Bureau of Justice Statistics and the New York City Criminal Justice Agency continues to confirm studies conducted over the last 60 years demonstrating that, controlling for all other factors, defendants detained pretrial are convicted and plead guilty more often, and are sentenced to prison and receive harsher sentences than those who are released. Moreover, as recently as November 2013, the Laura and John Arnold Foundation released a study of over 150,000 defendants finding that – all other things being equal – defendants detained pretrial were over four times more likely to be sentenced to jail (and with longer sentences) and three times more likely to be sentenced to prison (again with longer sentences) than defendants who were not detained.[9]

While detention for a defendant's entire pretrial period has decades of documented negative effects, the Arnold Foundation research is also beginning to demonstrate that even small amounts of pretrial detention – perhaps even the few days necessary to secure funds to pay a cash bond or fee for a surety bond – have negative effects on defendants and actually makes them more at risk for

[9] *See* Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, at 10-11 (Laura & John Arnold Found. 2013).

pretrial misbehavior.[10] Looking at the same 150,000 case data set, the Arnold researchers found that low- and moderate-risk defendants held only 2 to 3 days were more likely to commit crimes and fail to appear for court before trial than similar defendants held 24 hours or less. As the time in jail increased, the researchers found, the likelihood of defendant misbehavior also increased. The study also found similar correlations between pretrial detention and long-term recidivism, especially for lower risk defendants. In a field of paradoxes, the idea that a judge setting a condition of bail intending to protect public safety might be unwittingly *increasing* the danger to the public – both short and long-term – is cause for radically rethinking the way we administer bail.

Other Areas in Need of Pretrial Reform

Unnecessary pretrial detention is a deplorable byproduct of the traditional money bail system, but it is not the only part of that system in need of significant reform. In many states, the overreliance on money at bail takes the place of a transparent and due-process-laden detention scheme based on risk, which would allow for the detention of high-risk defendants with no bail. Indeed, the traditional money bail system fosters processes that allow certain high-risk defendants to effectively purchase their freedom, often without being assessed for their pretrial risk and often without supervision. These processes include using bail schedules (through which defendants are released by paying an arbitrary money amount based on charge alone), a practice of dubious legal validity and counter to any notions of public safety. They include using bail bondsmen, who operate under a business model designed to maximize profit based on getting defendants back to court but with no regard for public safety, and they include setting financial conditions to help protect the public, a practice that is both legally and empirically flawed. In short, the use of money at bail at the expense of risk-based best practices tends to create the two main reasons cited for the need for pretrial reform: (1) it needlessly and unfairly keeps lower risk defendants in jail, disproportionately affecting poor and minority defendants and at a high cost to taxpayers; and (2) it too often allows higher risk defendants out of jail at the expense of public safety and integrity of the justice system. Both of these reasons were illustrated by the Colorado study, cited above, which documented that when making bail decisions without the benefit of an empirical risk instrument, judges often set financial conditions that not only

[10] *See* Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013).

kept lower risk persons in jail, but also frequently allowed the highest risk defendants out.

While the effect of money at bail is often cited as a reason for pretrial reform, research over the last 25 years has also illuminated other issues ripe for pretrial justice improvements. They include the need for (1) bail education among all criminal justice system actors; (2) data-driven policies and infrastructure to administer bail; (3) improvements to procedures for release through citations and summonses; (4) better prosecutorial and defense attorney involvement at the front-end of the system; (5) empirically created pretrial risk assessment instruments; (6) traditional (and untraditional) pretrial services functions in jurisdictions without those functions; (7) improvements to the timing and nature of first appearances; (8) judicial release and detention decision-making to follow best practices; (9) systems to allocate resources to better effectuate best practices; and (10) changes in county ordinances, state statutes, and even state constitutions to embrace and facilitate pretrial justice and best practices at bail.

> *"What has been made clear . . . is that our present attitudes toward bail are not only cruel, but really completely illogical. . . . '[O]nly one factor determines whether a defendant stays in jail before he comes to trial [and] that factor is, simply, money."*
>
> Attorney General Robert Kennedy, 1962
>
> *Many pretrial inmates "are forced to remain in custody . . . because they simply cannot afford to post the bail required – very often, just a few hundred dollars."*
>
> Attorney General Eric Holder, 2011

The Third Generation of Bail/Pretrial Reform

The traditional money bail system that has existed in America since the turn of the 20th century is deficient legally, economically, and socially, and virtually every neutral and objective bail study conducted over the last 90 years has called for its reform. Indeed, over the last century, America has undergone two generations of bail reform, but those generations have not sufficed to fully achieve what we know today constitutes pretrial justice. Nevertheless, we are

entering a new generation of pretrial reform with the same three hallmarks seen in previous generations.

First, like previous generations, we now have an extensive body of research literature – indeed, we have more than previous generations – pointing uniformly in a single direction toward best practices at bail and toward improvements over the status quo. Second, we have the necessary meeting of minds of an impressive number of national organizations – from police chiefs and sheriffs, to county administrators and judges – embracing the research and calling for data-driven pretrial improvements. Third, and finally, we are now seeing jurisdictions actually changing their laws, policies, and practices to reflect best practice recommendations for improvements. Fortunately, through this third generation of pretrial reform, we already know the answers to most of the pressing issues at bail. We know what changes must be made to state laws, and we know how to follow the law and the research to create bail schemes in which pretrial practices are rational, fair, and transparent.

A deeper understanding of the foundations of bail makes the need for pretrial improvements even more apparent. The next three parts of this paper are designed to summarize the evolution and importance of three of the most important foundational aspects of bail – the history, the law, and the research.

Additional Sources and Resources: American Bar Association Standards for Criminal Justice – Pretrial Release (3rd ed. 2007); Spike Bradford, For Better or for Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice (JPI 2012); E. Ann Carson & William J. Sabol, Prisoners in 2011 (BJS 2012); Case Studies: the D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth (PJI), found at http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf; Thomas H. Cohen & Tracey Kyckelhahn, Felony Defendants in Large Urban Counties, 2006 (BJS 2010); Jean Chung, Bailing on Baltimore: Voices from the Front Lines of the Justice System (JPI 2012); Thomas H. Cohen & Brian A. Reaves, Pretrial Release of Felony Defendants in State Courts (BJS 2007); Jamie Fellner, The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City (Human Rights Watch 2010); Frequently Asked Questions About Pretrial Release Decision Making (ABA 2012); Robert F. Kennedy, Address by Attorney General Robert F. Kennedy to the American Bar Association House of Delegates, San Francisco, Cal., (Aug. 6, 1962) available at http://www.justice.gov/ag/rfkspeeches/1962/08-06-1962%20Pro.pdf; Christopher T. Lowenkamp & Marie VanNostrand, Exploring the Impact of

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Chapter 2: The History of Bail

According to the American Historical Association, studying history is crucial to helping us understand ourselves and others in the world around us. There are countless quotes on the importance of studying history from which to draw, but perhaps most relevant to bail is one from philosopher Soren Kierkegaard, who reportedly said, "Life must be lived forward, but it can only be understood backward." Indeed, much of bail today is complex and confusing, and the only way to truly understand it is to view it through a historical lens.

The Importance of Knowing Bail's History

Understanding the history of bail is not simply an academic exercise. When the United States Supreme Court equated the right to bail to a "right to release before trial," and likened the modern practice of bail with the "ancient practice of securing the oaths of responsible persons to stand as sureties for the accused,"[11] the Court was explaining the law by drawing upon notions discernible only through knowledge of history. When the commercial bail insurance companies argue that pretrial services programs have "strayed" beyond their original purpose, their argument is not fully understood without knowledge of 20th century bail, and especially the improvements gained from the first generation of bail reform in the 1960s. Some state appellate courts have relied on sometimes detailed accounts of the history of bail in order to decide cases related to release under "sufficient sureties," a term fully known only through the lens of history.

> *"This difference [between the U.S. and the Minnesota Constitution] is critical to our analysis and to fully understand this critical difference, some knowledge of the history of bail is necessary. Therefore, it is important to examine the origin of bail and its development in Anglo-American jurisprudence."*
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> *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000)

In short, knowledge of the history of bail is necessary to pretrial reform, and therefore it is crucial that this history be shared. Indeed, the history of bail is the

[11] *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951).

starting point for understanding all of pretrial justice, for that history has shaped our laws, guided our research, helped to mold our best practice standards, and forced changes to our core definitions of terms and phrases. Fundamentally, though, the history of bail answers two pressing questions surrounding pretrial justice: (1) given all that we know about the deleterious effects of money at bail, how did America, as opposed to the rest of the world, come to rely upon money so completely?; and (2) does history suggest solutions to this dilemma, which might lead to American pretrial justice?

Civil Rights, Poverty, and Bail

Anyone who has read the speeches of Robert F. Kennedy while he was Attorney General knows that civil rights, poverty, and bail were three key issues he wished to address. Addressing them together, as he often did, was no accident, as the three topics were, and continue to be, intimately related.

In 1961, philanthropist Louis Schweitzer and magazine editor Herbert Sturz took their concerns over the administration of bail in New York City (a system "that granted liberty based on income") to Robert Kennedy and Daniel Freed, Department of Justice liaison to the newly created Committee on Poverty and the Administration of Federal Criminal Justice, known as the "Allen Committee." Schweitzer and Sturz's efforts ultimately led to the creation of the Vera Foundation (now the Vera Institute of Justice), whose pioneering work on the Manhattan Bail Project heavily influenced the first generation of bail reform by finding effective alternatives to the commercial bail system. Freed, in turn, took the Vera work and incorporated it into an entire chapter of the Allen Committee's report, leading to the first National Conference on Bail and Criminal Justice in 1964.

At the same time that these bail and poverty reformers were working to change American notions of equal justice, civil rights activists were taking on a traditionally difficult hurdle for Southern blacks – the lack of money to bail themselves and others out of jail – and using it to their advantage. Through the "jail, no bail" policy, activists refused to pay bail or fines after being arrested for sit-ins, opting instead to have the government incarcerate them, and sometimes to force them to work hard labor, to bring more attention to their cause.

The link between civil rights, poverty, and bail was probably inevitable, and Kennedy set out to rectify overlapping injustices seen in all three areas. But despite promising improvements encompassed in the war on poverty, the civil rights movement, and the first generation of bail reform in the 1960s, we remain unfortunately tolerant of a bail process inherently biased against the poor and disproportionately affecting persons of color. Studies continue to demonstrate that bail amounts are empirically related to increased (and typically needless)

pretrial detention, and other studies are equally consistent in demonstrating racial disparity in the application of bail and detention.

Fortunately, however, just like those persons pursuing civil rights and equal justice in the 20th century, the current generation of pretrial reform is fueled by committed individuals urging cultural changes to a system manifested by disparate state laws, unfair practices, and irrational policies that negatively affect the basic human rights of the most vulnerable among us. The commitment of those individuals, stemming from the success of past reformers, remains the catalyst for pretrial justice across the nation.

Sources and Resources: Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, 1990-2004* (BJS Nov. 2007); Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. Legis. & Pub. Pol'y 919 (2013); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI Oct. 2013); Besiki Kutateladze, Vanessa Lynn, & Edward Liang, *Do Race and Ethnicity Matter in Prosecution? Review of Empirical Studies* (1st Ed.) (Vera Institute of Justice 2012) at 11-12; *National Symposium on Pretrial Justice: Summary Report of Proceedings* at 35-35 and citations therein (PJI/BJA 2011) (statement of Professor Cynthia Jones).

Origins of Bail

While bail can be traced to ancient Rome, our traditional American understanding of bail derives primarily from English roots. When the Germanic tribes the Angles, the Saxons, and the Jutes migrated to Britain after the fall of Rome in the fifth century, they brought with them the blood feud as the primary means of settling disputes. Whenever one person wronged another, the families of the accused and the victim would often pursue a private war until all persons in one or both of the families were killed. This form of "justice," however, was brutal and costly, and so these tribes quickly settled on a different legal system based on compensation (first with goods and later with money) to settle wrongs. This compensation, in turn, was based on the concept of the "wergeld," meaning "man price" or "man payment" and sometimes more generally called a "bot," which was a value placed on every person (and apparently on every person's property) according to social rank. Historians note the existence of detailed tariffs assigning full wergeld amounts to be paid for killing persons of various ranks as well as partial amounts payable for injuries, such as loss of limbs or other wrongs. As a replacement to the blood feud between families, the wergeld system was also initially based on concepts of kinship and private justice, which

meant that wrongs were still settled between families, unlike today, where crimes are considered to be wrongs against all people or the state.

With the wergeld system as a backdrop, historians agree on what was likely a prototypical bail setting that we now recognize as the ancestor to America's current system of release. Author Hermine Meyer described that original bail process as follows:

> Since the [wergeld] sums involved were considerable and could rarely be paid at once, the offender, through his family, offered sureties, or *wereborh*, for the payment of the *wergeld*. If accepted, the injured party met with the offender and his surety. The offender gave a *wadia,* a *wed,* such as a stick, as a symbol or pledging or an indication of the assumption of responsibility. The creditor then gave it to the surety, indicating that he recognized the surety as the trustee for the debt. He thereby relinquished his right to use force against the debtor. The debtor's pledge constituted a pledging of person and property. Instead of finding himself in the hands of the creditor, the debtor found himself, up to the date when payment fell due, in the hands of the surety.[12]

This is, essentially, the "ancient practice of securing the oaths" referred to by the Supreme Court in *Stack v. Boyle,* and it has certain fundamental properties that are important to note. First, the surety (also known as the "pledge" or the "bail") was a person, and thus the system of release became known as the "personal surety system." Second, the surety was responsible for making sure the accused paid the wergeld to avoid a feud, and he did so by agreeing in early years to stand in completely for the accused upon default of his obligations ("body for body," it was reported, meaning that the surety might also suffer some physical punishment upon default), and in later years to at least pay the wergeld himself in the event of default. Thus, the personal surety system was based on the use of recognizances, which were described by Blackstone as obligations or debts that would be voided upon performance of specified acts. Though not completely the same historically, they are essentially what we might now call unsecured bonds using co-signors, with nobody required to pay any money up-front, and with the

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[12] Hermine Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139, 1146 (1971-1972) (citing and summarizing Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275,* 3-15 (NY, AMS Press, 1966).

security on any particular bond coming from the sureties, or persons, who were willing to take on the role and acknowledge the amount potentially owed upon default.

Third, the surety was not allowed to be repaid or otherwise profit from this arrangement. As noted above, the wadia, or the symbol of the suretyship arrangement, was typically a stick or what historians have described as some item of trifling value. In fact, as discussed later, even reimbursing or merely promising to reimburse a surety upon default – a legal concept known as indemnification – was declared unlawful in both England and America and remained so until the 1800s.

Fourth, the surety's responsibility over the accused was great and was based on a theory of continued custody, with the sureties often being called "private jailers" or "jailers of [the accused's] own choosing."[13] Indeed, it was this great responsibility, likely coupled with the prohibition on reimbursement upon default and on profiting from the system, which led authorities to bestow great powers to sureties as jailers to produce the accused – powers that today we often associate with those possessed by bounty hunters under the common law. Fifth, the purpose of bail in this earliest of examples was to avoid a blood feud between families. As we will see, that purpose would change only once in later history. Sixth and finally, the rationale behind this original bail setting made sense because the amount of the payment upon default was identical to the amount of the punishment. Accordingly, because the amount of the promised payment was identical to the wergeld, for centuries there was never any questioning whether the use of that promised amount for bail was arbitrary, excessive, or otherwise unfair.

The administration of bail has changed enormously from this original bail setting, and these changes in America can be attributed largely to the intersection during the 20th century of two historical phenomena. The first was the slow evolution from the personal surety system using unsecured financial conditions to a commercial surety system (with profit and indemnification) primarily using secured financial conditions. The second was the often misunderstood creation and nurturing of a "bail/no bail" or "release/no release" dichotomy, which continues to this day.

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[13] *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869).

The Evolution to Secured Bonds/Commercial Sureties

The gradual evolution from a personal surety system using unsecured bonds to the now familiar commercial surety system using secured bonds in America began with the Norman Invasion. When the Normans arrived in 1066, they soon made changes to the entire criminal justice system, which included moving from a private justice system to a more public one through three royal initiatives. First, the crown initiated the now-familiar idea of crimes against the state by making certain felonies "crimes of royal concern." Second, whereas previously the commencement of a dispute between families might start with a private summons based upon sworn certainty, the crown initiated the mechanism of the presentment jury, a group of individuals who could initiate an arrest upon mere suspicion from third parties. Third, the crown established itinerant justices, who would travel from shire to shire to exert royal control over defendants committing crimes of royal concern. These three changes ran parallel to the creation of jails to hold various arrestees, although the early jails were crude, often barbaric, and led to many escapes.

These changes to the criminal justice process also had a measurable effect on the number of cases requiring bail. In particular, the presentment jury process led to more arrests than before, and the itinerant justice system led to long delays between arrest and trial. Because the jails at the time were not meant to hold so many persons and the sheriffs were reluctant to face the severe penalties for allowing escapes, those sheriffs began to rely more frequently upon personal sureties, typically responsible (and preferably landowning) persons known to the sheriff, who were willing to take control of the accused prior to trial. The need for more personal sureties, in turn, was met through the growth of the parallel institutions of local government units known as tithings and hundreds – a part of the overall development of the frankpledge system, a system in which persons were placed in groups to engage in mutual supervision and control.

While there is disagreement on whether bail was an inherent function of frankpledge, historians have frequently documented sheriffs using sureties from within the tithings and hundreds (and sometimes using the entire group), indicating that that these larger non-family entities served as a safety valve so that sheriffs or judicial officials rarely lacked for "sufficient" sureties in any particular case. The fundamental point is that in this period of English history, sureties were individuals who were willing to take responsibility over defendants – for no money and with no expectation of indemnification upon default – and the sufficiency of the sureties behind any particular release on bail

came from finding one or more of these individuals, a process that was made exceedingly simpler through the use of the collective, non-family groups.

All of this meant that the fundamental purpose of bail had changed: whereas the purpose of the original bail setting process of providing oaths and pledges was to avoid a blood feud between families while the accused met his obligations, the use of more lengthy public processes and jails meant that the purpose of bail would henceforth be to provide a mechanism for release. As before, the purpose of conditioning that release by requiring sureties was to motivate the accused to face justice – first to pay the debt but now to appear for court – and, indeed, court appearance remained the sole purpose for limiting pretrial freedom until the 20th century.

Additional alterations to the criminal process occurred after the Norman Invasion, but the two most relevant to this discussion involve changes in the criminal penalties that a defendant might face as well as changes in the persons, or sureties, and their associated promises at bail. At the risk of being overly simplistic, punishments in Anglo-Saxon England could be summed up by saying that if a person was not summarily executed or mutilated for his crime (for that was the plight of persons with no legal standing, who had been caught in the act, or persons of "ill repute" or long criminal histories, etc.), then that person would be expected to make some payment. With the Normans, however, everything changed. Slowly doing away with the wergeld payments, the Normans introduced first afflictive punishment, in the form of ordeals and duels, and later capital and other forms of corporal punishment and prison for virtually all other offenses.

The changes in penalties had a tremendous impact on what we know today as bail. Before the Norman Invasion, the surety's pledge matched the potential monetary penalty perfectly. If the wergeld was thirty silver pieces, the surety was expected to pay exactly thirty silver pieces upon default of the primary debtor. After the Invasion, however, with increasing use of capital punishment, corporal punishment, and prison sentences, it became frequently more difficult to assign the amount that ought to be pledged, primarily because assigning a monetary equivalent to either corporal punishment or imprisonment is largely an arbitrary act. Moreover, the threat of these seemingly more severe punishments led to increasing numbers of defendants who refused to stay put, which created additional complexity to the bail decision. These complexities, however, were not enough to cause society to radically change course from its use of the personal surety system. Instead, that change came when both England and America began running out of the sureties themselves.

As noted previously, the personal surety system generally had three elements: (1) a reputable person (the surety, sometimes called the "pledge" or the "bail"); (2) this person's willingness to take responsibility for the accused under a private jailer theory and with a promise to pay the required financial condition on the back-end – that is, only if the defendant forfeited his obligation; and (3) this person's willingness to take the responsibility without any initial remuneration or even the promise of any future payment if the accused were to forfeit the financial condition of bail or release. This last requirement addressed the concept of indemnification of sureties, which was declared unlawful by both England and America as being against the fundamental public policy for having sureties take responsibility in the first place. In both England and America, courts repeatedly articulated (albeit in various forms) the following rationale when declaring surety indemnification unlawful: once a surety was paid or given a promise to be paid the amount that could potentially be forfeited, that surety lost all interest and motivation to make sure that the condition of release was performed. Thus, a prohibition on indemnifying sureties was a foundational part of the personal surety system.

And indeed, the personal surety system flourished in England and America for centuries, virtually ensuring that those deemed bailable were released with "sufficient sureties," which were designed to provide assurance of court appearance. Unfortunately, however, in the 1800s both England and America began running out of sureties. There are many reasons for this, including the demise of the frankpledge system in England, and the expansive frontier and urban areas in America that diluted the personal relationships necessary for a personal surety system. Nevertheless, for these and other reasons, the demand for personal sureties gradually outgrew supply, ultimately leading to many bailable defendants being unnecessarily detained.

It is at this point in history that England and the United States parted ways in how to resolve the dilemma of bailable defendants being detained for lack of sureties. In England (and, indeed, in the rest of the world), the laws were amended to allow judges to dispense with sureties altogether when justice so required. In America, however, courts and legislatures began chipping away at the laws against surety indemnification. This transformation differed among the states. In the end, however, across America states gradually allowed sureties to demand re-payment upon a defendant's default and ultimately to profit from the bail enterprise itself. By 1898, the first commercial surety was reportedly opened for business in America. And by 1912, the United States Supreme Court wrote, "The distinction between bail [i.e., common law bail, which forbade

indemnification] and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary."[14]

Looking at court opinions from the 1800s, we see that the evolution from a personal to a commercial surety system (in addition to the states gradually increasing defendants ability to self-pay their own financial conditions, a practice that had existed before, but that was used only rarely) was done in large part to help release bailable defendants who were incarcerated due only to their inability to find willing sureties. However, that evolution ultimately virtually assured unnecessary pretrial incarceration because bondsmen began charging money up-front (and later requiring collateral) to gain release in addition to requiring a promise of indemnification. While America may have purposefully moved toward a commercial surety system from a personal surety system to help release bailable defendants, perhaps unwittingly, and certainly more importantly, it moved to a secured money bail system (requiring money to be paid before release is granted) from an unsecured system (promising to pay money only upon default of obligations). The result has been an increase in the detention of bailable defendants over the last 100 years.

The "Bail/No Bail" Dichotomy

The second major historical phenomenon involved the creation and nurturing of a "bail/no bail" dichotomy in both England and America. Between the Norman Invasion and 1275, custom gradually established which offenses were bailable and which were not. In 1166, King Henry II bolstered the concept of detention based on English custom through the Assize of Clarendon, which established a list of felonies of royal concern and allowed detention based on charges customarily considered unbailable. Around 1275, however, Parliament and the Crown discovered a number of abuses, including sheriffs detaining bailable defendants who refused or could not pay those sheriffs a fee, and sheriffs releasing unbailable defendants who were able to pay some fee. In response, Parliament enacted the Statute of Westminster in 1275, which hoped to curb abuses by establishing criteria governing bailability (largely based on a prediction of the outcome of the trial by examining the nature of the charge, the weight of the evidence, and the character of the accused) and, while doing so, officially categorized presumptively bailable and unbailable offenses.

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[14] *Leary v. United States*, 224 U.S. 567, 575 (1912).

Importantly, this statutory enactment began the legal tradition of expressly articulating a bail/no bail scheme, in which a right to bail would be given to some, but not necessarily to all defendants. Perhaps more important, however, are other elements of the Statute that ensured that bailable defendants would be released and unbailable defendants would be detained. In 1275, the sheriffs were expressly warned through the Statute that to deny the release of bailable defendants or to release unbailable defendants was against the law; all defendants were to be either released or detained, and without any additional payment to the sheriff. Doing otherwise was deemed a criminal act.

> *"And if the Sheriff, or any other, let any go at large by Surety, that is not replevisable . . . he shall lose his Fee and Office for ever. . . . And if any withhold Prisoners replevisable, after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King; and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall [be in the great mercy of] the King."*
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> Statute of Westminster 3 Edward I. c. 15, *quoted in* Elsa de Haas, Antiquities of Bail, Origin and Historical Development in Criminal Cases to the Year 1275 (NY AMS Press 1966).

Accordingly, in 1275 the right to bail was meant to equal a right to release and the denial of a right to bail was meant to equal detention, and, generally speaking, these important concepts continued through the history of bail in England. Indeed, throughout that history any interference with bailable defendants being released or with unbailable (or those defendants whom society deemed unbailable) defendants being lawfully detained, typically led to society recognizing and then correcting that abuse. Thus, for example, when Parliament learned that justices were effectively detaining bailable defendants through procedural delays, it passed the Habeas Corpus Act of 1679, which provided procedures designed to prevent delays prior to bail hearings. Likewise, when corrupt justices were allowing the release of unbailable defendants, thus causing what many believed to be an increase in crime, it was rearticulated in 1554 that unbailable defendants could not be released, and that bail decisions be held in open session or by two or more justices sitting together. As another example, when justices began setting financial conditions for bailable defendants in prohibitively high amounts, the abuse led William and Mary to consent to the

English Bill of Rights in 1689, which declared, among other things, that "excessive bail ought not to be required."[15]

"Bail" and "No Bail" in America

Both the concept of a "bail/no bail" dichotomy as well as the parallel notions that "bail" should equal release and "no bail" should equal detention followed into the American Colonies. Generally, those Colonies applied English law verbatim, but differences in beliefs about criminal justice, customs, and even crime rates led to more liberal criminal penalties and bail laws. For example, in 1641 the Massachusetts Body of Liberties created an unequivocal right to bail to all except for persons charged with capital offenses, and it also removed a number of crimes from its list of capital offenses. In 1682, Pennsylvania adopted an even more liberal law, granting bail to all persons except when charged with a capital offense "where proof is evident or the presumption great," adding an element of evidentiary fact finding so as to also allow bail even for certain capital defendants. This provision became the model for nearly every American jurisdiction afterward, virtually assuring that "bail/no bail" schemes would ultimately find firm establishment in America.

Even in the federal system – despite its lack of a right to bail clause in the United States Constitution – the Judiciary Act of 1789 established a "bail/no bail," "release/detain" scheme that survived radical expansion in 1984 and that still exists today. Essentially, any language articulating that "all persons shall be bailable . . . unless or except" is an articulation of a bail/no bail dichotomy. Whether that language is found in a constitution or a statute, it is more appropriately expressed as "release (or freedom) or detention" because the notion that bailability should lead to release was foundational in early American law.

[15] English Bill of Rights, 1 W. & M., 2nd Sess., Ch. 2 (1689).

"Bail" and "No Bail" in the Federal and District of Columbia Systems

Both the federal and the District of Columbia bail statutes are based on "bail/no bail" or "release/no release" schemes, which, in turn, are based on legal and evidence-based pretrial practices such as those found in the American Bar Association's Criminal Justice Standards on Pretrial Release. Indeed, each statute contains general legislative titles describing the process as either "release" or "detention" during the pretrial phase, and each starts the bail process by providing judges with four options: (1) release on personal recognizance or with an unsecured appearance bond; (2) release on a condition or combination of conditions; (3) temporary detention; or (4) full detention. Each statute then has provisions describing how each release or detention option should function.

Because they successfully separate bailable from unbailable defendants, thus allowing the system to lawfully and transparently detain unbailable defendants with essentially none of the conditions associated with release (including secured financial conditions), both statutes are also able to include sections forbidding financial conditions that result in the preventive detention of the defendant – an abuse seen frequently in states that have not fully incorporated notions of a release/no release system.

The "bail" or "release" sections of both statutes use certain best practice pretrial processes, such as presumptions for release on recognizance, using "least restrictive conditions" to provide reasonable assurance of public safety and court appearance, allowing supervision through pretrial services entities for both public safety and court appearance concerns, and prompt review and appeals for release and detention orders.

The "no bail" or "detention" sections of both statutes are much the same as when the United States Supreme Court upheld the federal provisions against facial due process and 8th Amendment claims in *United States v. Salerno* in 1987. The *Salerno* opinion emphasized key elements of the existing federal statute that helped it to overcome constitutional challenges by "narrowly focusing" on the issue of pretrial crime. Moreover, the Supreme Court wrote, the statute appropriately provided "extensive safeguards" to further the accuracy of the judicial determination as well as to ensure that detention remained a carefully limited exception to liberty. Those safeguards included: (1) detention was limited to only "the most serious of crimes;" (2) the arrestee was entitled to a prompt hearing and the maximum length of pretrial detention was limited by stringent speedy trial time limitations; (3) detainees were to be housed separately from those serving sentences or awaiting appeals; (4) after a finding of probable cause, a "fullblown adversary hearing" was held in which the government was required to convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions of release would reasonably assure court appearance or the safety of the community or any person; (5) detainees had a

right to counsel, and could testify or present information by proffer and cross-examine witnesses who appeared at the hearing; (6) judges were guided by statutorily enumerated factors such as the nature of the charge and the characteristics of the defendant; (7) judges were to include written findings of fact and a written statement of reasons for a decision to detain; and (8) detention decisions were subject to immediate appellate review.

While advances in pretrial research are beginning to suggest the need for certain alterations to the federal and D.C. statutes, both laws are currently considered "model" bail laws, and the Summary Report to the National Symposium on Pretrial Justice specifically recommends using the federal statute as a structural template to craft meaningful and transparent preventive detention provisions.

Sources and Resources: District of Columbia Code, §§ 23-1301-09, 1321-33; Federal Statute, 18 U.S.C. §§ 3141-56; *United States v. Salerno,* 481 U.S. 739 (1987); *National Symposium on Pretrial Justice: Summary Report of Proceedings*, at 42 (PJI/BJA 2011).

Indeed, given our country's foundational principles of liberty and freedom, it is not surprising that this parallel notion of bailable defendants actually obtaining release followed from England to America. William Blackstone, whose Commentaries on the Laws of England influenced our Founding Fathers as well as the entire judicial system and legal community, reported that denying the release of a bailable defendant during the American colonial period was considered itself an offense. In examining the administration of bail in Colonial Pennsylvania, author Paul Lermack reported that few defendants had trouble finding sureties, and thus, release.

This notion is also seen in early expressions of the law derived from court opinions. Thus, in the 1891 case of *United States v. Barber*, the United States Supreme Court articulated that in criminal bail, "it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time."[16] Four years later, in *Hudson v. Parker,* the Supreme Court wrote that the laws of the United States "have been framed upon the theory that [the accused] shall not, until he has been finally adjudged guilty . . . be absolutely compelled to undergo imprisonment or punishment."[17] Indeed, it was *Hudson* upon which the Supreme Court relied in *Stack v. Boyle* in 1951, when the Court wrote its memorable quote equating the right to bail with the right to release and freedom:

[16] *United States v. Barber*, 140 U.S. 164, 167 (1891).

[17] *United States v. Hudson*, 156 U.S. 277, 285 (1895).

> From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[18]

In his concurring opinion, Justice Jackson elaborated on the Court's reasoning:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . providing: 'A person arrested for an offense not punishable by death shall be admitted to bail' . . . before conviction.[19]

And finally, in perhaps its best known expression of the right to bail, the Supreme Court did not explain that merely having one's bail set, whether that setting resulted in release or detention, was at the core of the right. Instead, the Court wrote that "liberty" – a state necessarily obtained from actual release – is the American "norm."[20]

Nevertheless, in the field of pretrial justice we must also recognize the equally legitimate consideration of "no bail," or detention. It is now fairly clear that the federal constitution does not guarantee an absolute right to bail, and so it is more appropriate to discuss the right as one that exists when it is authorized by a

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[18] 342 U.S. 1, 4 (1951) (internal citations omitted).

[19] *Id.* at 7-8.

[20] *United States v. Salerno,* 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception").

particular constitutional or legislative provision. The Court's opinion in *United States v. Salerno* is especially relevant because it instructs us that when examining a law with no constitutionally-based right-to-bail parameters (such as, arguably, the federal law), the legislature may enact statutory limits on pretrial freedom (including detention) so long as: (1) those limitations are not excessive in relation to the government's legitimate purposes; (2) they do not offend due process (either substantive or procedural); and (3) they do not result in a situation where pretrial liberty is not the norm or where detention has not been carefully limited as an exception to release.

It is not necessarily accurate to say that the Court's opinion in *Salerno* eroded its opinion in *Stack,* including *Stack's* language equating bail with release. *Salerno* purposefully explained *Stack* and another case, *Carlson v. Landon*, together to provide cohesion. And therefore, while it is true that the federal constitution does not contain an explicit right to bail, when that right is granted by the applicable statute (or in the various states' constitutions or statutes), it should be regarded as a right to pretrial freedom. The *Salerno* opinion is especially instructive in telling us how to create a fair and transparent "no bail" side of the dichotomy, and further reminds us of a fundamental principle of pretrial justice: both bail and no bail are lawful if we do them correctly.

Liberalizing American bail laws during our country's colonial period meant that these laws did not always include the English "factors" for initially determining bailability, such as the seriousness of the offense, the weight of the evidence, and the character of the accused. Indeed, by including an examination of the evidence into its constitutional bail provision, Pennsylvania did so primarily to allow bailability despite the defendant being charged with a capital crime. Nevertheless, the historical factors first articulated in the Statute of Westminster survived in America through the judge's use of these factors to determine *conditions* of bail.

Thus, technically speaking, bailability in England after 1275 was determined through an examination of the charge, the evidence, and the character or criminal history of the defendant, and if a defendant was deemed bailable, he or she was required to be released. In America, bailability was more freely designated, but judges would still typically look at the charge, the evidence, and the character of the defendant to set the only limitation on pretrial freedom available at that time – the amount of the financial condition. Accordingly, while bailability in America was still meant to mean release, by using those factors traditionally used to determine bailability to now set the primary condition of bail or release, judges found that those factors sometimes had a determining effect on the actual release

of bailable defendants. Indeed, when America began running out of personal sureties, judges, using factors historically used to determine bailability, were finding that these same factors led to unattainable financial conditions creating, ironically, a state of unbailability for technically bailable defendants.

> *"Bail is a matter of confidence and personal relation. It should not be made a matter of contract or commercialism. . . . Why provide for a bail piece, intended to promote justice, and then destroy its effect and utility? Why open the door to barter freedom from the law for money?"*
>
> *Carr v Davis* 64 W. Va. 522, 535 (1908) (Robinson, J. dissenting).

Intersection of the Two Historical Phenomena

The history of bail in America in the 20th century represents an intersection of these two historical phenomena. Indeed, because it involved requiring defendants to pay money up-front as a prerequisite to release, the blossoming of a secured bond scheme as administered through a commercial surety system was bound to lead to perceived abuses in the bail/no bail dichotomy to such an extent that history would demand some correction. Accordingly, within only 20 years of the advent of commercial sureties, scholars began to study and critique that for-profit system.

In the first wave of research, scholars focused on the inability of bailable defendants to obtain release due to secured financial conditions and the abuses in the commercial surety industry. The first generation of bail reform, as it is now known, used research from the 1920s to the 1960s to find alternatives to the commercial surety system, including release on recognizance and nonfinancial conditional release. Its focus was on the "bail" side of the dichotomy and how to make sure bailable defendants would actually obtain release.

The second generation of bail reform (from the 1960s to the 1980s) focused on the "no bail" side, with a wave of research indicating that there were some defendants whom society believed should be detained without bail (rather than by using money) due to their perceived dangerousness through documented instances of defendants committing crime while released through the bail process. That generation culminated with the United States Supreme Court's approval of a federal detention statute, and with states across America changing their constitutions and statutes to reflect not only a new constitutional purpose

for restricting pretrial liberty – public safety – but also detention provisions that followed the Supreme Court's desired formula.

Three Generations of Bail Reform: Hallmarks and Highlights

Since the evolution from a personal surety system using unsecured bonds to primarily a commercial surety system using secured bonds, America has seen two generations of bail or pretrial reform and is currently in a third. Each generation has certain elements in common, such as significant research, a meeting of minds, and changes in laws, policies, and practices.

The First Generation – 1920s to 1960s: Finding Alternatives to the Traditional Money Bail System; Reducing Unnecessary Pretrial Detention of Bailable Defendants

Significant Research – This generation's research began with Roscoe Pound and Felix Frankfurter's *Criminal Justice in Cleveland* (1922) and Arthur Beeley's *The Bail System in Chicago* (1927), continued with Caleb Foote's study of the Philadelphia process found in *Compelling Appearance in Court: Administration of Bail in Philadelphia* (1954), and reached a peak through the research done by the Vera Foundation and New York University Law School's Manhattan Bail Project (1961) as well as similar bail projects such as the one created in Washington D.C. in 1963.

Meeting of Minds – The meeting of minds for this generation culminated with the 1964 Attorney General's National Conference on Bail and Criminal Justice and the Bail Reform Act of 1966.

Changes in Laws, Policies and Practices – The Supreme Court's ruling in *Stack v. Boyle* (1951) had already guided states to better individualize bail determinations through their various bail laws. The Bail Reform Act of 1966 (and state statutes modeled after the Act) focused on alternatives to the traditional money bail system by encouraging release on least restrictive, nonfinancial conditions as well as presumptions favoring release on recognizance, which were based on information gathered concerning a defendant's community ties to help assure court appearance. The American Bar Association's Criminal Justice Standards on Pretrial Release in 1968 made legal and evidence-based recommendations for all aspects of release and detention decisions. Across America, though, states have not fully incorporated the full panoply of laws, policies, and practices designed to reduce unnecessary pretrial detention of bailable defendants

The Second Generation – late 1960s to 1980s: Allowing Consideration of Public Safety as a Constitutionally Valid Purpose to Limit Pretrial Freedom; Defining the Nature and Scope of Preventive Detention

Significant Research – Based on discussions in the 1960s, the American Bar Association Standards on Pretrial Release first addressed preventive detention (detaining a defendant with no bail based on danger and later expressly encompassing risk for failure to appear) in 1968, a position later adopted by other organizations' best practice standards. Much of the "research" behind this wave of reform focused on: (1) philosophical debates surrounding the 1966 Act's inability to address public safety as a valid purpose for limiting pretrial freedom; and (2) judges' tendencies to use money to detain defendants due to the lack of alternative procedures for defendants who pose high risk to public safety or for failure to appear for court. The research used to support Congress's finding of "an alarming problem of crimes committed by persons on release" (noted by the U.S. Supreme Court in *United States v. Salerno)* is contained in the text and references from Senate Report 98-225 to the Bail Reform Act of 1984. Other authors, such as John Goldkamp (*see Danger and Detention: A Second Generation of Bail Reform*, 76 J. Crim. L. & Criminology 1 (1985)) and Senator Ted Kennedy (*see A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 Fordham L. Rev. 423 (1980)), also contributed to the debate and relied on a variety of empirical research in their papers.

Meeting of Minds – Senate Report 98-225 to the Bail Reform Act of 1984 cited broad support for the idea of limiting pretrial freedom up to and including preventive detention based on public safety in addition to court appearance. This included the fact that consideration of public safety already existed in the laws of several states and the District of Columbia, the fact that the topic was addressed by the various national standards, and the fact that it also had the support from the Attorney General's Task Force on Violent Crime, the Chief Justice of the United States Supreme Court, and even the President.

Changes in Laws, Policies and Practices – Prior to 1970, court appearance was the only constitutionally valid purpose for limiting a defendant's pretrial freedom. Congress first allowed public safety to be considered equally to court appearance in the District of Columbia Court Reform and Criminal Procedure Act of 1970, and many states followed suit. In 1984, Congress passed the Bail Reform Act of 1984 (part of the Comprehensive Crime Control Act), which included public safety as a valid purpose for limiting pretrial freedom and procedures designed to allow preventive detention without bail for high-risk defendants. In 1987, the United States Supreme Court upheld the Bail Reform Act of 1984 against facial due process and excessive bail challenges in *United States v, Salerno*. However, as in the first generation of bail reform, states across America have not fully implemented the laws, policies, and practices needed to adequately and lawfully detain defendants when necessary.

The Third Generation – 1990 to present: Fixing the Holes Left by States Not Fully Implementing Improvements from the First Two Generations of Bail Reform; Using Legal and Evidence-Based Practices to Create a More Risk-Based System of Release and Detention

Significant Research – Much of the research in this generation revisits deficiencies caused by the states not fully implementing adequate "bail" and "no bail" laws, policies, and practices developed in the previous two generations. Significant legal, historical, and empirical research sponsored by the Department of Justice, the Pretrial Justice Institute, the New York City Criminal Justice Agency, the District of Columbia Pretrial Services Agency, the Administrative Office of the U.S. Courts, various universities, and numerous other public, private, and philanthropic entities across America have continued to hone the arguments for improvements as well as the solutions to discreet bail issues. Additional groundbreaking research involves the creation of empirical risk assessment instruments for local, statewide, and now national use, along with research focusing on strategies for responding to predicted risk while maximizing release.

Meeting of Minds – The meeting of minds for this generation has been highlighted so far by the Attorney General's National Symposium on Pretrial Justice in 2011, along with the numerous policy statements issued by national organizations favoring the administration of bail based on risk.

Changes in Laws, Policies and Practices – Jurisdictions are only now beginning to make changes reflecting the knowledge generated and shared by this generation of pretrial reform. Nevertheless, changes are occurring at the county level (such as in Milwaukee County, Wisconsin, which has implemented a number of legal and evidence-based pretrial practices), the state level (such as in Colorado, which passed a new bail statute based on pretrial best practices in 2013), and even the national level (such as in the federal pretrial system, which continues to examine its release and detention policies and practices).

The Current Generation of Bail/Pretrial Reform

The first two generations of bail reform used research to attain a broad meeting of the minds, which, in turn, led to changes to laws, policies, and practices. It is now clear, however, that these two generations did not go far enough. The traditional money bail system, which includes heavy reliance upon secured bonds administered primarily through commercial sureties, continues to flourish in America, thus causing the unnecessary detention of bailable defendants. Moreover, for a number of reasons, the states have not fully embraced ways to fairly and transparently detain persons without bail, choosing instead to maintain a primarily charge-and-money-based bail system to respond to threats to public safety. In short, the two previous generations of bail reform have instructed us on how to properly implement both "bail" (release) and "no bail" (detention), but many states have instead clung to an outmoded system that leads to the detention of bailable defendants and the release of unbailable defendants (or those whom we perceive to be unbailable defendants) – abuses to the "bail/no bail" dichotomy that historically demand correction.

Fortunately, the current generation of pretrial reform has a vast amount of relevant research literature from which to fashion solutions to these problems. Moreover, like previous generations, this generation also shaped a distinct meeting of minds of numerous individuals, organizations, and government agencies, all of which now believe that pretrial improvements are necessary.

At its core, the third generation of pretrial reform thus has three primary goals. First, it aims to fully implement lawful bail/no bail dichotomies so that the right persons (and in lawful proportions) are deemed bailable and unbailable. Second, using the best available research and best pretrial practices, it seeks to lawfully effectuate the release and subsequent mitigation of pretrial risk of defendants deemed bailable and the fair and transparent detention of those deemed unbailable. Third, it aims to do this primarily by replacing charge-and-money-based bail systems with systems based on empirical risk.

Generations of Reform and the Commercial Surety Industry

The first generation of bail reform in America in the 20th century focused almost exclusively on finding alternatives to the predominant release system in place at the time, which was one based primarily on secured financial conditions administered through a commercial surety system. In hindsight, however, the second generation of bail reform arguably has had more of an impact on the for-profit bail bond industry in America. That generation focused primarily on public safety, and it led to changes in federal and state laws providing ways to assess pretrial risk for public safety, to release defendants with supervision designed to mitigate the risk to public safety, and even to detain persons deemed too risky.

Despite this national focus on public safety, however, the commercial surety industry did not alter its business model of providing security for defendants solely to help provide reasonable assurance of court appearance. Today, judges concerned with public safety cannot rely on commercial bail bondsmen because in virtually every state allowing money as condition of bail, the laws have been crafted so that financial conditions cannot be forfeited for breaches in public safety such as new crimes. In those states, a defendant who commits a new crime may have his or her bond revoked, but the money is not lost. When the bond is revoked, bondsmen, when they are allowed into the justice system (for most countries, four American states, and a variety of other large and small jurisdictions have ceased allowing profit at bail), can simply walk away, even though the justice system is not yet finished with that particular defendant. Bondsmen are free to walk away and are even free re-enter the system – free to negotiate a new surety contract with the same defendant, again with the money forfeitable only upon his or her failing to appear for court. Advances in our knowledge about the ineffectiveness and deleterious effects of money at bail only exacerbate the fundamental disconnect between the commercial surety industry, which survives on the use of money for court appearance, and what our society is trying to achieve through the administration of bail.

There are currently two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. Commercial bail agents and the insurance companies that support them are concerned with only one – court appearance – because legally money is simply not relevant to public safety. Historically speaking, America's gradual movement toward using pretrial services agencies, which, when necessary, supervise defendants both for court appearance and public safety concerns, is due, at least in part, to the commercial surety industry's purposeful decision not to take responsibility for public safety at bail.

What Does the History of Bail Tell Us?

The history of bail tells us that the pretrial release and detention system that worked effectively over the centuries was a "bail/no bail" system, in which bailable defendants were expected to be released and unbailable (or those whom society deemed should be unbailable) defendants were expected to be detained. Moreover, the bail side of the dichotomy functioned most effectively through an uncompensated and un-indemnified personal surety system based on unsecured financial conditions. What we in America today know as the traditional money bail system – a system relying primarily on secured financial conditions administered through commercial sureties – is, historically speaking, a relatively new system that was encouraged to solve America's dilemma of the unnecessary detention of bailable defendants in the 1800s. Unfortunately, however, the traditional money bail system has only exacerbated the two primary abuses that have typically led to historical correction: (1) the unnecessary detention of bailable defendants, whom we now often categorize as lower risk; and (2) the release of those persons whom we feel should be unbailable defendants, and whom we now often categorize as higher risk.

The history of bail also instructs us on the proper purpose of bail. Specifically, while avoiding blood feuds may have been the primary purpose for the original bail setting, once more public processes and jails were fully introduced into the administration of criminal justice, the purpose of bail changed to one of providing a mechanism of conditional release. Concomitantly, the purpose of "no bail" was and is detention. Historically speaking, the only purpose for limiting or conditioning pretrial release was to assure that the accused come to court or otherwise face justice. That changed in the 1970s and 1980s, as jurisdictions began to recognize public safety as a second constitutionally valid purpose for limiting pretrial freedom.[21]

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[21] Occasionally, a third purpose for limiting pretrial freedom has been articulated as maintaining or protecting the integrity of the courts or judicial process. Indeed, the third edition of the ABA Standards changed "to prevent intimidation of witnesses and interference with the orderly administration of justice" to "safeguard the integrity of the judicial process" as a "third purpose of release conditions." ABA Standards *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-5.2 (a) (history of the standard) at 107. The phrase "integrity of the judicial process," however, is one that has been historically misunderstood (its meaning requires a review of appellate briefs for decisions leading up to the Supreme Court's opinion in *Salerno*), and

The American history of bail further instructs us on the lessons of the first two generations of bail and pretrial reform in the 20th century. If the first generation provided us with practical methods to better effectuate the release side of the "bail/no bail" dichotomy, the second generation provided us with equally effective methods for lawful detention. Accordingly, despite our inability to fully implement what we now know are pretrial best practices, the methods gleaned from the first two generations of bail reform as well as the research currently contributing to the third generation have given us ample knowledge to correct perceived abuses and to make improvements to pretrial justice. In the next section, we will see how the evolution of the law and legal foundations of pretrial justice provide the parameters for those improvements.

Additional Sources and Resources: William Blackstone, *Commentaries on the Laws of England* (Oxford 1765-1769); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syracuse L. Rev. 517 (1983); Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement,* 1 Res. in Corr. 3:1 (1988); Comment, *Bail: An Ancient Practice Reexamined,* 70 Yale L. J. 966 (1960-61); Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (AMS Press, Inc., New York 1966); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Praeger Pub. 1991); Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System,* 33 Hous. L. Rev. 731 (1996-97); William F. Duker, *The Right to Bail: A Historical Inquiry,* 42 Alb. L. Rev. 33 (1977-78); Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II,* 113 Univ. Pa. L. Rev. 959 and 1125 (1965); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found. 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (Harper & Rowe 1965); James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases,* 6 Fordham L. Rev. 387 (1937); William Searle Holdsworth, *A History of English Law* (Methuen & Co., London, 1938); Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L. Q. 475 (1977); Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juszkiewicz, *The Pretrial Services Reference Book: History, Challenges, Programming* (Pretrial Servs. Res. Ctr. 1999); Hermine Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139 (1971-72); Gerald P.

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that typically begs further definition. Nevertheless, in most, if not all cases, that further definition is made unnecessary as being adequately covered by court appearance and public safety. Indeed, the ABA Standards themselves state that one of the purposes of the pretrial decision is "maintaining the integrity of the judicial process by securing defendants for trial." *Id.* Std. 10-1.1, at 36.

Monks, *History of Bail* (1982); Luke Owen Pike, *The History of Crime in England* (Smith, Elder, & Co. 1873); Frederick Pollock & Frederic Maitland, *The History of English Law Before the Time of Edward I* (1898); Timothy R. Schnacke, Michael R. Jones, Claire M. B. Brooker, *The History of Bail and Pretrial Release* (PJI 2010); Wayne H. Thomas, Jr. *Bail Reform in America* (Univ. CA Press 1976); Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions,* 19 New Eng. J. on Crim. & Civ. Confinement 267 (1993); Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act,* 97 Yale L. J. 320 (1987-88). **Cases:** *United States v. Edwards,* 430 A. 2d 1321 (D.C. 1981) (en banc); *State v. Brooks,* 604 N.W. 2d 345 (Minn. 2000); *State v. Briggs,* 666 N.W. 2d 573 (Iowa 2003).

Chapter 3: Legal Foundations of Pretrial Justice

History and Law

History and the law clearly influence each other at bail. For example, in 1627, Sir Thomas Darnell and four other knights refused to pay loans forced upon them by King Charles I. When the King arrested the five knights and held them on no charge (thus circumventing the Statute of Westminster, which required a charge, and the Magna Carta, on which the Statute was based), Parliament responded by passing the Petition of Right, which prohibited detention by any court without a formal charge. Not long after, however, officials sidestepped the Petition of Right by charging individuals and then running them through numerous procedural delays to avoid release. This particular practice led to the Habeas Corpus Act of 1679. However, by expressly acknowledging discretion in setting amounts of bail, the Habeas Corpus Act also unwittingly allowed determined officials to begin setting financial conditions of bail in prohibitively high amounts. That, in turn, led to passage of the English Bill of Rights, which prohibited "excessive" bail. In America, too, we see historical events causing changes in the laws and those laws, in turn, influencing events thereafter. One need only look to events before and after the two American generations of bail reform in the 20th century to see how history and the law are intertwined.

And so it is that America, which had adopted and applied virtually every English bail reform verbatim in its early colonial period, soon began a process of liberalizing both criminal laws generally, and bail in particular, due to the country's unique position in culture and history. Essentially, America borrowed the best of English law (such as an overall right to bail, habeas corpus, and prohibition against excessiveness) and rejected the rest (such as varying levels of discretion potentially interfering with the right to bail as well as harsh criminal penalties for certain crimes). The Colonies wrote bail provisions into their charters and re-wrote them into their constitutions after independence. Among those constitutions, we see broader right-to-bail provisions, such as in the model Pennsylvania law, which granted bail to all except those facing capital offenses (limited to willful murder) and only "where proof is evident or the presumption

great."[22] Nevertheless, some things remained the same. For example, continuing the long historical tradition of bail in England, the sole purpose of limiting pretrial freedom in America remained court appearance, and the only means for doing so remained setting financial conditions or amounts of money to be forfeited if a defendant missed court.

> *"The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of law, where there is no law, there is no freedom."*
>
> John Locke, 1689

In America, the ultimate expression of our shared values is contained in our founding documents, the Declaration of Independence and the Constitution. But if the Declaration can be viewed as amply supplying us with certain fundamental principles that can be interwoven into discussions of bail, such as freedom and equality, then the Constitution has unfortunately given us some measure of confusion on the topic. The confusion stems, in part, from the fact that the Constitution itself explicitly covers only the right of habeas corpus in Article 1, Section 9 and the prohibition on excessive bail in the 8th Amendment, which has been traced to the Virginia Declaration of Rights. There is no express right to bail in the U.S. Constitution, and that document provides no illumination on which persons should be bailable and which should not. Instead, the right to bail in the federal system originated from the Judiciary Act of 1789, which provided an absolute right to bail in non-capital federal criminal cases. Whether the constitutional omission was intentional is subject to debate, but the fact remains that when assessing the right to bail, it is typical for a particular state to provide superior rights to the United States Constitution. It also means that certain federal cases, such *United States v. Salerno*, must be read realizing that the Court was addressing a bail/no bail scheme derived solely from legislation. And it means that any particular bail case or dispute has the potential to involve a fairly complex mix of state and federal claims based upon any particular state's bail scheme.

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[22] June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syracuse L. Rev. 517, 531 (1983) (quoting 5 American Charters 3061, F. Thorpe ed. 1909).

The Legal "Mix"

There are numerous sources of laws surrounding bail and pretrial practices, and each state – and often a jurisdiction within a state – has a different "mix" of sources from that of all other jurisdictions. In any particular state or locality, bail practices may be dictated or guided by the United States Constitution and United States Supreme Court opinions, federal appellate court opinions, the applicable state constitution and state supreme court and other state appellate court decisions, federal and state bail statutes, municipal ordinances, court rules, and even administrative regulations. Knowing your particular mix and how the various sources of law interact is crucial to understanding and ultimately assessing your jurisdiction's pretrial practices.

The fact that we have separate and sometimes overlapping federal and state pretrial legal foundations is one aspect of the evolution of bail law that adds complexity to particular cases. The other is the fact that America has relatively little authoritative legal guidance on the subject of bail. In the federal realm, this may be due to issues of incorporation and jurisdiction, but in the state realm it may also be due to the relatively recent (historically speaking) change from unsecured to secured bonds. Until the nineteenth century, historians suggest that bail based on unsecured bonds administered through a personal surety system led to the release of virtually all bailable criminal defendants. Such a high rate of release leaves few cases posing the kind of constitutional issues that require an appellate court's attention. But even in the 20th century, we really have only two (or arguably three) significant United States Supreme Court cases discussing the important topic of the release decision at bail. It is apparently a topic that lawyers, and thus federal and state trial and appellate courts, have largely avoided. This avoidance, in turn, potentially stands in the way of jurisdictions looking for the bright line of the law to guide them through the process of improving the administration of bail.

On the other hand, what we lack in volume of decisions is made up to some extent by the importance of the few opinions that we do have. Thus, we look at *Salerno* not as merely one case among many from which we may derive guidance; instead, *Salerno* must be scrutinized and continually referenced as a foundational standard as we attempt to discern the legality of proposed improvements. The evolution of law in America, whether broadly encompassing all issues of criminal procedure, or more narrowly discussing issues related directly to bail and pretrial justice, has demonstrated conclusively the law's

importance as a safeguard to implementing particular practices in the criminal process. Indeed, in other fields we speak of using evidence-based practices to achieve the particular goals of the discipline. In bail, however, we speak of "legal and evidence-based practices,"[23] because it is the law that articulates those disciplinary goals to begin with. The phrase legal and evidence-based practices acknowledges the fact that in bail and pretrial justice, the empirical evidence, no matter how strong, is always subservient to fundamental legal foundations based on fairness and equal justice.

Fundamental Legal Principles

While all legal principles affecting the pretrial process are important, there are some that demand our particular attention as crucial to a shared knowledge base. The following list is derived from materials taught by D.C. Superior Court Judge Truman Morrison, III, in the National Institute of Corrections' Orientation for New Pretrial Executives, and occasionally supplemented by information contained in Black's Law Dictionary (9th ed.) as well as the sources footnoted or cited at the end of the chapter.

The Presumption of Innocence

Perhaps no legal principle is as simultaneously important and misunderstood as the presumption of innocence. Technically speaking, it is the principle that a person may not be convicted of a crime unless and until the government proves guilt beyond a reasonable doubt, without any burden placed on the defendant to prove his or her innocence. Its importance is emphasized in the Supreme Court's opinion in *Coffin v. United States*, in which the Court wrote: "a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[24] In *Coffin,* the Court traced the presumption's origins to various extracts of Roman law, which included language similar to the "better that ten guilty persons go free" ratio articulated by Blackstone. The importance of the presumption of innocence has not waned, and the Court has expressly quoted the "axiomatic and elementary" language in just the last few years.

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[23] Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007).
[24] *Coffin v. United States,* 156 U.S. 432, 453 (1895).

Its misunderstanding comes principally from the fact that in *Bell v. Wolfish*, the Supreme Court wrote that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun,"[25] a line that has caused many to argue, incorrectly, that the presumption of innocence has no application to bail. In fact, *Wolfish* was a "conditions of confinement" case, with inmates complaining about various conditions (such as double bunking), rules (such as prohibitions on receiving certain books), and practices (such as procedures involving inmate searches) while being held in a detention facility. In its opinion, the Court was clear about its focus in the case: "We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails. . . . Instead, what is at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee's right to be free from punishment, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point."[26] Specifically, and as noted by the Court, the parties were not disputing whether the government could detain the prisoners, the government's purpose for detaining the prisoners, or even whether complete confinement was a legitimate means for limiting pretrial freedom, all issues that would necessarily implicate the right to bail, statements contained in *Stack v. Boyle*, and the presumption of innocence. Instead, the issue before the Court was whether, after incarceration, the prisoners' complaints could be considered punishment in violation of the Due Process Clause.

Accordingly, the presumption of innocence has everything to do with bail, at least so far as determining which classes of defendants are bailable and the constitutional and statutory rights flowing from that decision. And therefore, the language of *Wolfish* should in no way diminish the strong statements concerning the right to bail found in *Stack v. Boyle* (and other state and federal cases that have quoted *Stack*), in which the Court wrote, "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[27] The idea that the right to bail (that is, the right to release when the accused is bailable) necessarily triggers serious consideration of the presumption of innocence is also clearly seen

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[25] *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

[26] *Id.* at 533-34 (internal citations omitted).

[27] 342 U.S. 1, 4 (1951) (internal citation omitted).

through Justice Marshall's dissent in *United States v. Salerno,* in which he wrote, albeit unconvincingly, that "the very pith and purpose of [the Bail Reform Act of 1984] is an abhorrent limitation of the presumption of innocence."[28]

As explained by the Court in *Taylor v. Kentucky*, the phrase is somewhat inaccurate in that there is no true presumption – that is, no mandatory inference to be drawn from evidence. Instead, "it is better characterized as an 'assumption' that is indulged in the absence of contrary evidence."[29] Moreover, the words "presumption of innocence" themselves are found nowhere in the United States Constitution, although the phrase is linked to the 5th, 14th, and 6th Amendments to the Constitution. *Taylor* suggests an appropriate way of looking at the presumption as "a special and additional caution" to consider beyond the notion that the government must ultimately prove guilt. It is the idea that "no surmises based on the present situation of the accused"[30] should interfere with the jury's determination. Applying this concept to bail, then, the presumption of innocence is like an aura surrounding the defendant, which prompts us to set aside our potentially negative surmises based on the current arrest and confinement as we determine the important question of release or detention.

> *"Here we deal with a right, the right to release of presumably innocent citizens. I cannot conceive that such release should not be made as widely available as it reasonably and rationally can be."*
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> *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (Gee, J. specially concurring)

[28] *United States v. Salerno*, 481 U.S. 739, 762-63 (1987).

[29] *Taylor v Kentucky*, 436 U.S. 478, 483 n. 12 (1978).

[30] *Id.* at 485 (quoting 9 J. Wigmore, Evidence § 2511 (3d ed. 1940) at 407).

The Right to Bail

When granted by federal or state law, the right to bail should be read as a right to release through the bail process. It is often technically articulated as the "right to non-excessive" bail, which goes to the reasonableness of any particular conditions or limitations on pretrial release.

The preface, "when granted by federal or state law" is crucial to understand because we now know that the "bail/no bail" dichotomy is one that legislatures or the citizenry are free to make though their statutes and constitutions. Ever since the Middle Ages, there have been certain classes of defendants (typically expressed by types of crimes, but changing now toward categories of risk) who have been refused bail – that is, denied a process of release altogether. The bail/no bail dichotomy is exemplified by the early bail provisions of Massachusetts and Pennsylvania, which granted bail to some large class of persons "except," and with the exception being the totality of the "no bail" side. These early provisions, as well as those copied by other states, were technically the genesis of what we now call "preventive detention" schemes, which allow for the detention of risky defendants – the risk at the time primarily being derived from the seriousness of the charge, such as murder or treason.

The big differences between detention schemes then and now include: (1) the old schemes were based solely on risk for failure to appear for court; we may now detain defendants based on a second constitutionally valid purpose for limiting pretrial freedom – public safety; (2) the old schemes were mostly limited to findings of "proof evident and presumption great" for the charge; today preventive detention schemes often have more stringent burdens for the various findings leading to detention; (3) overall, the states have largely widened the classes of defendants who may lawfully be detained – they have, essentially, changed the ratio of bailable to unbailable defendants to include potentially more unbailable defendants than were deemed unbailable, say, during the first part of the 20th century; and (4) in many cases, the states have added detailed provisions to the detention schemes (in addition to their release schemes). Presumably, this was to follow guidance by the United States Supreme Court from its opinion in *United States v. Salerno,* which approved the federal detention scheme based primarily on that law's inclusion of certain procedural due process elements designed to make the detention process fair and transparent.

How a particular state has defined its "bail/no bail" dichotomy is largely due to its constitution, and arguably on the state's ability to easily amend that

constitution. According to legal scholars Wayne LaFave, et al., in 2009 twenty-three states had constitutions modeled after Pennsylvania's 1682 language that guaranteed a right to bail to all except those charged with capital offenses, where proof is evident or the presumption is great. It is unclear whether these states today choose to remain broad "right-to-bail" states, or whether their constitutions are simply too difficult to amend. Nevertheless, these states' laws likely contain either no, or extremely limited, statutory pretrial preventive detention language.[31]

Nine states had constitutions mirroring the federal constitution – that is, they contain an excessive bail clause, but no clause explicitly granting a right to bail. The United States Supreme Court has determined that the federal constitution does not limit Congress' ability to craft a lawful preventive detention statute, and these nine states likewise have the same ability to craft preventive detention statutes (or court rules) with varying language.

The remaining 18 states had enacted in their constitutions relatively recent amendments describing more detailed preventive detention provisions. As LaFave, et al., correctly note, these states may be grouped in three ways: (1) states authorizing preventive detention for certain charges, combined with the requirement of a finding of danger to the community; (2) states authorizing preventive detention for certain charges, combined with some condition precedent, such as the defendant also being on probation or parole; and (3) states combining elements of the first two categories.

There are currently two fundamental issues concerning the right to bail in America today. The first is whether states have created the right ratio of bailable to unbailable defendants. The second is whether they are faithfully following best practices using the ratio that they currently have. The two issues are connected.

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[31] *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure* (3rd ed. 2007 & 5th ed. 2009). Readers should be vigilant for activity changing these numbers. For example, the 2010 constitutional amendment in Washington State likely adds it to the category of states having preventive detention provisions in their constitutions. Moreover, depending on how one reads the South Carolina constitution, the counts may, in fact, reveal 9 states akin to the federal scheme, 21 states with traditional right to bail provisions, and 20 states with preventive detention amendments.

American law contemplates a presumption of release, and thus there are limits on the ratio of bailable to unbailable defendants. The American Bar Association Standards on Pretrial Release describes its statement, "the law favors the release of defendants pending adjudication of charges" as being "consistent with Supreme Court opinions emphasizing the limited permissible scope of pretrial detention."[32] It notes language from *Stack v. Boyle*, in which the Court equates the right to bail to "[the] traditional right to freedom before conviction,"[33] and from *United States v. Salerno*, in which the Court wrote, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[34] Beyond these statements, however, we have little to tell us definitively and with precision how many persons should remain bailable in a lawful bail/no bail scheme.

We do know, however, that the federal "bail/no bail" scheme was examined by the Supreme Court and survived at least facial constitutional attacks based on the Due Process Clause and the 8th Amendment. Presumably, a state scheme fully incorporating the detention-limiting elements of the federal law would likely survive similar attacks. Accordingly, using the rest of the *Salerno* opinion as a guide, one can look at any particular jurisdiction's bail scheme to assess whether that scheme appears, at least on its face, to presume liberty and to restrict detention by incorporating the numerous elements from the federal statute that were approved by the Supreme Court. For example, if a particular state included a provision in either its constitution or statute opening up the possibility of detention for all defendants no matter what their charges, the scheme should be assessed for its potential to over-detain based on *Salerno's* articulated approval of provisions that limited detention to defendants "arrested for a specific category of extremely serious offenses."[35] Likewise, any jurisdiction that does not "carefully" limit detention – that is, it detains carelessly or without thought possibly through the casual use of money – is likely to be seen as running afoul of the foundational principles underlying the Court's approval of the federal law.

The second fundamental issue concerning the right to bail – whether states are faithfully following the ratio that they currently have – is connected to the first. If states have not adequately defined their bail/no bail ratio, they will often see money still being used to detain defendants whom judges feel are extreme risks,

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[32] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-1.1 (commentary) at 38.
[33] 342 U.S. 1, 4 (1951).
[34] 481 U.S. 739, 755 (1987).
[35] *Id.* at 750.

which is essentially the same practice that led to the second generation of American bail reform in the 20th century. Simply put, a proper bail/no bail dichotomy should lead naturally to an in-or-out decision by judges, with bailable defendants released pursuant to a bond with reasonable conditions and unbailable defendants held with no bond. Without belaboring the point, judges are not faithfully following any existing bail/no bail dichotomy whenever they (1) treat a bailable defendant as unbailable by setting unattainable conditions, or (2) treat an unbailable defendant as bailable in order to avoid the lawfully enacted detention provisions. When these digressions occur, then they suggest either that judges should be compelled to comply with the existing dichotomy, or that the balance of the dichotomy must be changed.

This latter point is important to repeat. Among other things, the second generation of American bail reform was, at least partially, in response to judges setting financial conditions of bail at unattainable levels to protect the public despite the fact that the constitution had not been read to allow public safety as a proper purpose for limiting pretrial freedom. Judges who did so were said to be setting bail "sub rosa," in that they were working secretively toward a possibly improper purpose of bail. The Bail Reform Act of 1984, as approved by the United States Supreme Court, was designed to create a more transparent and fair process to allow the detention of high-risk defendants for the now constitutionally valid purpose of public safety. From that generation of reform, states learned that they could craft constitutional and statutory provisions that would effectively define the "bail" and "no bail" categories so as to satisfy both the Supreme Court's admonition that liberty be the "norm" and the public's concern that the proper persons be released and detained.

Unfortunately, many states have not created an appropriate balance. Those that have attempted to, but have done so inadequately, are finding that the inadequacy often lies in retaining a charge-based rather than a risk-based scheme to determine detention eligibility. Accordingly, in those states judges continue to set unattainable financial conditions at bail to detain bailable persons whom they consider too risky for release. If a proper bail/no bail balance is not crafted through a particular state's preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to expeditiously detain otherwise bailable defendants. On the other hand, if the proper balance is created so that high-risk defendants can be detained through a fair and transparent process, money can be virtually eliminated from the bail process without negatively affecting public safety or court appearance rates.

Despite certain unfortunate divergences, the law, like the history, generally considers the right to bail to be a right to release. Thus, when a decision has been made to "bail" a particular defendant, every consideration should be given, and every best practice known should be employed, to effectuate and ensure that release. Bailable defendants detained on unattainable conditions should be considered clues that the bail process is not functioning properly. Judicial opinions justifying the detention of bailable defendants (when the bailable defendant desires release) should be considered aberrations to the historic and legal notion that the right to bail should equal the right to release.

What Can International Law and Practices Tell Us About Bail?

Unnecessary and arbitrary pretrial detention is a worldwide issue, and American pretrial practitioners can gain valuable perspective by reviewing international treaties, conventions, guidelines, and rules as well as reports documenting international practices that more closely follow international norms.

According to the American Bar Association's Rule of Law Initiative,

> "International standards strongly encourage the imposition of noncustodial measures during investigation and trial and at sentencing, and hold that deprivation of liberty should be imposed only when non-custodial measures would not suffice. The overuse of detention is often a symptom of a dysfunctional criminal justice system that may lack protection for the rights of criminal defendants and the institutional capacity to impose, implement, and monitor non-custodial measures and sanctions. It is also often a cause of human rights violations and societal problems associated with an overtaxed detention system, such as overcrowding; mistreatment of detainees; inhumane detention conditions; failure to rehabilitate offenders leading to increased recidivism; and the imposition of the social stigma associated with having been imprisoned on an ever-increasing part of the population. Overuse of pretrial detention and incarceration at sentencing are equally problematic and both must be addressed in order to create effective and lasting criminal justice system reform."

International pretrial practices, too, can serve as templates for domestic improvement. For example, bail practitioners frequently cite to author F.E. Devine's study of international practices demonstrating various effective alternatives to America's traditional reliance on secured bonds administered by commercial bail bondsmen and large insurance companies.

Sources and Resources: David Berry & Paul English, *The Socioeconomic Impact of Pretrial Detention* (Open Society Foundation 2011); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Greenwood Publishing Group 1991); Anita H. Kocsis, *Handbook of International Standards on Pretrial Detention Procedure* (ABA, 2010); Amanda Petteruti & Jason Fenster, *Finding Direction:*

Expanding Criminal Justice Options by Considering Policies of Other Nations (Justice Policy Institute, 2011). There are also several additional documents and other resources available from the Open Society Foundation's Global Campaign for Pretrial Justice online website, found at http://www.opensocietyfoundations.org/projects/global-campaign-pretrial-justice.

Release Must Be the Norm

This concept is part of the overall consideration of the right to bail, discussed above, but it bears repeating and emphasis as its own fundamental legal principle. The Supreme Court has said, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[36] As noted previously, in addition to suggesting the ratio of bailable to unbailable defendants, the second part of this quote cautions against a release process that results in detention as well as a detention process administered haphazardly. Given that the setting of a financial bail condition often leaves judges and others wondering whether the defendant will be able to make it – i.e., the release or detention of that particular defendant is now essentially random based on any number of factors – it is difficult to see how such a detention caused by money can ever be considered a "carefully limited" process.

Due Process

Due Process refers generally to upholding people's legal rights and protecting individuals from arbitrary or unfair federal or state action pursuant to the rights afforded by the Fifth and Fourteenth Amendments of the United States Constitution (and similar or equivalent state provisions). The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[37] The Fourteenth Amendment places the same restrictions on the states. The concept is believed to derive from the Magna Carta, which required King John of England to accept certain limitations to his power, including the limitation that no man be imprisoned or otherwise deprived of his rights except by lawful judgment of his peers or the law of the land. Many of the original provisions of the Magna Carta were incorporated into the Statute of Westminster of 1275, which included important provisions concerning bail.

[36] *Id.* at 755.

[37] U.S. Const. amend. V.

As noted by the Supreme Court in *United States v. Salerno*, due process may be further broken down into two subcategories:

> So called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process.[38]

In *Salerno,* the Court addressed both substantive and procedural fairness arguments surrounding the federal preventive detention scheme. The substantive due process argument dealt with whether detention represented punishment prior to conviction. The procedural issue dealt with how the statute operated – whether there were procedural safeguards in place so that detention could be ordered constitutionally. People who are detained pretrial without having the benefit of the particular safeguards enumerated in the *Salerno* opinion could, theoretically, raise procedural due process issues in an appeal of their bail-setting.

A shorthand way to think about due process is found in the words "fairness" or "fundamental fairness." Other words, such as "irrational," "unreasonable," and "arbitrary" tend also to lead to due process scrutiny, making the Due Process Clause a workhorse in the judicial review of bail decisions. Indeed, as more research is being conducted into the nature of secured financial conditions at bail – their arbitrariness, the irrationality of using them to provide reasonable assurance of either court appearance or public safety, and the documented negative effects of unnecessary pretrial detention – one can expect to see many more cases based on due process clause claims.

Equal Protection

If the Due Process Clause protects against unfair, arbitrary, or irrational laws, the Equal Protection Clause of the Fourteenth Amendment (and similar or equivalent state provisions) protects against the government treating similarly situated persons differently under the law. Interestingly, "equal protection" was not mentioned in the original Constitution, despite the phrase practically

[38] 481 U.S 739, 746 (internal citations omitted).

embodying what we now consider to be the whole of the American justice system. Nevertheless, the Fourteenth Amendment to the United States Constitution now provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[39] While there is no counterpart to this clause that is applicable to the federal government, federal discrimination may be prohibited as violating the Due Process Clause of the Fifth Amendment.

> *"The only stable state is the one in which all men are equal before the law."*
>
> Aristotle, 350 B.C.

Over the years, scholars have argued that equal protection considerations should serve as an equally compelling basis as does due process for mandating fair treatment in the administration of bail, especially when considering the disparate effect of secured money bail bonds on defendants due only to their level of wealth. This argument has been bolstered by language from Supreme Court opinions in cases like *Griffin v. Illinois*, which dealt with a defendant's ability to purchase a transcript required for appellate review. In that case, Justice Black wrote, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[40] Moreover, sitting as circuit justice to decide a prisoner's release in two cases, Justice Douglas uttered the following dicta frequently cited as support for equal protection analysis: (1) "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?";[41] and (2) "[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."[42] Overall, despite scholarly arguments to invoke equal protection analysis to the issue of bail (including any further impact caused by the link between income and race), the courts have been largely reluctant to do so.

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[39] U.S. Const. amend. XIV, § 1.

[40] 351 U.S. 12, 19 (1956).

[41] *Bandy v. United States*, 81 S. Ct. 197, 198 (1960).

[42] *Bandy v. United States*, 82 S. Ct. 11, 13 (1961).

Excessive Bail and the Concept of Least Restrictive Conditions

Excessive bail is a legal term of art used to describe bail that is unconstitutional pursuant to the 8th Amendment to the United States Constitution (and similar or equivalent state provisions). The 8th Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[43] The Excessive Bail Clause derives from reforms made by the English Parliament in the 1600s to curb the abuse of judges setting impossibly high money bail to thwart the purpose of bail to afford a process of pretrial release. Indeed, historians note that justices began setting high amounts on purpose after King James failed to repeal the Habeas Corpus Act, and the practice represents, historically, the first time that a condition of bail rather than the actual existence of bail became a concern. The English Bill of Rights of 1689 first used the phrase, "Excessive bail ought not to be required," which was incorporated into the 1776 Virginia Declaration of rights, and ultimately found its way into the United States and most state constitutions. Excessiveness must be determined by looking both at federal and state law, but a rule of thumb is that the term relates overall to reasonableness.

"Excessive bail" is now, in fact, a misnomer, because bail more appropriately defined as a process of release does not lend itself to analysis for excessiveness. Instead, since it was first uttered, the phrase excessive bail has always applied to conditions of bail or limitations on pretrial release. The same historical factors causing jurisdictions to define bail as money are at play when one says that bail can or cannot be excessive; hundreds of years of having only one condition of release – money – have caused the inevitable but unfortunate blurring of bail and one of its conditions. Accordingly, when we speak of excessiveness, we now more appropriately speak in terms of limitations on pretrial release or freedom.

Looking at excessiveness in England in the 1600s requires us to consider its application within a personal surety system using unsecured amounts. Bail set at a prohibitively high amount meant that no surety (i.e., a person), or even group of sureties, would willingly take responsibility for the accused. Even before the prohibition, however, amounts were often beyond the means of any particular defendant, requiring sometimes several sureties to provide "sufficiency" for the bail determination. Accordingly, as is the case today, it is likely that some indicator of excessiveness at a time of relatively plentiful sureties for any particular defendant was continued detention of an otherwise bailable

[43] U.S. Const. amend. VIII.

defendant. Nevertheless, before the abuses leading to the English Bill of Rights and Habeas Corpus Act, there was no real indication that high amounts required of sureties led to detention in England. And in America, "[a]lthough courts had broad authority to deny bail for defendants charged with capital offenses, they would generally release in a form of pretrial custody defendants who were able to find willing custodians."[44] In a review of the administration of bail in Colonial Pennsylvania, author Paul Lermack concluded that "bail . . . continued to be granted routinely . . . for a wide variety of offenses . . . [and] [a]lthough the amount of bail required was very large in cash terms and a default could ruin a guarantor, few defendants had trouble finding sureties."[45]

The current test for excessiveness from the United States Supreme Court is instructive on many points. In *United States v. Salerno*, the Court wrote as follows:

> The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack v. Boyle*, *supra*. We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the 8th Amendment does not require release on bail.[46]

Thus, as explained in *Galen v. County of Los Angeles,* to determine excessiveness, one must

> look to the valid state interests bail is intended to serve for a particular individual and judge whether bail conditions are excessive for the purpose of achieving those interests. The state may not set bail to achieve invalid interests . . . nor in an amount

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[44] Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 Yale L. J. 323, 323-24 (1987-88) (internal citations omitted).

[45] Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L. Q. 475 at 497, 505 (1977).

[46] 481 U.S. 739, 754-55 (1987).

> that is excessive in relation to the valid interests it seeks to achieve.[47]

Salerno thus tells us at least three important things. First, the law of *Stack v. Boyle* is still strong: when the state's interest is assuring the presence of the accused, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the 8th Amendment."[48] The idea of "reasonable" calculation necessarily compels us to assess how judges are typically setting bail, which might be arbitrarily (such as through a bail schedule) or irrationally (such as through setting financial conditions to protect the public when those conditions cannot be forfeited for breaches in public safety, or when they are otherwise not effective at achieving the lawful purposes for setting them, which recent research suggests).

Second, financial conditions (i.e., amounts of money) are not the only conditions vulnerable to an excessive bail claim. Any unreasonable condition of release, including a nonfinancial condition, that has no relationship to mitigating an identified risk, or that exceeds what is needed to reasonably assure the constitutionally valid state interest, might be deemed constitutionally excessive.

Third, the government must have a proper purpose for limiting pretrial freedom. This is especially important because scholars and courts (as well as Justice Jackson, again sitting as circuit justice) have indicated that setting bail with a purpose to detain an otherwise bailable defendant would be unconstitutional. In states where the bail/no bail dichotomy has been inadequately crafted, however, judges are doing precisely that.

While the Court in *Salerno* upheld purposeful pretrial detention pursuant to the Bail Reform Act of 1984, it did so only because the statute contained "numerous procedural safeguards" that are rarely, if ever, satisfied merely through the act of setting a high money bond. Therefore, when a state has established a lawful method for preventively detaining defendants, setting financial conditions designed to detain otherwise bailable defendants outside of that method could still be considered an unlawful purpose. Purposeful pretrial detention through a process of the type endorsed by the United States Supreme Court is entirely different from purposeful pretrial detention done through setting unattainable financial conditions of release.

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[47] 477 F.3d 652, 660 (9th Cir. 2007) (internal citations omitted).

[48] 342 U.S. 1, 5 (1951).

When the United States Supreme Court says that conditions of bail must be set at a level designed to assure a constitutionally valid purpose for limiting pretrial freedom "and no more," as it did in *Salerno,* then we must also consider the related legal principle of "least restrictive conditions" at bail. The phrase "least restrictive conditions" is a term of art expressly contained in the federal and District of Columbia statutes, the American Bar Association best practice standards on pretrial release, and other state statutes based on those Standards (or a reading of *Salerno*). Moreover, the phrase is implicit through similar language from various state high court cases articulating, for example, that bail may be met only by means that are "the least onerous" or that impose the "least possible hardship" on the accused.

Commentary to the ABA Standard recommending release under the least restrictive conditions states as follows:

> This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act and the District of Columbia release and pretrial detention statute, as well as in the laws and court rules of a number of states. The presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.[49]

The least restrictive principle is foundational, and is expressly reiterated throughout the ABA Standards when, for example, those Standards recommend citation release or summonses versus arrest. Moreover, the Standards' overall scheme creating a presumption of release on recognizance, followed by release on nonfinancial conditions, and finally release on financial conditions is directly tied to this foundational premise. Indeed, the principle of least restrictive conditions transcends the Standards and flows from even more basic

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[49] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-1.2 (commentary) at 39-40 (internal citations omitted).

understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty.

More specifically, however, the ABA Standards' commentary on financial conditions makes it clear that the Standards consider secured financial conditions to be more restrictive than both unsecured financial conditions and nonfinancial conditions: "When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first."[50] Moreover, the Standards state, "Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unsecured bond because such a bond requires no 'up front' costs to the defendant and no costs if the defendant meets appearance requirements."[51] These principles are well founded in logic: setting aside, for now, the argument that money at bail might not be of any use at all, it at least seems reasonably clear that secured financial conditions (requiring up-front payment) are always more restrictive than unsecured ones, even to the wealthiest defendant. Moreover, in the aggregate, we know that secured financial conditions, as typically the only condition precedent to release, are highly restrictive compared to all nonfinancial conditions and unsecured financial conditions in that they tend to cause pretrial detention. Like detention itself, any condition causing detention should be considered highly restrictive. In sum, money is a highly restrictive condition, and more so (and possibly excessive) when combined with other conditions that serve the same purpose.

[50] *Id.* Std. 10-1.4 (c) (commentary) at 43-44.

[51] *Id.* Std. 10-5.3 (a) (commentary) at 112.

What Can the Juvenile Justice System Tell Us About Adult Bail?

In addition to the fact that the United States Supreme Court relied heavily on *Schall v. Martin,* a juvenile preventive detention case, in writing its opinion in *United States v. Salerno,* an adult preventive detention case, the juvenile justice system has an impressive body of knowledge and research that can be used to inform the administration of bail for adults.

Perhaps most relevant is the work being done through the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI), an initiative to promote changes to juvenile justice policies and practices to "reduce reliance on secure confinement, improve public safety, reduce racial disparities and bias, save taxpayers' dollars, and stimulate overall juvenile justice reforms."

In remarks at the National Symposium on Pretrial Justice in 2011, Bart Lubow, Director of the Juvenile Justice Strategy Center of the Foundation, stated that JDAI used cornerstone innovations of adult bail to inform its work with juveniles, but through collaborative planning and comprehensive implementation of treatments designed to address a wider array of systemic issues, the juvenile efforts have eclipsed many adult efforts by reducing juvenile pretrial detention an average of 42% with no reductions in public safety measures.

Sources and Resources: *National Symposium on Pretrial Justice: Summary Report of Proceedings* at 23-24 (Statement of Bart Lubow) (PJI/BJA 2011); *Schall v. Martin*, 467 U.S 253 (1984); *United States v. Salerno,* 481 U.S. 739 (1987); Additional information may be found at the Annie E. Casey Foundation Website, found at http://www.aecf.org/.

Bail May Not Be Set For Punishment (Or For Any Other Invalid Purpose)

This principle is related to excessiveness, above, because analysis for excessiveness begins with looking at the government's purpose for limiting pretrial freedom. It is more directly tied to the Due Process Clause, however, and was mentioned briefly in *Salerno* when the Court was beginning its due process analysis. In *Bell v. Wolfish*, the Supreme Court had previously written, "The Court of Appeals properly relied on the Due Process Clause, rather than the 8th Amendment, in considering the claims of pretrial detainees. Due process

requires that a pretrial detainee not be punished."[52] Again, there are currently only two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. Other reasons, such as punishment or, as in some states, to enrich the treasury, are clearly unconstitutional. And still others, such as setting a financial condition to detain, are at least potentially so.

The Bail Process Must Be Individualized

In *Stack v. Boyle*, the Supreme Court wrote as follows:

> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure [at the time, the nature and circumstances of the offense, the weight of the evidence against the defendant, and the defendant's financial situation and character] are to be applied in each case to each defendant.[53]

In his concurrence, Justice Jackson observed that if the bail in *Stack* had been set in a uniform blanket amount without taking into account differences between defendants, it would be a clear violation of the federal rules. As noted by Justice Jackson, "Each defendant stands before the bar of justice as an individual."[54]

At the time, the function of bail was limited to setting conditions on pretrial freedom designed to provide reasonable assurance of court appearance. Bail is still limited today, although the purposes for conditioning pretrial freedom have been expanded to include public safety in addition to court appearance. Nevertheless, pursuant to *Stack*, there must be standards in place relevant to these purposes. After *Stack,* states across America amended their statutes to include language designed to individualize bail setting for purposes of court appearance. In the second generation of bail reform, states included individualizing factors relevant to public safety. And today, virtually every state has a list of factors that can be said to be "individualizing criteria" relevant to the proper purposes for limiting pretrial freedom. To the extent that states do not use these factors, such as when over-relying on monetary bail bond schedules that

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[52] 441 U.S. 520, 535 and n. 16 (1979).

[53] 342 U.S. 1, 5 (1951) (internal citations omitted).

[54] *Id.* at 9.

merely assign amounts of money to charges for all or average defendants, the non-individualized bail settings are vulnerable to constitutional challenge.

The concept of requiring standards to ensure that there exists a principled means for making non-arbitrary decisions in criminal justice is not without a solid basis under the U.S. Constitution. Indeed, such standards have been a fundamental precept of the Supreme Court's death penalty jurisprudence under the cruel and unusual punishment clause of the 8th Amendment.

> *"The term [legal and evidence-based practices] is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles."*
>
> Marie VanNostrand, Ph.D., 2007

The Right to Counsel

This principle refers to the Sixth Amendment right of the accused to assistance of counsel for his or her defense. There is also a 5th Amendment right, which deals with the right to counsel during all custodial interrogations, but the 6th Amendment right more directly affects the administration of bail as it applies to all "critical stages" of a criminal prosecution. According to the Supreme Court, the 6th Amendment right does not attach until a prosecution is commenced. Commencement, in turn, is "the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[55] In *Rothgery v. Gillespie County*, the United States Supreme Court "reaffirm[ed]" what it has held and what "an overwhelming majority of American jurisdictions" have understood in practice: "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[56]

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[55] *See United States* v. *Gouveia*, 467 U. S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)).
[56] 554 U.S. 191, 198, 213 (2008).

Both the American Bar Association's and the National Association of Pretrial Services Agencies' best practice standards on pretrial release recommend having defense counsel at first appearances in every court, and important empirical data support the recommendations contained in those Standards. Noting that previous attempts to provide legal counsel in the bail process had been neglected, in 1998 researchers from the Baltimore, Maryland, Lawyers at Bail Project sought to demonstrate empirically whether or not lawyers mattered during bail hearings. Using a controlled experiment (with some defendants receiving representation at the bail bond review hearing and others not receiving representation) those researchers found that defendants with lawyers: (1) were over two and one-half times more likely to be released on their own recognizance; (2) were over four times more likely to have their initially-set financial conditions reduced at the hearing; (3) had their financial conditions reduced by a greater amount; (4) were more likely to have the financial conditions reduced to a more affordable level ($500 or under); (5) spent less time in jail (an average of two days versus nine days for unrepresented defendants); and (6) had longer bail bond review hearings than defendants without lawyers at first appearance.

The Privilege Against Compulsory Self-Incrimination

This foundational principle refers to the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment (in addition to similar or equivalent state provisions), which says that no person "shall be compelled, in any criminal case, to be a witness against himself . . ." At bail there can be issues surrounding pretrial interviews as well as with incriminating statements the defendant makes while the court is setting conditions of release. In that sense, the principle against compulsory self-incrimination is undoubtedly linked to the right to counsel in that counsel can help a particular defendant fully understand his or her rights.

Probable Cause

Black's Law Dictionary defines probable cause as reasonable cause, or a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Probable cause sometimes refers to having more evidence for than against. It is a term of art in criminal procedure referring to the requirement that arrests be based on probable cause. Probable cause to arrest is present when "at that moment [of the

arrest] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person] had committed or was committing an offense."[57] In *County of Riverside v. McLaughlin,* [58] the Supreme Court ruled that suspects who are arrested without a warrant must be given a probable cause hearing within 48 hours.

As the arrest or release decision is technically one under the umbrella of a broadly defined bail or pretrial process, practices surrounding probable cause or the lack of it are crucial for study. Interestingly, because a probable cause hearing is a prerequisite only to "any significant pretrial restraint of liberty,"[59] jurisdictions that employ bail practices that are speedy and result in a large number of releases using least restrictive conditions (such as the District of Columbia) may find that they need not hold probable cause hearings for every arrestee prior to setting bail.

Other Legal Principles

Of course, there are other legal principles that are critically important to defendants during the pretrial phase of a criminal case, such as certain rights attending trial, evidentiary rules and burdens of proof, the right to speedy trial, and rules affecting pleas. Moreover, there are principles that arise only in certain jurisdictions; for example, depending on which state a person is in, using money to protect public safety may be expressly unlawful and thus its prohibition may rise to the level of other, more universal legal principles beyond its inferential unlawfulness due to its irrationality. Nevertheless, the legal foundations listed above are the ones most likely to arise in the administration of bail. It is thus crucial to learn them and to recognize the issues that arise within them.

What Do the Legal Foundations of Pretrial Justice Tell Us?

Pretrial legal foundations provide the framework and the boundaries within which we must work in the administration of bail. They operate uniquely in the pretrial phase of a criminal case, and together should serve as a cornerstone for all pretrial practices; they animate and inform our daily work and serve as a visible daily backdrop for our pretrial thoughts and actions.

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[57] *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

[58] 500 U.S. 44 (1991).

[59] *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975).

For the most part, the legal foundations confirm and solidify the history of bail. The history of bail tells us that the purpose of bail is release, and the law has evolved to strongly favor, if not practically demand the release of bailable defendants as well as to provide us with the means for effectuating the release decision. The history tells us that "no bail" is a lawful option, and the law has evolved to instruct us on how to fairly and transparently detain unbailable defendants. History tells us that court appearance and public safety are the chief concerns of the bail determination, and the law recognizes each as constitutionally valid purposes for limiting pretrial freedom.

The importance of the law in "legal and evidence-based practices" is unquestioned. Pretrial practices, judicial decision making (for judges are sworn to uphold the law and their authority derives from it), and even state bail laws themselves must be continually held up to the fundamental principles of broad national applicability for legal legitimacy. Moreover, the law acts as a check on the evidence; a pretrial practice, no matter how effective, must always bow to the higher principles of equal justice, rationality, and fairness. Finally, the law provides us with the fundamental goals of the pretrial release and detention decision. Indeed, if evidence-based decision making is summarized as attempting to achieve the goals of a particular discipline by using best practices, research, and evidence, then the law is critically important because it tells us that the goals of bail are to maximize release while simultaneously maximizing court appearance and public safety. Accordingly, all of the research and pretrial practices must be continually questioned as to whether they inform or further these three inter-related goals. In the next section, we will examine how the evolution of research at bail has, in fact, informed lawful and effective bail decision making.

Additional Sources and Resources: Black's Law Dictionary (9th ed. 2009); Douglas L. Colbert, Ray Paternoster, & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail,* 32 Cardozo L. Rev. 1719 (2002); *Early Appointment of Counsel: The Law, Implementation, and Benefits* (Sixth Amend. Ctr./PJI 2014); Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure* (3rd ed. 2007 & 5th ed. 2009); Jack K. Levin & Lucan Martin, 8A American Jurisprudence 2d, *Bail and Recognizance* (West 2009); Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011); Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services*

(CJI/NIC 2007); 3B Charles Allen Wright & Peter J. Henning, Federal Practice and Procedure §§ 761-87 (Thomson Reuters 2013).

Chapter 4: Pretrial Research

The Importance of Pretrial Research

Research allows the field of bail and pretrial justice to advance. Although our concepts of proper research have certainly changed over the centuries, arguably no significant advancement in bail or pretrial justice has ever occurred without at least some minimal research, whether that research was legal, historical, empirical, opinion, or any other way of better knowing things. This was certainly true in England in the 1200s, when Edward I commissioned jurors to study bail and used their documented findings of abuse to enact the Statute of Westminster in 1275. It is especially true in America in the 20th century, when research was the catalyst for the first two generations of bail reform and has arguably sparked a third.

While other research disciplines are important, the current workhorse of the various methods in bail is social research. According to noted sociologists Earl Babbie and Lucia Benaquisto, social research is important because we often already know the answers to life's most pressing problems, but we are still unable to solve them. Social science research provides us with the solutions to these problems by telling us how to organize and run our social affairs by analyzing the forms, values, and customs that make up our lives. This is readily apparent in bail, where many of the solutions to current problems are already known; social science research provides help primarily by illuminating how we can direct our social affairs so as to fully implement those solutions. By continually testing theories and hypotheses, social science research finds incremental explanations that simplify a complex life, and thus allows us to find answers to confounding questions such as how to reduce or eliminate unnecessary pretrial detention.

> *"We can't solve our social problems until we understand how they come about, persist. Social science research offers a way to examine and understand the operation of human social affairs. It provides points of view and technical procedures that uncover things that would otherwise escape our awareness."*
>
> Earl Babbie & Lucia Benaquisto, 2009

Like history and the law, social science research and the law are growing more and more entwined. In the 1908 case of *Muller v. Oregon,*[60] Louis Brandeis submitted a voluminous brief dedicated almost exclusively to social science research indicating the negative effects of long work hours on women. This landmark instance of the use of social research in the law, ultimately dubbed a "Brandeis brief," became the model for many legal arguments thereafter. One need only read the now famous footnote 11 of the Supreme Court's opinion in *Brown v. Board of Education*,[61] which ended racial segregation in America's schools and showed the detrimental effects of segregation on children, to understand how social science research can significantly shape our laws.

Social science research and the law are especially entwined in criminal justice and bail. Perhaps no single topic ignites as deep an emotional response as crime – how to understand it, what to do about it, and how to prevent it. And bail, for better or worse, ignites the same emotional response. Moreover, bail is deceptively complex because it superimposes notions of a defendant's freedom and the presumption of innocence on top of our societal desires to bring defendants to justice and to avoid pretrial misbehavior. Good social science research can aid us in simplifying the topic by answering questions surrounding the three legal and historical goals of bail and conditions of bail. Specifically, social science pretrial research tells us what works to simultaneously: (1) maximize release; (2) maximize public safety; and (3) maximize court appearance.

Because of the complex balance of bail, research that addresses all three of these goals is superior to research that does not. For example, studies showing only the effectiveness of release pursuant to a commercial surety bond at ultimately reducing failures to appear (whether true or not) is less helpful than also knowing how those bonds do or do not affect public safety and tend to detain otherwise bailable defendants. It is helpful to know that pretrial detention causes negative long-term effects on defendants; it is more helpful to learn how to reduce those effects while simultaneously keeping the community safe. It is helpful to know a defendant's risk empirically; it is more helpful to know how to best embrace risk so as to facilitate release and then to mitigate known risk to further the constitutionally valid purposes for limiting pretrial freedom.

Nevertheless, some research is always better than no research, even if that research is found on the lowest levels of an evidence-based decision making

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[60] *Muller v. Oregon,* 208 U.S. 412 (1908).

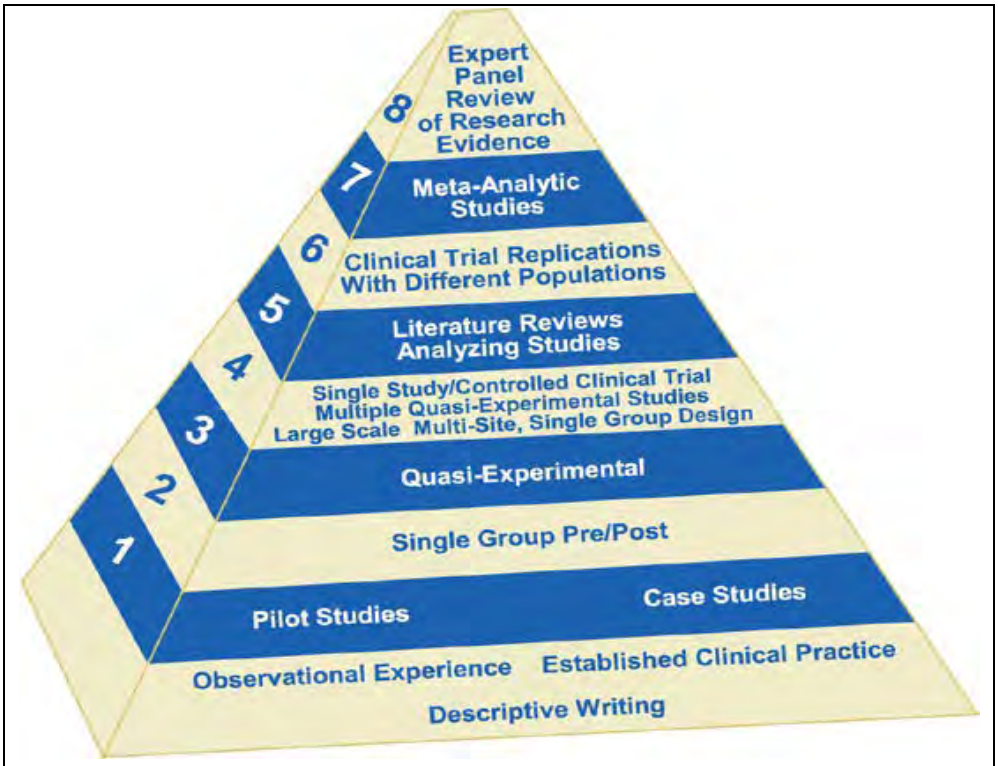
[61] *Brown v. Board of Education,* 347 U.S. 483 (1954).

hierarchy of evidence pyramid. And that is simply because we are already making decisions every day at bail, often with no research at all, and typically based on customs and habits formed over countless decades of uninformed practice. To advance our policies, practices, and laws, we must at least become informed consumers of pretrial research. We must recognize the strengths and limitations of the research, understand where it is coming from, and even who is behind creating it. Ultimately, however, we must use it to help solve what we perceive to be our most pressing problems at bail.

Research in the Context of Legal and Evidence-Based Practices

The term "evidence-based practices" is common to numerous professional fields. As noted earlier, however, due to the unique nature of the pretrial period of a criminal case as well as the importance of legal foundations to pretrial decision making, Dr. Marie VanNostrand has more appropriately coined the term "legal and evidence-based practices" for the pretrial field. Legal and evidence-based practices are defined as "interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage."

In addition to holding up practices and the evidence behind them to legal foundations, to fully follow an evidence-based decision making model jurisdictions must also determine how much research is needed to make a practice "evidence-based." According to the U.S. Department of Health and Human Services (HHS), this is done primarily by assessing the strength of the evidence indicating that the practice leads to the desired outcome. To help with making this assessment, many fields employ the use of graphics indicating the varying "strength of evidence" for the kinds of data or research they are likely to use. For example, the Colorado Commission on Criminal and Juvenile Justice, a statewide commission that focuses on evidence-based recidivism reduction and cost-effective criminal justice expenditures, refers to the strength of evidence pyramid, below, which was developed by HHS's Substance Abuse and Mental Health Services Administration's Co-Occurring Center for Excellence (COCE).



As one can see, the levels vary in strength from lower to higher, with higher levels more likely to illuminate research that works better to achieve the goals of a particular field. As noted by the COCE, "Higher levels of research evidence derive from literature reviews that analyze studies selected for their scientific merit in a particular treatment area, clinical trial replications with different populations, and meta-analytic studies of a body of research literature. At the highest level of the pyramid are expert panel reviews of the research literature."

Sources and Resources: Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); Information gathered from the Colorado Commission on Criminal and Juvenile Justice website, found at http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251622402893; *Understanding Evidence-Based Practices for Co-Occurring Disorders* (SAMHSA's CORE) contained in SAMHSA's website, found online at http://www.samhsa.gov/co-occurring/topics/training/OP5-Practices-8-13-07.pdf.

Research in the Last 100 Years: The First Generation

If we focus on just the last 100 years, we see that major periods of bail research in America have led naturally to more intense periods of reform resulting in new policies, practices, and laws. Although French historian Alexis de Tocqueville informally questioned America's continued use of money bail in 1835, detailed studies of bail practices in America had their genesis in the 1920s, first from Roscoe Pound and Felix Frankfurter's study of criminal justice in Cleveland, Ohio, and then from Arthur Beeley's now famous study of bail in Chicago, Illinois. Observing secured-money systems primarily administered through the use of commercial bail bondsmen (that had really only existed since 1898), both of those 1920s studies found considerable flaws in the current way of administering bail. Beeley's seminal statement of the problem in 1927, made at the end of a painstakingly detailed report, is still relevant today:

> [L]arge numbers of accused, but obviously dependable persons are needlessly committed to Jail; while many others, just as obviously undependable, are granted a conditional release and never return for trial. That is to say, the present system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.[62]

Pound, Frankfurter, and Beeley began a period of bail research, advanced significantly by Caleb Foote in the 1950s, that culminated in the first generation of bail reform in the 1960s. That research consisted of several types – for example, one of the most important historical accounts of bail was published in 1940 by Elsa de Haas. But the most significant literature consisted of social science studies observing and documenting the deficiencies of the current system. As noted by author Wayne H. Thomas, Jr.,

> [These] studies had shown the dominating role played by bondsmen in the administration of bail, the lack of any meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because bail, even in modest amounts, was

[62] Arthur L. Beeley, *The Bail System in Chicago*, at 160 (Univ. of Chicago Press, 1927).

> beyond their means. The studies also revealed that bail was often used to 'punish' defendants prior to a determination of guilt or to 'protect' society from anticipated future conduct, neither of which is a permissible purpose of bail; that defendants detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.[63]

Clearly, the most impactful of this period's research was so-called "action research," in which bail practices were altered and outcomes measured in pioneering "bail projects" to study alternatives to the secured bond/commercial surety system of release. Perhaps the most well-known of these endeavors was the Manhattan Bail Project, conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in 1960. The Manhattan Bail Project used an experimental design to demonstrate that given the right information, judges could release more defendants without the requirement of a financial bond condition and with no measurable impact on court appearance rates. At that time in American history, bail had only two goals – to release defendants while simultaneously maximizing court appearance – because public safety had not yet been declared a constitutionally valid purpose for limiting pretrial freedom. The Manhattan Bail Project was significant because it worked to achieve both of the existing goals. Based on the information provided by Vera, release rates increased while court appearance rates remained high.

[63] Wayne H. Thomas, Jr., *Bail Reform in America* at 15 (Univ. Cal. Press 1976).

Caleb Foote's Unfulfilled Prediction Concerning Bail Research

At the National Conference on Bail and Criminal Justice in 1964, Professor of Law Caleb Foote explained to attendees that courts would likely move from their "wholly passive role" during the first generation of bail reform to a more active one, saying, "Certainly courts are not going to be immune to the sense of basic unfairness which alike has motivated scholarly research, foundation support for bail action projects, the Attorney General's Committee on Poverty, and your attendance at this Conference." Noting the lack of any definitive empirical evidence showing that pretrial detention alone adversely affected the quality of treatment given to criminal defendants, Foote nonetheless cited current studies attempting to show that very thing, and predicted:

"If it comes to be generally accepted that in the outcome of his case the jailed defendant is prejudiced compared with the defendant who has pretrial liberty, such a finding will certainly have a profound impact upon any judicial consideration of constitutional bail questions. It was such impermissible prejudicial effects, stemming from poverty, which formed the basis of the due process requirement of counsel in *Gideon v. Wainwright*."

Since then, numerous studies have highlighted the prejudicial effects of pretrial detention, with the research consistently demonstrating that when compared to defendants who are released, defendants detained pretrial – all other things being equal – plead guilty more often, are convicted more often, get sentenced to prison more often, and receive longer sentences. And yet, despite this overwhelming research, Foote's prediction of increased judicial interest and activity in the constitutional issues of bail has not come true.

Sources and Resources: *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* at 29 n. 1 (2007) (citing studies); John Clark, *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process*, at 2 (PJI/MacArthur Found. 2012) (same); *The National Conference on Bail and Criminal Justice, Proceedings and Interim Report,* at 224-25 (Washington, D.C. April 1965);

The Manhattan Bail Project was the center of discussion of bail reform at the 1964 National Conference on Bail and Criminal Justice, which in turn led to changes in both federal and state laws designed to facilitate the release of bailable defendants who were previously unnecessarily detained. Those changes included presumptions for release on recognizance, release on unsecured bonds (like those used for centuries in England and America prior to the 1800s), release on "least restrictive" nonfinancial conditions, and additional constraints on the

use of secured money bonds. The improvements were, essentially, America's attempt to solve the early 20th century's dilemma of bailable defendants not being released – a dilemma that, historically speaking, has always demanded correction.

The Second Generation

Research flowing toward the second generation of pretrial reform in America followed the same general pattern of identifying abuses or areas in need of improvement and then gradually creating a meeting of minds on practical solutions to those abuses. In that generation, though, the identified "abuse" dealt primarily with the "no bail" side of the "bail/no bail" dichotomy – the side that determines who should not be released at all. As summarized by Senator Edward Kennedy in 1980,

> Historically, bail has been viewed as a procedure designed to ensure the defendant's appearance at trial by requiring him to post a bond or, in effect, make a promise to appear. Current findings, suggest, however, that this traditional approach, though noble in design, has one important shortcoming. It fails to deal effectively with those defendants who commit crimes while they are free on bail.[64]

Indeed, for nearly 1,500 years, the only acceptable purpose for limiting pretrial freedom was to assure that the defendant performed his or her duty to face justice, which ultimately came to mean appearing for court. Even when crafting their constitutional and statutory exceptions to any recognized right to bail, the states and the federal government had always done so with an eye toward court appearance. To some, limiting freedom based on future dangerousness was un-American, more akin to tyrannical practices of police states, and contrary to all notions of fundamental human rights. Indeed, there was considerable debate over whether it could *ever* be constitutional to do so.

Nevertheless, many judges felt compelled to respond to legitimate fears for public safety even if the law did not technically allow for it. Accordingly, those judges often followed two courses of action when faced with obviously dangerous defendants who perhaps posed virtually no risk of flight: (1) if those

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[64] Edward M. Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 Fordham L. Rev. 423, 423 (1980) (internal footnotes omitted).

defendants happened to fall in the categories listed as "no bail," judges could deny their release altogether; (2) if they did not fall into a "no bail" category, judges could and would set high monetary conditions of bail to effectively detain the defendant. The practice of detaining persons for public safety, or preventive detention, was known at the time as furthering a "sub rosa" or secret purpose for limiting freedom, and it was done with little interference from the appellate courts.

The research leading to reform in this area was multifaceted. Law reviews published articles on the right to bail, the Excessive Bail Clause, and on due process concerns. Historians examined the right to bail in England and America to determine if and how it could be restricted or even denied altogether for purposes of public safety. Politicians and others looked to the experiences of states that had already changed their laws to account for public safety and danger. And social scientists documented what Congress ultimately called "the alarming problem of crimes committed by persons on release"[65] by conducting empirical studies of pretrial release and re-arrest rates in a number of American jurisdictions.

Ultimately, this research led to dramatic changes in the administration of bail. Congress passed the Bail Reform Act of 1984, which expanded the law to allow for direct, fair, and transparent detention of certain dangerous defendants after a due process hearing. In *United States v. Salerno*, the Supreme Court upheld the Act, giving constitutional validity to public safety as a limitation on pretrial freedom. If they had not already done so, many states across the country changed their statutes and constitutions to allow consideration of dangerousness in the release and detention decision and by re-defining the "no bail" side of their schemes to better reflect which defendants should be denied the right to bail altogether.

[65] S. Rep. No. 98-225, P. L. 98-473 p. 3 (1983).

The Third Generation

The previous generations of bail research have followed the pattern of identifying abuses or issues of concern and then finding consensus on solutions, and the current generation is no different. Some of the research in this generation of bail reform is merely a continuation of studies begun in previous generations. For example, a body of literature examining the effects of pretrial detention on ultimate outcomes of cases (guilty pleas, sentences, etc.) began in the 1950s and has continued to this day. As another example, after Congress passed the Bail Reform Act of 1966, pretrial services programs gradually expanded from the "bail projects" of the early 1960s to more comprehensive agencies designed to carry out the mandates of new laws requiring risk assessment and often supervision of pretrial defendants. As these programs evolved, a body of research began to develop around their practices. In 1973, the National Association of Pretrial Services Agencies (NAPSA) was founded to, among other things, promote research and development in the field. In 1976, NAPSA and the Department of Justice created the Pretrial Services Resource Center (PSRC, now the Pretrial Justice Institute), an entity also designed to, among other things, collect and disseminate research and information relevant to the pretrial field. The data collected by these entities over the years, in addition to the numerous important reports they have issued analyzing that data, have been instrumental sources of fundamental pretrial research.

A Meeting of Minds – Who is Currently In Favor of Pretrial Improvements?

The following national organizations have produced express policy statements generally supporting the use of evidence-based and best pretrial practices, which include risk assessment and fair and transparent preventive detention, at the front end of the criminal justice system:

The Conference of Chief Justices

The Conference of State Court Administrators

The National Association of Counties

The International Association of Chiefs of Police

The Association of Prosecuting Attorneys

The American Council of Chief Defenders

The National Association of Criminal Defense Lawyers

The American Jail Association

The American Bar Association

The National Judicial College

The National Sheriff's Association

The American Probation and Parole Association

The National Association of Pretrial Services Agencies

In addition, numerous other organizations and individuals are lending their support or otherwise partnering to facilitate pretrial justice in America. For a list of just those organizations participating in the Pretrial Justice Working Group, created in the wake of the National Symposium on Pretrial Justice, go to http://www.pretrial.org/infostop/pjwg/

As another example, in 1983, the PSRC – with funding from the Bureau of Justice Statistics (BJS) – initiated the National Pretrial Reporting Program, which was designed to create a national pretrial database by collecting local bail data and aggregating it at the state and national levels. In 1994, that program became BJS's State Court Processing Statistics (SCPS) program, which collected data on felony defendants in jurisdictions from the 75 most populous American counties. Research documents analyzing that data, including the *Felony Defendants from Large Urban Counties* series, and *Pretrial Release of Felony Defendants in State Courts*,

have become crucial, albeit sometimes misinterpreted sources of basic pretrial data, such as defendant charges and demographics, case outcomes, types of release and release rates, financial condition amounts, and basic information on pretrial misconduct. Most recently, BJS asked the Urban Institute to re-design and re-develop the National Pretrial Reporting Program as a replacement to SCPS.

An Unusual, But Necessary, Research Warning

Since 1988, the Bureau of Justice Statistic's (BJS) State Court Processing Statistics (SCPS) program (formerly the National Pretrial Reporting Program) has been an important source of data on criminal processing of persons charged with felonies in the 75 most populous American counties. Issues surrounding pretrial release, in particular, have been tempting topics for study due to the SCPS's inclusion of data indicating whether defendants were released pretrial, the type of release (e.g., personal recognizance, surety bond), and whether the defendant misbehaved while on pretrial release. In some cases, researchers would use the SCPS data to make "evaluative" statements, that is, statements declaring that a particular type of release was superior to another based on the data showing pretrial misbehavior associated with each type. Moreover, when these studies favored the commercial bail bonding and insurance industry, that industry would repeat the researcher's evaluative statements (as well as make their own statements based on their own reading of the SCPS data), and claim that the data demonstrated that the use of a commercial surety bond was a superior form of release.

According to Bechtel, et.al, (2012) "The bonding industry's claims based on the SCPS data became so widespread that BJS was compelled to take the unusual and unprecedented step of issuing a 'Data Advisory.'" That advisory, issued in March of 2010, listed the limitations of the SCPS data, and specifically warned that, "Any evaluative statement about the effectiveness of a particular program in preventing pretrial misconduct based on SCPS is misleading."


DATA ADVISORY

State Court Processing Statistics Data Limitations

Despite the warning, there are those who persist in citing SCPS data to convince policy makers or others about the effectiveness of one type of release over another. Both Bechtel, et al., and VanNostrand, et al., have listed flaws in the various studies using the data and have given compelling reasons for adopting a more discriminating attitude whenever persons or entities begin comparing one type of release with another.

As mentioned in the body of this paper, the best research at bail, which will undoubtedly include future efforts at comparing release types, must not only comply with the rigorous standards necessary so as not to violate the BJS Data Advisory, but should also address all three legal and evidence-based goals underlying the bail decision, which include maximizing release while maximizing public safety and court appearance.

Sources and Resources: Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research* (PJI, 2012); Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010); Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (PJI/BJA 2011).

Finally, a related body of ongoing research derives simply from pretrial services agencies and programs measuring themselves, which can be a powerful way to present and use data to affect pretrial practices. In 2011, the NIC published *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field*, which proposed standardized definitions and uniform suggested measures consistent with established pretrial standards to "enable pretrial services agencies to gauge more accurately their programs' effectiveness in meeting agency and justice system goals."[66] Broadly speaking, standardized guidelines and definitions for documenting performance measures and outcomes enables better communication and leads to better and more coordinated research efforts overall.

Other research flowing toward this current generation of pretrial reform, akin to Arthur Beeley's report on Chicago bail practices, has been primarily observational. That research, such as some of the multifaceted analyses performed in Jefferson County, Colorado, in 2007-2010, merely examines system practices to assess whether those practices or even the current laws can be improved. Other entities, such as Human Rights Watch and the Justice Policy Institute, have created similar research documents that include varying ratios of observational and original research. On the other hand, another body of this generation's research goes far beyond observation and uses large data sets and complex statistical tests to create empirical pretrial risk instruments that provide scientific structure and meaning to current lists dictating the factors judges must consider in the release and detention decision.

[66] *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field* (NIC 2011) at v.

In between is a body of research most easily identified by topic, but sometimes associated best with the person or entity producing it. For example, throughout the years researchers have been interested in analyzing judicial discretion and guided discretion in the decision to release, and so one finds numerous papers and studies examining that issue. In particular, though, Dr. John Goldkamp spent much of his distinguished academic career focusing on judicial discretion in the pretrial release decision, and published numerous important studies on his findings. Likewise, other local jurisdictions have delved deep into their own systems to look at a variety of issues associated with pretrial release and detention, but perhaps none have done so as consistently and thoroughly as the New York City Criminal Justice Agency, and its research continues to inspire and inform the nation.

Other topics of interest in this generation of reform include racial disparity, cost benefit analyses affecting pretrial practices, training police officers for first contacts and effects of that training on pretrial outcomes, citation release, the legality and effectiveness of monetary bail schedules, pretrial processes and outcomes measurements, re-entry from jail to the community, bail bondsmen and bounty hunters, special populations such as those with mental illness or defendants charged with domestic violence, and gender issues. Prominent organizations consistently working on publishing pretrial research literature include various agencies within the Department of Justice, including the National Institute of Corrections, the Bureau of Justice Assistance, the Bureau of Justice Statistics, and the National Institute of Justice. Other active entities include the Pretrial Justice Institute, the National Association of Counties, the United States Probation and Pretrial Services, the Pretrial Services Agency for the District of Columbia, the Vera Institute, the Urban Institute, and the Justice Policy Institute. Other organizations, such as the International Association of Chiefs of Police, the National Association of Drug Court Professionals, National Council on Crime and Delinquency, the Council of State Governments, the Pew Research Center, the American Probation and Parole Association, and various colleges and universities have also become actively involved in pretrial issues.

Along with these entities are a number of individuals who have consistently led the pretrial field by devoting much or all of their professional careers on pretrial research, such as Dr. John Goldkamp, D. Alan Henry, Dr. Marie VanNostrand, Dr. Christopher Lowenkamp, Dr. Alex Holsinger, Dr. James Austin, Dr. Mary Phillips, Dr. Brian Reaves, Dr. Thomas Cohen, Dr. Edward J. Latessa, Timothy Cadigan, Spurgeon Kennedy, John Clark, Kenneth J. Rose, Barry Mahoney, and Dr. Michael Jones. Often these individuals are sponsored by generous

philanthropic foundations interested in pretrial justice, such as the Public Welfare Foundation and the Laura and John Arnold Foundation.

Public Opinion Research

An important subset of criminal justice research is survey research, which can include collecting data to learn how people feel about crime or justice policy. For example, in 2012 the PEW Center on the States published polling research by Public Opinion Strategies and the Mellman Group showing that while people desire public safety and criminal accountability, they also support sentencing and corrections reforms that reduce imprisonment, especially for non-violent offenders. In 2009, the National Institute of Corrections reported a Zogby International poll similarly showing that 87% of those contacted would support research-based alternatives to jail to reduce recidivism for non-violent persons.

Very little of this type of research had been done in the field of pretrial release and detention, but in 2013 Lake Research Partners released the results of a nationwide poll focusing on elements of the current pretrial reform movement. That research found "overwhelming support" for replacing a cash-based bonding system with risk-based screening tools. Moreover, that support was high among all demographics, including gender, age, political party identification, and region. Interestingly too, most persons polled were unaware of the current American situation, with only 36% of persons understanding that empirical risk assessment was not currently happening in most places.

Sources and Resources: *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (NIC, 2010); *Support for Risk Assessment Programs Nationwide* (Lake Research Partners 2013) found at http://www.pretrial.org/download/advocacy/Support%20for%20Risk%20Assessment%20Nationwide%20-%20Lake%20Research%20Partners.pdf. Public Opinion on Sentencing and Corrections Policy in America (Public Opinion Strategies/Mellman Group 2012) found at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf;

All of this activity brings hope to a field that has recently been described as significantly limited in its research agenda and output. In 2011, the Summary Report to the National Symposium on Pretrial Justice listed four recommendations related to a national research agenda: (1) collect a comprehensive set of pretrial data needed to support analysis, research, and reform through the Bureau of Justice Statistics; (2) embark on comprehensive research that results in the identification of proven best pretrial practices through the National Institute of Justice; (3) develop and seek funding for research proposals relating to pretrial justice; and (4) prepare future practitioners and leaders to effectively address pretrial justice issues in a fair, safe, and effective manner.

In the wake of the Symposium, the Department of Justice's Office of Justice Programs (OJP) convened a Pretrial Justice Working Group, a standing, multidisciplinary group created to collaboratively address national challenges to moving toward pretrial reform. The Working Group, in turn, established a "Research Subcommittee," which was created to stimulate detailed pretrial data collection, increase quantitative and qualitative pretrial research, support existing OJP initiatives dealing with evidence-based practices in local justice systems, and develop pretrial justice courses of studies in academia. Due in part to that Subcommittee's purposeful focus, its members have begun a coordinated effort to identify pretrial research needs and to develop research projects designed specifically to meet those needs. Accordingly, across America, we are seeing great progress in both the interest and the output of pretrial research.

> *"Research is formalized curiosity. It is poking and prying with a purpose."*
>
> Zora Neale Hurston, 1942

However, there are many areas of the pretrial phase of a defendant's case that are in need of additional helpful research. For example, while Professor Doug Colbert has created groundbreaking and important research on the importance of defense attorneys at bail, and while the Kentucky Department of Public Advocacy has put that research into practice through a concentrated effort toward advancing pretrial advocacy, there is relatively little else on this very important topic. Similarly, other areas under the umbrella of pretrial reform, such as a police officer's decision to arrest or cite through a summons, the prosecutor's decision to charge, early decisions dealing with specialty courts, and diversion, suffer from a relative lack of empirical research. This is true in the legal field as well, as only a handful of scholars have recently begun to focus

again on fundamental legal principles or on how state laws can help or hinder our intent to follow evidence-based pretrial practices. In sum, there are still many questions that, if answered through research, would help guide us toward creating bail systems that are the most effective in maximizing release, public safety, and court appearance. Moreover, there exists today even a need to better compile, categorize, and disseminate the research that we do have. To that end, both the National Institute of Justice and the Pretrial Justice Institute have recently created comprehensive bibliographies on their websites.

Current Research – Special Mention

One strand of current pretrial research warranting special mention, however, is research primarily focusing on one or both of the two following categories: (1) empirical risk assessment; and (2) the effect of release type on pretrial outcomes, including the more nuanced question of the effect of specific conditions of release on pretrial outcomes. The two topics are related, as often the data sets compiled to create empirical risk instruments contain the sort of data required to answer the questions concerning release type and conditions as well as the effects of conditional release or detention on risk itself. The more nuanced subset of how conditions of release affect pretrial outcomes can become quite complicated when we think about differential supervision strategies including questions of dosage, e.g., how much drug testing must we order (if any) to achieve the optimal pretrial court appearance and public safety rates?

Empirical Risk Assessment Instruments

Researchers creating empirical pretrial risk assessment instruments take large amounts of defendant data and identify which specific factors are statistically related and how strongly they are related to defendant pretrial misconduct. Ever since the mid-20th century, primarily in response to the United States Supreme Court's opinion in *Stack v. Boyle,* states have enacted into their laws factors judges are supposed to consider in making a release or detention decision. For the most part, these factors were created using logic and later some research from the 1960s showing the value of community ties to the pretrial period. Unfortunately, however, little to no research existed to demonstrate which of the many enacted factors were actually predictive of pretrial misconduct and at what strength. Often, judges relied on one particular factor – the current charge or sometimes the charge and police affidavit – to make their decision. Over the years, single jurisdictions, such as counties, occasionally created risk instruments

using generally accepted social science research methods, but their limited geographic influence and sometimes their lack of data from which to test multiple variables meant that research in this area spread slowly.

In 2003, however, Dr. Marie VanNostrand created the Virginia Pretrial Risk Assessment Instrument, most recently referred to by Dr. VanNostrand and others as simply the "Virginia Model," which was ultimately tested and validated in multiple Virginia jurisdictions and then deployed throughout the state. Soon after, other researchers developed other multi-jurisdictional risk instruments, including Kentucky, Ohio, Colorado, Florida, and the federal system, and now other American jurisdictions, including single counties, are working on similar instruments. Still others are "borrowing" existing instruments for use on local defendants while performing the process of validating them for their local population. Most recently, in November 2013, researchers sponsored by the Laura and John Arnold Foundation announced the creation of a "national" risk instrument, capable of accurately predicting pretrial risk (including risk of violent criminal activity) in virtually any American jurisdiction due to the extremely large database used to create it.

In its 2012 issue brief titled, *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants*, PJI and BJA summarize the typical risk instrument as follows:

> A pretrial risk assessment instrument is typically a one-page summary of the characteristics of an individual that presents a score corresponding to his or her likelihood to fail to appear in court or be rearrested prior to the completion of their current case. Instruments typically consist of 7-10 questions about the nature of the current offense, criminal history, and other stabilizing factors such as employment, residency, drug use, and mental health.
>
> Responses to the questions are weighted, based on data that shows how strongly each item is related to the risk of flight or rearrest during pretrial release. Then the answers are tallied to produce an overall risk score or level, which can inform the judge or other decisionmaker about the best course of action.[67]

[67] *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants* (PJI/BJA 2012) (internal footnote omitted).

Using a pretrial risk assessment instrument is an evidence-based practice, and to the extent that it helps judges with maximizing the release of bailable defendants and identifying those who can lawfully be detained, it is a legal and evidence-based practice. Nevertheless, it is a relatively new practice – it is too new for detailed discussion in the current ABA Criminal Justice Standards on Pretrial Release – and so the fast-paced research surrounding these instruments must be scrutinized and our shared knowledge constantly updated to provide for the best application of these powerful tools. In 2011, Dr. Cynthia Mamalian authored *The State of the Science of Pretrial Risk Assessment*, and noted many of the issues (including "methodological challenges") that surround the creation and implementation of these instruments.[68]

Bail and the Aberrational Case

Social scientists primarily deal with aggregate patterns of behavior rather than with individual cases, but the latter is often what criminal justice professionals are used to. Cases that fall outside of a particular observable pattern might be called "outliers" or "aberrations" by social scientists and thus disregarded by the research that is most relevant to bail. Unfortunately, however, it is often these aberrational cases – typically those showing pretrial misbehavior – that drive public policy.

Thus, when making policy decisions about bail it is important for decision makers to embrace perspective by also studying aggregates. By looking at a problem from a distance, one can often see that the single episode that brought a particular case to the pretrial justice discussion table may not present the actual issue needing improvement. If the single case represents an aggregate pattern, however, or if that case illustrates some fundamental flaw in the system that demands correction, then that case may be worthy of further study.

In the aggregate, very few defendants misbehave while released pretrial (for example, the D.C. Pretrial Services Agency reports that in 2012, 89% of released defendants were arrest-free during their pretrial phase, and that only 1% of those arrested were for violent crimes; likewise, Kentucky reports a 92% public safety rate), and yet occasionally defendants will commit heinous crimes under all forms of supervision, including secured detention. In the aggregate, most people show up for court (again, D.C. Pretrial reports that 89% of defendants did not miss a single court date; likewise, Kentucky reports a 90% court appearance rate), and yet occasionally some high profile defendant will not appear, just as fifty may not show up for traffic court on the same day. In the aggregate, virtually all defendants will ultimately be released back into our communities and thus can be safety supervised within our communities while awaiting the disposition of

[68] *See* Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment*, at 26 (PJI/BJA 2011).

their cases, and yet occasionally there are defendants who are so risky that they must be detained.

Sources and Resources: Tara Boh Klute & Mark Heyerly, *Report on Impact of House Bill 463: Outcomes, Challenges, and Recommendations* (KY Pretrial Servs. 2012); Michael G. Maxfield & Earl Babbie, Research Methods for Criminal Justice and Criminology (Wadsworth, 6th ed. 2008); D.C. Pretrial statistics found at http://www.psa.gov/.

Beyond those issues, however, is the somewhat under-discussed topic of what these "risk-based" instruments mean for states that currently have entire bail schemes created without pure notions of risk in mind. For example, many states have preventive detention provisions in their constitutions denying the right to bail for certain defendants, but often these provisions are tied primarily to the current charge or the charge and some criminal precondition. The ability to better recognize high-risk defendants, who perhaps should be detained but who, because of their charge, are not detainable through the available "no bail" process, has caused these states to begin re-thinking their bail schemes to better incorporate risk. The general move from primarily a charge-and-resource-based bail system to one based primarily on pretrial risk automatically raises questions as to the adequacy of existing statutory and constitutional provisions.

Effects of Release Types and Conditions on Pretrial Outcomes

The second category of current research – the effect of release type as well as the effect of individual conditions on pretrial outcomes – continues to dominate discussions about what is next in the field. Once we know a particular defendant's risk profile, it is natural to ask "what works" to then mitigate that risk. The research surrounding this topic is evolving rapidly. Indeed, during the writing of this paper, the Pretrial Justice Institute released a rigorous study indicating that release on a secured (money paid up front) bond does nothing for public safety or court appearance compared to release on an unsecured (money promised to be paid only if the defendant fails to appear) bond, but that secured bonds have a significant impact on jail bed use through their tendency to detain defendants pretrial. Likewise, in November 2013, the Laura and John Arnold Foundation released its first of several research studies focusing on the impact of pretrial supervision. Though admittedly lacking detail in important areas, that study suggested that moderate and higher risk defendants who were supervised were significantly more likely to show up for court than non-supervised defendants.

In 2011, VanNostrand, Rose, and Weibrecht summarized the then-existing research behind a variety of release types, conditions, and differential supervision strategies, including court date notification, electronic monitoring, pretrial supervision and supervision with alternatives to detention, release types based on categories of bail bonds, and release guidelines, and that summary document, titled *State of the Science of Pretrial Release Recommendations and Supervision,* remains an important foundational resource for anyone focusing on the topic. Nevertheless, as the Pretrial Justice Institute explained in its conclusion to that report, we have far to go before we can confidently identify legal and evidence-based conditions and supervision methods:

> Great strides have been made in recent years to better inform [the pretrial release decision], both in terms of what is appropriate under the law and of what works according to the research, and to identify which supervision methods work best for which defendants.
>
> As this document demonstrates, however, there is still much that we do not know about what kinds of conditions are most effective. Moreover, as technologies advance to allow for the expansion of potential pretrial release conditions and the supervision of those conditions, we can anticipate that legislatures and courts will be called upon to define the limits of what is legally appropriate.[69]

Application and Implications

Applying the research has been a major component of jurisdictions currently participating in the National Institute of Correction's (NIC's) Evidence-Based Decision Making Initiative, a collaborative project among the Center for Effective Public Policy, the Pretrial Justice Institute, the Justice Management Institute, and the Carey Group. The seven jurisdictions piloting the NIC's collaborative "Framework," which has been described as providing a "purpose and a process" for applying evidence-based decision making to all decision points in the justice system, are actively involved in applying research and evidence to real world issues with the aim toward reducing harm and victimization while maintaining certain core justice system values. Those Framework jurisdictions focusing on the

[69] Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision*, at 42 (conclusion by PJI) (PJI/BJA 2011).

pretrial release and detention decision are learning first hand which areas have sufficient research to fully inform pretrial improvements and which areas have gaps in knowledge, thus signifying the need for more research. Their work will undoubtedly inform the advancement of pretrial research in the future.

Finally, the weaving of the law with the research into pretrial application has the potential to itself raise significantly complex issues. For example, if GPS monitoring is deemed by the research to be ineffective, is it not then excessive under the 8th Amendment? If a secured money condition does nothing for public safety or court appearance, is it not then irrational, and thus also a violation of a defendant's right to due process, for a judge to set it? If certain release conditions actually increase a lower risk defendant's chance of pretrial misbehavior, can imposing them ever be considered lawful? These questions, and others, will be the sorts of questions ultimately answered by future court opinions.

What Does the Pretrial Research Tell Us?

Pretrial research is crucial for telling us what works to achieve the purposes of bail, which the law and history explain are to maximize release while simultaneously maximizing public safety and court appearance. All pretrial research informs, but the best research helps us to implement laws, policies, and practices that strive to achieve all three goals. Each generation of bail or pretrial reform has a body of research literature identifying areas in need of improvement and creating a meeting of minds surrounding potential solutions to pressing pretrial issues. This current generation is no different, as we see a growing body of literature illuminating poor laws, policies, and practices while also demonstrating evidence-based solutions that are gradually being implemented across the country.

Nevertheless, in the field of pretrial research there are still many areas requiring attention, including areas addressed in this chapter such as risk assessment, risk management, the effects of money bonds, cost/benefit analyses, impacts and effects of pretrial detention, and racial disparity as well as areas not necessarily addressed herein, such as money bail forfeitures, fugitive recovery, and basic data on misdemeanor cases.

Most of us are not research producers. We are, however, research consumers. Accordingly, to further the goal of pretrial justice we must understand how rapidly the research is evolving, continually update our knowledge base of relevant research, and yet weed out the research that is biased, flawed, or

otherwise unacceptable given our fundamental legal foundations. We must strive to understand the general direction of the pretrial research and recognize that a change in direction may require changes in laws, policies, and practices to keep up. Most importantly, we must continue to support pretrial research in all its forms, for it is pretrial research that advances the field.

Additional Sources and Resources: Steve Aos, Marna Miller, & Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (WSIPP 2006); Earl Babbie & Lucia Benaquisto, *Fundamentals of Social Research: Second Canadian Edition* (Cengage Learning 2009); Bernard Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes,* 43 Tex. L. Rev. 319 (1964-65); Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research* (PJI, 2012); John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services,* Topics in Cmty. Corr. (2008); Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006* (BJS 2010); Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010); Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (AMS Press, Inc., New York 1966); *Evidence-Based Practices in the Criminal Justice System (Annotated Bibliography)* (NIC updated 2013); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 Univ. of Pa. L. Rev. 1031 (1954); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found. 1964); Michael R. Jones, *Pretrial Performance Measurement: A Colorado Example of Going from the Ideal to Everyday Practice* (PJI 2013); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI Oct. 2013); *Laura and John Arnold Foundation Develops National Model for Pretrial Risk Assessments* (Nov. 2013) found at http://www.arnoldfoundation.org/laura-and-john-arnold-foundation-develops-national-model-pretrial-risk-assessments; Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* (Laura & John Arnold Found. 2013); Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Laura & John Arnold Found. 2013); Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013); Michael G. Maxfield & Earl Babbie, *Research Methods for Criminal Justice and Criminology* (Wadsworth, 6th ed. 2008); *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. 1965); *National Symposium on Pretrial Justice: Summary Report of Proceedings* (PJI/BJS 2011); Mary T. Phillips, *A Decade of Bail Research in*

New York City (N.Y. NYCCJA 2012); Roscoe Pound & Felix Frankfurter (Eds.), *Criminal Justice in Cleveland* (Cleveland Found. 1922); Marie VanNostrand, *Assessing Risk Among Pretrial Defendants In Virginia: The Virginia Pretrial Risk Assessment Instrument* (VA Dept. Crim. Just. Servs. 2003); Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007).

Chapter 5: National Standards on Pretrial Release

Pretrial social science research tells us what works to further the goals of bail. History and the law tell us that the goals of bail are to maximize release while simultaneously maximizing public safety and court appearance, and the law provides a roadmap of how to constitutionally deny bail altogether through a transparent and fair detention process. If this knowledge was all that any particular jurisdiction had to use today, then its journey toward pretrial justice might be significantly more arduous than it really is. But it is not so arduous, primarily because we have national best practice standards on pretrial release and detention, which combine the research and the law (which is intertwined with history) to develop concrete recommendations on how to administer bail.

In the wake of the 1964 National Conference on Bail and Criminal Justice and the 1966 Federal Bail Reform Act, various organizations began issuing standards designed to address relevant pretrial release and detention issues at a national level. The American Bar Association (ABA) was first in 1968, followed by the National Advisory Committee on Criminal Justice, the National District Attorneys Association, and finally the National Association of Pretrial Services Agencies (NAPSA). The NAPSA Standards, in particular, provide important detailed provisions dealing with the purposes, roles, and functions of pretrial services agencies.

The ABA Standards

Among these sets of standards, however, the ABA Standards stand out. Their preeminence is based, in part, on the fact that they "reflect[] a consensus of the views of representatives of all segments of the criminal justice system,"[70] which includes prosecutors, defense attorneys, academics, and judges, as well as various groups such as the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Attorneys General, the U.S. Department of Justice, the Justice Management Institute, and other notable pretrial scholars and pretrial agency professionals.

More significant, however, is the justice system's use of the ABA Criminal Justice Standards as important sources of authority. The ABA's Standards have been

[70] Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence,* 23 Crim. Just. (Winter 2009).

either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100 law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts had used the Standards to implement new court rules. According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, "[t]he Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects."[71]

> *"The Court similarly dismisses the fact that the police deception which it sanctions quite clearly violates the American Bar Association's Standards for Criminal Justice – Standards which the Chief Justice has described as 'the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history,' and which this Court frequently finds helpful."*
>
> *Moran v. Burbine*, 475 U.S. 412 (1986) (Stevens, J. dissenting)

The ABA's process for creating and updating the Standards is "lengthy and painstaking," but the Standards finally approved by the ABA House of Delegates (to become official policy of the 400,000 member association) "are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process, either individually or as representatives of their respective associations, and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions, over three or more years."[72]

Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the ABA Standards use both to provide rationales for its recommendations. For example, in recommending that commercial sureties be abolished, the ABA relies on numerous critiques of the money bail system going back nearly 100 years, social science experiments, law review articles, and various state statutes providing for its abolition. In recommending a presumption of release on recognizance and

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[71] *Id.* (internal quotation omitted).

[72] *Id.*

that money not be used to protect public safety, the ABA relies on United States Supreme Court opinions, findings from the Vera Foundation's Manhattan Bail Project, discussions from the 1964 Conference on Bail and Criminal Justice, Bureau of Justice Statistics data, as well as the *absence* of evidence, i.e., "the absence of any relationship between the ability of a defendant to post a financial bond and the risk that a defendant may pose to public safety."[73]

The ABA Standards provide recommendations spanning the entirety of the pretrial phase of the criminal case, from the decision to release on citation or summons, to accountability through punishment for pretrial failure. They are based, correctly, on a "bail/no bail" or "release/no release" model, designed to fully effectuate the release of bailable defendants while providing those denied bail with fair and transparent due process hearing prior to detention.

Drafters of the 2011 Summary Report to the National Symposium on Pretrial Justice recognized that certain fundamental features of an ideal pretrial justice system are the same features that have been a part of the ABA Standards since they were first published in 1968. And while that Report acknowledged that simply pointing to the Standards is not enough to change the customs and habits built over 100 years of a bail system dominated by secured money, charge versus risk, and profit, the Standards remain a singularly important resource for all pretrial practitioners. Indeed, given the comprehensive nature of the ABA Standards, jurisdictions can at least use them to initially identify potential areas for improvement by merely holding up existing policies, practices, and even laws to the various recommendations contained therein.

[73] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-5.3 (a) (commentary) at 111.

Chapter 6: Pretrial Terms and Phrases

The Importance of a Common Vocabulary

It is only after we know the history, the law, the research, and the national standards that we can fully understand the need for a common national vocabulary associated with bail. The Greek philosopher Socrates correctly stated that, "The beginning of wisdom is a definition of terms." After all, how can you begin to discuss society's great issues when the words that you apply to those issues elude substance and meaning? But beyond whatever individual virtue you may find in defining your own terms, the undeniable merit of this ancient quote fully surfaces when applied to dialogue with others. It is one thing to have formed your own working definition of the terms "danger" or "public safety," for example, but your idea of public safety and danger can certainly muddle a conversation if another person has defined the terms differently. This potential for confusion is readily apparent in the field of bail and pretrial justice, and it is the wise pretrial practitioner who seeks to minimize it.

Minimizing confusion is necessary because, as noted previously, bail is already complex, and the historically complicated nature of various terms and phrases relating to bail and pretrial release or detention only adds to that complexity, which can sometimes lead to misuse of those terms and phrases. Misuse, in turn, leads to unnecessary quibbling and distraction from fundamental issues in the administration of bail and pretrial justice. This distraction is multiplied when the definitions originate in legislatures (for example, by defining bail statutorily as an amount of money) or court opinions (for example, by articulating an improper or incomplete purpose of bail). Given the existing potential for confusion, avoiding further complication is also a primary reason for finding consensus on bail's basic terms and phrases.

As also noted previously, bail is a field that is changing rapidly. For nearly 1,500 years, the administration of bail went essentially unchanged, with accused persons obtaining pretrial freedom by pledging property or money, which, in turn, would be forfeited if those persons did not show up to court. By the late 1800s, however, bail in America had changed from the historical personal surety system to a commercial surety system, with the unfortunate consequence of solidifying money at bail while radically transforming money's use from a condition subsequent (i.e., using unsecured bonds) to a condition precedent (i.e.,

using secured bonds) to release. Within a mere 20 years after the introduction of the commercial surety system in America, researchers began documenting abuses and shortcomings associated with that system based on secured financial conditions. By the 1980s, America had undergone two generations of pretrial reform by creating alternatives to the for-profit bail bonding system, recognizing a second constitutionally valid purpose for the government to impose restrictions on pretrial freedom, and allowing for the lawful denial of bail altogether based on extreme risk. These are monumental changes in the field of pretrial justice, and they provide further justification for agreeing on basic definitions to keep up with these major developments.

Finally, bail is a topic of increasing interest to criminal justice researchers, and criminal justice research begins with conceptualizing and operationalizing terms in an effort to collect and analyze data with relevance to the field. For example, until we all agree on what "court appearance rates" mean, we will surely struggle to agree on adequate ways to measure them and, ultimately, to increase them. In the same way, as a field we must agree on the meaning and purpose of so basic a term as "bail."

More important than achieving simple consensus, however, is that we agree on meanings that reflect reality or truth. Indeed, if wisdom begins with a definition of terms, wisdom is significantly furthered when those definitions hold up to what is real. For too long, legislatures, courts, and various criminal justice practitioners have defined bail as an amount of money, but that is an error when held up to the totality of the law and practice through history. And for too long legislatures, courts, and criminal justice practitioners have said that the purpose of bail is to provide reasonable assurance of public safety and/or court appearance, but that, too, is an error when held up against the lenses of history and the law. Throughout history, the definition of "bail" has changed to reflect what we know about bail, and the time to agree on its correct meaning for this generation of pretrial reform is now upon us.

The Meaning and Purpose of "Bail"

For the legal and historical reasons articulated above, bail should never be defined as money. Instead, bail is best defined in terms of release, and most appropriately as a process of conditional release. Moreover, the purpose of bail is not to provide reasonable assurance of court appearance and public safety – that is the province and purpose of conditions of bail or limitations on pretrial freedom. The purpose of bail, rather, is to effectuate and maximize release. There

is "bail" – i.e., a process of release – and there is "no bail," – a process of detention. Constitutionally speaking, "bail" should always outweigh "no bail" because, as the U.S. Supreme Court has explained, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[74]

Historically, the term bail derives from the French "baillier," which means to hand over, give, entrust, or deliver. It was a delivery, or bailment, of the accused to the surety – the jailer of the accused's own choosing – to avoid confinement in jail. Indeed, even until the 20th century, the surety himself or herself was often known as the "bail" – the person to whom the accused was delivered. Unfortunately, however, for centuries money was also a major part of the bail agreement. Because paying money was the primary promise underlying the release agreement, the coupling of "bail" and money meant that money slowly came to be equated with the release process itself. This is unfortunate, as money at bail has never been more than a condition of bail – a limitation on pretrial freedom that must be paid upon forfeiture of the bond agreement. But the coupling became especially misleading in America after the 1960s, when the country attempted to move away from its relatively recent adoption of a secured surety system and toward other methods for releasing defendants, such as release on recognizance and release on nonfinancial conditions.

Legally, bail as a process of release is the only definition that (1) effectuates American notions of liberty from even colonial times; (2) acknowledges the rationales for state deviations from more stringent English laws in crafting their constitutions (and the federal government in crafting the Northwest Territory Ordinance of 1787); and (3) naturally follows from various statements equating bail with release from the United States Supreme Court from *United States v. Barber*[75] and *Hudson v. Parker,*[76] to *Stack v. Boyle*[77] and *United States v. Salerno*.[78]

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[74] *United States v. Salerno,* 481 U.S. 739, 755 (1987).

[75] 140 U.S. 164, 167 (1891) ("[I]n criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time . . . .").

[76] 156 U.S 277, 285 (1895) ("The statutes of the United States have been framed upon the theory that a person accused of a crime shall not, until he has been finally adjudged guilty . . . be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail . . . .").

[77] 342 U.S. 1, 4 (1951) ("[F]ederal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction . . . .").

Bail as a process of release accords not only with history and the law, but also with scholars' definitions (in 1927, Beeley defined bail as the release of a person from custody), the federal government's usage (calling bail a process in at least one document), and use by organizations such as the American Bar Association, which has quoted Black's Law Dictionary definition of bail as a "process by which a person is released from custody."[79] States with older (and likely outdated) bail statutes often still equate bail with money, but many states with newer provisions, such as Virginia (which defines bail as "the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer"),[80] Colorado (which defines bail as security like a pledge or a promise, which can include release without money),[81] and Florida (which defines bail to include "any and all forms of pretrial release"[82]) have enacted statutory definitions to recognize bail as something more than simply money. Moreover, some states, such as Alaska,[83] Florida,[84] Connecticut,[85] and Wisconsin,[86] have constitutions explicitly incorporating the word "release" into their right-to-bail provisions.

> *"In general, the term 'bail' means the release of a person from custody upon the undertaking, with or without one or more persons for him, that he will abide the judgment and orders of the court in appearing and answering the charge against him. It is essentially a delivery or bailment of a person to his sureties—the jailers of his own choosing—so that he is placed in their friendly custody instead of remaining in jail."*
>
> Arthur Beeley, 1927

A broad definition of bail, such as "release from governmental custody" versus simply release from jail, is also appropriate to account for the recognition that bail, as a process of conditional release prior to trial, includes many mechanisms

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[78] 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm . . . .").
[79] *Frequently Asked Questions About Pretrial Release Decision Making* (ABA 2012).
[80] Va. Code. § 19.2-119 (2013).
[81] Colo. Rev. Stat. § 16-1-104 (2013).
[82] Fla. Stat. § 903.011 (2013).
[83] Alaska Const. art. I, § 11.
[84] Florida Const. art. I, § 14.
[85] Conn. Const. art. 1, § 8.
[86] Wis. Const. art. 1, § 8.

– such as citation or "station house release" – that effectuate that release apart from jails and that are rightfully considered in endeavors seeking to improve the bail process.

The Media's Use of Bail Terms and Phrases

Much of what the public knows about bail comes from the media's use, and often misuse, of bail terms and phrases. A sentence from a newspaper story stating that "the defendant was released without bail," meaning perhaps that the defendant was released without a secured financial condition or on his or her own recognizance, is an improper use of the term "bail" (which itself means release) and can create unnecessary confusion surrounding efforts at pretrial reform. Likewise, stating that someone is being "held on $50,000 bail" not only misses the point of bail equaling release, but also equates money with the bail process itself, reinforcing the misunderstanding of money merely as a condition of bail – a limitation of pretrial freedom which, like all such limitations, must be assessed for legality and effectiveness in any particular case. For several reasons, the media continues to equate bail with money and tends to focus singularly on the amount of the financial condition (as opposed to any number of non-financial conditions) as a sort-of barometer of the justice system's sense of severity of the crime. Some of those reasons are directly related to faulty use of terms and phrases by the various states, which define terms differently from one another, and which occasionally define the same bail term differently at various places within a single statute.

In the wake of the 2011 National Symposium on Pretrial Justice, the Pretrial Justice Working Group created a Communications Subcommittee to, among other things, create a media campaign for public education purposes. To effectively educate the public, however, the Subcommittee recognized that some measure of media education also needed to take place. Accordingly, in 2012 the John Jay College Center on Media, Crime, and Justice, with support from the Public Welfare Foundation, held a symposium designed to educate members of the media and to help them identify and accurately report on bail and pretrial justice issues. Articles written by symposium fellows are listed as they are produced, and continue to demonstrate how bail education leads to more thorough and accurate coverage of pretrial issues.

Sources and Resources: John Jay College and Public Welfare Foundation Symposium resources, found at http://www.thecrimereport.org/conferences/past/2012-05-jailed-without-conviction-john-jaypublic-welfare-sym. Pretrial Justice Working Group website and materials, found at http://www.pretrial.org/infostop/pjwg/.

To say that bail is a process of release and that the purpose of bail is to maximize release is not completely new (researchers have long described an "effective" bail decision as maximizing or fostering release) and may seem to be only a subtle shift from current articulations of meaning and purpose. Nevertheless, these ideas have not taken a firm hold in the field. Moreover, certain consequences flow from whether or not the notions are articulated correctly. In Colorado, for example, where, until recently, the legislature incorrectly defined bail as an amount of money, bail insurance companies routinely said that the sole function of bail was court appearance (which only makes sense when bail and money are equated, for legally the only purpose of money was court appearance), and that the right to bail was the right merely to have an amount of money set – both equally untenable statements of the law. Generally speaking, when states define bail as money their bail statutes typically reflect the definition by overemphasizing money over all other conditions throughout the bail process. This, in turn, drives individual misperceptions about what the bail process is intended to do.

Likewise, when persons inaccurately mix statements of purpose for bail with statements of purpose for conditions of bail, the consequences can be equally misleading. For example, when judges inaccurately state that the purpose of bail is to protect public safety (again, public safety is a constitutionally valid purpose for any particular condition of bail or limitation of pretrial freedom, not for bail itself), those judges will likely find easy justification for imposing unattainable conditions leading to pretrial detention – for many, the safest pretrial option available. When the purpose of bail is thought to be public safety, then the emphasis will be on public safety, which may skew decisionmakers toward conditions that lead to unnecessary pretrial detention. However, when the purpose focuses on release, the emphasis will be on pretrial freedom with conditions set to provide a reasonable assurance, and not absolute assurance, of court appearance and public safety.

Thus, bail defined as a process of release places an emphasis on pretrial release and bail conditions that are attainable at least in equal measure to their effect on court appearance and public safety. In a country, such as ours, where bail may be constitutionally denied, a focus on bail as release when the right to bail is granted is crucial to following *Salerno's* admonition that pretrial liberty be our nation's norm. Likewise, by correctly stating that the purpose of any particular bail condition or limitation on pretrial freedom is tied to the constitutionally valid rationales of public safety and court appearance, the focus is on the particular

condition – such as GPS monitoring or drug testing – and its legality and efficacy in providing reasonable assurance of the desired outcome.

Other Terms and Phrases

There are other terms and phrases with equal need for accurate national uniformity. For example, many states define the word "bond" differently, sometimes describing it in terms of one particular type of bail release or condition, such as through a commercial surety. A bond, however, occurs whenever the defendant forges an agreement with the court, and can include an additional surety, or not, depending on that agreement. Prior definitions – and thus categories of bail bonds – have focused primarily on whether or how those categories employ money as a limitation on pretrial freedom, thus making those definitions outdated. Future use of the term bond should recognize that money is only one of many possible conditions, and, in light of legal and evidence-based practices, should take a decidedly less important role in the agreement forged between a defendant and the court. Accordingly, instead of describing a release by using terms such as "surety bond," "ten percent bond," or "personal recognizance bond," pretrial practitioners should focus first on release or detention, and secondarily address conditions (for release is always conditional) of the release agreement.

Other misused terms include: "pretrial" and "pretrial services," which are often inaccurately used as a shorthand method to describe pretrial services agencies and/or programs instead of their more appropriate use as (1) a period of time, and (2) the actual services provided by the pretrial agency or program; "court appearance rates" (and, concomitantly, "failure to appear rates") which is defined in various ways by various jurisdictions; "the right to bail," "public safety," "sureties" or "sufficient sureties," and "integrity of the judicial process." There have been attempts at creating pretrial glossaries designed to bring national uniformity to these terms and phrases, but acceptance of the changes in usage has been fairly limited. Until that uniformity is reached, however, jurisdictions should at least recognize the extreme variations in definitions of terms and phrases, question whether their current definitions follow from a study of bail history, law, and research, and be open to at least discussing the possibility of changing those terms and phrases that are misleading or otherwise in need of reform.

Additional Sources and Resources: Black's Law Dictionary (9th ed. 2009); *Criminal Bail: How Bail Reform is Working in Selected District Courts*, U.S. GAO Report to the Subcomm. on Courts, Civ. Liberties, and the Admin. of Justice (1987); Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press, 3rd ed. 1995); Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011).

Chapter 7: Application – Guidelines for Pretrial Reform

In a recent op-ed piece for *The Crime Report*, Timothy Murray, then Executive Director of the Pretrial Justice Institute, stated that "the cash-based model [relying primarily on secured bonds] represents a tiered system of justice based on personal wealth, rather than risk, and is in desperate need of reform."[87] In fact, from what we know about the history of bail, because a system of pretrial release and detention based on secured bonds administered primarily through commercial sureties causes abuses to both the "bail" and "no bail" sides of our current dichotomy, reform is not only necessary – it is ultimately inevitable. But how should we marshal our resources to best accomplish reform? How can we facilitate reform across the entire country? What can we do to fully understand pretrial risk, and to fortify our political will to embrace it? And how can we enact and implement laws, policies, and practices aiming at reform so that the resulting cultural change will actually become firmly fixed?

Individual Action Leading to Comprehensive Cultural Change

The answers to these questions are complex because every person working in or around the pretrial field has varying job responsibilities, legal boundaries, and, presumably, influence over others. Nevertheless, pretrial reform in America requires all persons – from entry-level line officers and pretrial services case workers to chief justices and governors – to embrace and promote improvements within their spheres of influence while continually motivating others outside of those spheres to reach the common goal of achieving a meaningful top to bottom (or bottom to top) cultural change. The common goal is collaborative, comprehensive improvement toward maximizing release, public safety, and court appearance through the use of legal and evidence-based practices, but we will only reach that goal through individual action.

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[87] Timothy Murray, *Why the Bail Bond System Needs Reform*, The Crime Report (Nov. 19, 2013) found at http://www.thecrimereport.org/viewpoints/2013-11-why-the-bail-bond-system-needs-reform

Individual Decisions

Individual action, in turn, starts with individual decisions. First, every person working in the field must decide whether pretrial improvements are even necessary. It is this author's impression, along with numerous national and local organizations and entities, that improvements are indeed necessary, and that the typical reasons given to keep the customary yet damaging practices based on a primarily money-based bail system are insufficient to reject the national movement toward meaningful pretrial reform. The second decision is to resolve to educate oneself thoroughly in bail and to make the necessary improvements by following the research, wherever that research goes and so long as it does not interfere with fundamental legal foundations. Essentially, the second decision is to follow a legal and evidence-based decision making model for pretrial improvement. By following that model, persons (or whole jurisdictions working collaboratively) will quickly learn (1) which particular pretrial justice issues are most pressing and in need of immediate improvement, (2) which can be addressed in the longer term, and (3) which require no action at all.

Third, each person must decide how to implement improvements designed to address the issues. This decision is naturally limited by the person's particular job and sphere of influence, but those limitations should not stop individual action altogether. Instead, the limitations should serve merely as motivation to recruit others outside of each person's sphere to join in a larger collaborative process. Fourth and finally, each person must make a decision to ensure those improvements "stick" by using proven implementation techniques designed to promote the comprehensive and lasting use of a research-based improvement.

Learning about improvements to the pretrial process also involves learning the nuances that make one's particular jurisdiction unique in terms of how much pretrial reform is needed. If, for example, in one single (and wildly hypothetical) act, the federal government enacted a provision requiring the states to assure that no amount of money could result in the pretrial detention of any particular defendant – a line that is a currently a crucial part of both the federal and District of Columbia bail statutes – some states would be thrust immediately into perceived chaos as their constitutions and statutes practically force bail practices that include setting high amounts of money to detain high-risk yet bailable defendants pretrial. Other states, however, might be only mildly inconvenienced, as their constitutions and statutes allow for a fairly robust preventive detention process that is simply unused. Still others might recognize that their preventive detention provisions are somewhat archaic because they rely primarily on

charge-based versus risk-based distinctions. Knowing where one's jurisdiction fits comparatively on the continuum of pretrial reform needs can be especially helpful when crafting solutions to pretrial problems. Some states underutilize citations and summonses, but others have enacted statutory changes to encourage using them more. Some jurisdictions rely heavily on money bond schedules, but some have eliminated them entirely. There is value in knowing all of this.

Individual Roles

The process of individual decision making and action will look different depending on the person and his or her role in the pretrial process. For a pretrial services assessment officer, for example, it will mean learning everything available about the history, fundamental legal foundations, research, national standards, and terms and phrases, and then holding up his or her current practices against that knowledge to perhaps make changes to risk assessment and supervision methods. Despite having little control over the legal parameters, it is nonetheless important for each officer to understand the fundamentals so that he or she can say, for example, "Yes, I know that bail should mean release and so I understand that our statute, which defines bail as money, has provisions that can be a hindrance to certain evidence-based pretrial practices. Nevertheless, I will continue to pursue those practices within the confines of current law while explaining to others operating in other jobs and with other spheres of influence how amending the statute can help us move forward." This type of reform effort – a bottom to top effort – is happening in numerous local jurisdictions across America.

> *"Once you make a decision, the universe conspires to make it happen."*
>
> Ralph Waldo Emerson

For governors or legislators, it will mean learning everything available about the history, legal foundations, research, national standards, and terms and phrases, and then also holding up the state's constitution and statutes against that knowledge to perhaps make changes to the laws to better promote evidence-based practices. It is particularly important for these leaders to know the fundamentals and variances across America so that each can say, for example, "I now understand that our constitutional provisions and bail statutes are somewhat outdated, and thus a hindrance to legal and evidence-based practices

designed to fully effectuate the bail/no bail dichotomy that is already technically a part of our state bail system. I will therefore begin working with state leaders to pursue the knowledge necessary to make statewide improvements to bail and pretrial justice so that our laws will align with broad legal and evidence-based pretrial principles and therefore facilitate straightforward application to individual cases." This type is reform effort – a top to bottom effort – is also happening in America, in states such as New York, New Jersey, and Kentucky.

Everyone has a role to play in pretrial justice, and every role is important to the overall effort. Police officers should question whether their jurisdiction uses objective pretrial risk assessment and whether it has and uses fair and transparent preventive detention (as the International Chiefs of Police/PJI/Public Welfare Foundation's Pretrial Justice Reform Initiative asks them to do), but they should also question their own citation policies as well as the utility of asking for arbitrary money amounts on warrants. Prosecutors should continue to advocate support for pretrial services agencies or others using validated risk assessments (as the Association of Prosecuting Attorneys policy statement urges them to do), but they should also question their initial case screening policies as well as whether justice is served through asking for secured financial conditions for any particular bond at first appearance. Defense attorneys, jail administrators, sheriffs and sheriff's deputies, city and county officials, state legislators, researchers and academics, persons in philanthropies, and others should strive individually to actively implement the various policy statements and recommendations that are already a part of the pretrial justice literature, and to question those parts of the pretrial system seemingly neglected by others.

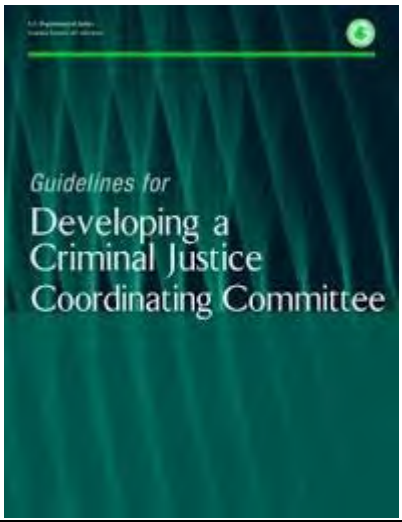
Everyone has a part to play in pretrial justice, and it means individually deciding to improve, learning what improvements are necessary, and then implementing legal and evidence-based practices to further the goals of bail. Nevertheless, while informed individual action is crucial, it is also only a means to the end of a comprehensive collaborative culture change. In this generation of pretrial reform, the most successful improvement efforts have come about when governors and legislators have sat at the same table as pretrial services officers (and everyone else) to learn about bail improvements and then to find comprehensive solutions to problems that are likely insoluble through individual effort alone.

Collaboration and Pretrial Justice

In a complicated justice system made up of multiple agencies at different levels of government, purposeful collaboration can create a powerful mechanism for discussing and implementing criminal justice system improvements. Indeed, in the National Institute of Corrections document titled *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems,* the authors call collaboration a "key ingredient" of an evidence-based system, which uses research to achieve system goals.

Like other areas in criminal justice, bail and pretrial improvements affect many persons and entities, making collaboration between system actors and decision makers a crucial part of an effective reform strategy. Across the country, local criminal justice coordinating committees (CJCCs) are demonstrating the value of coming together with a formalized policy planning process to reach system goals, and some of the most effective pretrial justice strategies have come from jurisdictions working through these CJCCs. Collaboration allows individuals with naturally limited spheres of influence to interact and achieve group solutions to problems that are likely insoluble through individual efforts. Moreover, through staff and other resources, CJCCs often provide the best mechanisms for ensuring the uptake of research so that full implementation of legal and evidence-based practices will succeed.

The National Institute of Corrections currently publishes two documents designed to help communities create and sustain CJCCs. The first, Robert Cushman's *Guidelines for Developing a Criminal Justice Coordinating Committee* (2002), highlights the need for system coordination, explains a model for a planning and coordination framework, and describes mechanisms designed to move jurisdictions to an "ideal" CJCC. The second, Dr. Michael Jones's *Guidelines for Staffing a Criminal Justice Coordinating Committee* (2012), explains the need and advantages of CJCC staff and how that staff can help collect, digest, and synthesize research for use by criminal justice decision makers.



Judicial Leadership

Finally, while everyone has a role and a responsibility, judges must be singled out as being absolutely critical for achieving pretrial justice in America. Bail is a judicial function, and the history of bail in America has consistently demonstrated that judicial participation will likely mean the difference between pretrial improvement and pretrial stagnation. Indeed, the history of bail is replete with examples of individuals who attempted and yet failed to make pretrial improvements because those changes affected only one or two of the three goals associated with evidence-based decision making at bail, and they lacked sufficient judicial input on the three together. Judges alone are the individuals who must ensure that the balance of bail – maximizing release (through an understanding of a defendant's constitutional rights) while simultaneously maximizing public safety and court appearance (through an understanding of the constitutionally valid purposes of limiting pretrial freedom, albeit tempered by certain fundamental legal foundations such as due process, equal protection, and excessiveness, combined with evidence-based pretrial practices) – is properly maintained. Moreover, because the judicial decision to release or detain any particular defendant is the crux of the administration of bail, whatever improvements we make to other parts of the pretrial process are likely to stall if judges do not fully participate in the process of pretrial reform. Finally, judges are in the best position to understand risk, to communicate that understanding to others, and to demonstrate daily the political will to embrace the risk that is inherent in bail as a fundamental precept of our American system of justice.

Indeed, this generation of bail reform needs more than mere participation by judges; this generation needs judicial leadership. Judges should be organizing and directing pretrial conferences, not simply attending them. Judges should be educating the justice system and the public, including the media, about the right to bail, the presumption of innocence, due process, and equal protection, not the other way around.

Fortunately, American judges are currently poised to take a more active leadership role in making the necessary changes to our current system of bail. In February of 2013, the Conference of Chief Justices, made up of the highest judicial officials of the fifty states, the District of Columbia, and the various American territories, approved a resolution endorsing certain fundamental

recommendations surrounding legal and evidence-based improvements to the administration of bail. Additionally, the National Judicial College has conducted focus groups with judges designed to identify opportunities for improvement. Moreover, along with the Pretrial Justice Institute and the Bureau of Justice Assistance, the College has created a teaching curriculum to train judges on legal and evidence-based pretrial decision making. Judges thus need only to avail themselves of these resources, learn the fundamentals surrounding legal and evidence-based pretrial practice, and then ask how to effectuate the Chief Justice Resolution in their particular state.

The Chief Justice Resolution should also serve as a reminder that all types of pretrial reform include both an evidentiary and a policy/legal component – hence the term legal and evidence-based practices. Indeed, attempts to increase the use of evidence or research-based practices without engaging the criminal justice system and the general public in the legal and policy justifications and parameters for those practices may lead to failure. For example, research-based risk assessment, by itself, can be beneficial to any jurisdiction, but only if implementing it involves a parallel discussion of the legal demand for embracing and then mitigating risk, the need to avoid other practices that undermine the benefits of assessment, and the pitfalls of attempting to fully incorporate risk into a state legal scheme that is unable to adequately accommodate it. On the other hand, increasing the use of unsecured financial conditions, coupled with a discussion of how research has shown that those conditions can increase release without significant decreases in court appearance and public safety – the three major legal purposes underlying the bail decision – can move a jurisdiction closer to model bail practices that, among other things, ensure bailable defendants who are ordered release are actually released.

Additional Sources and Resources: Association of Prosecuting Attorneys, *Policy Statement on Pretrial Justice* (2012) found at http://www.apainc.org/html/APA+Pretrial+Policy+Statement.pdf. Conference of Chief Justices Resolution 3: *Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial* Release (2013), found at http://www.pretrial.org/wp-content/uploads/2013/05/CCJ-Resolution-on-Pretrial.pdf; William F. Dressell & Barry Mahoney, *Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement* (Nat'l. Jud. College 2013); *Effective Pretrial Decision Making: A Model Curriculum for Judges* (BJA/PJI/Nat'l Jud. Coll. (2013) http://www.pretrial.org/download/infostop/Judicial%20Training.pdf; Dean L. Fixsen, Sandra F. Naoom, Karen A. Blase, Robert M. Friedman, and Frances Wallace, *Implementation Research: A Synthesis of the Literature* (Univ. S. Fla. 2005); International Chiefs of Police Pretrial Justice Reform Initiative, found at http://www.theiacp.org/Pretrial-Justice-Reform-Initiative.

Conclusion

Legal and evidence-based pretrial practices, derived from knowing the history of bail, legal foundations, and social science pretrial research, and expressed as recommendations in the national best practice standards, point overwhelmingly toward the need for pretrial improvements. Fortunately, in this third generation of American bail reform, we have amassed the knowledge necessary to implement pretrial improvements across the country, no matter how daunting or complex any particular state believes that implementation process to be. Whether the improvements are minor, such as adding an evidence-based supervision technique to an existing array of techniques, or major, such as drafting new constitutional language to allow for the fair and transparent detention of high-risk defendants without the need for money bail, the only real prerequisites to reform are education and action. This paper is designed to further the process of bail education with the hope that it will lead to informed action.

As a prerequisite to national reform, however, that bail education must be uniform. Accordingly, achieving pretrial justice in America requires everyone both inside and outside of the field to agree on certain fundamentals, such as the history of bail, the legal foundations, the importance of the research and national standards, and substantive terms and phrases. This includes agreeing on the meaning and purpose of the word "bail" itself, which has gradually evolved into a word that often is used to mean anything but its historical and legal connotation of release. Fully understanding these fundamentals of bail is paramount to overcoming our national amnesia of a system of bail that worked for centuries in England and America – an unsecured personal surety system in which bailable defendants were released, in which non-bailable defendants were detained, and in which no profit was allowed.

> *"A sound pretrial infrastructure is not just a desirable goal – it is vital to the legitimate system of government and to safer communities."*
>
> Deputy Attorney General James M. Cole (2011).

Moreover, while we have learned much from the action generated by purely local pretrial improvement projects, we must not forget the enormous need for pretrial justice across the entire country. We must thus remain mindful that meaningful American bail reform will come about only when entire American

states focus on these important issues. Anything less than an entire state's complete commitment to examine all pretrial practices across jurisdictions and levels of government – by following the research from all relevant disciplines – means that any particular pretrial practitioner's foremost duty is to continue communicating the need for reform until that complete commitment is achieved. American pretrial justice ultimately depends on reaching a tipping point among the states, which can occur only when enough states have shown that major pretrial improvements are necessary and feasible.

In 1964, Robert Kennedy stated the following:

> [O]ur present bail system inflicts hardship on defendants and it inflicts considerable financial cost on society. Such cruelty and cost should not be tolerated in any event. But when they are *needless*, then we must ask ourselves why we have not developed a remedy long ago. For it is clear that the cruelty and cost of the bail system *are* needless.[88]

Fifty years later, this stark assessment remains largely true, and yet we now have significant reason for hope that this third generation of bail reform will be America's last. For in the last 50 years, we have accumulated the knowledge necessary to replace, once and for all, this "cruel and costly" system with one that represents safe, fair, and effective administration of pretrial release and detention. We have amassed a body of research literature, of best practice standards, and of experiences from model jurisdictions that together have created both public and criminal justice system discomfort with the status quo. It is a body of knowledge that points in a single direction toward effective, evidence-based pretrial practices, and away from arbitrary, irrational, and customary practices, such as the casual use of money. We now have the information necessary to recognize and fully understand the paradox of bail. We know what to do, and how to do it. We must now only decide to act.

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[88] Attorney General Robert F. Kennedy, Testimony on Bail Legislation Before the Subcommittee on Constitutional Rights and Improvements in the Judicial Machinery of the Senate Judiciary Committee 4 (Aug. 4, 1964) (emphasis in original) *available at* http://www.justice.gov/ag/rfkspeeches/1964/08-04-1964.pdf.

Money as a Criminal Justice Stakeholder:

The Judge's Decision to Release or Detain a Defendant Pretrial

National Institute of Corrections

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Preface

The future of pretrial justice in America will come partly from our deliberative focus on our judges' decisions to release or detain a criminal defendant pretrial and from our questioning of whether our current constitutional and statutory bail schemes are either helping or hindering those decisions. When I started researching bail, I wrote reams of paper on this particular decision point, only to be told by an extremely bright judge that the current Colorado statute seemed to guide him toward a primarily charge and money-based decision-making process. He was right, and even though people said we could never do it, we changed the entire statute to create a legal scheme designed to help judges realize the actual release of bailable defendants by reducing the use of money and bail schedules.

Now, however, we recognize that we also need a fair and transparent scheme allowing the preventive detention of higher risk defendants without "bail," or judges will continue to be forced to use money to accomplish the same thing, albeit unfairly, non-transparently, and, some would say, unlawfully. A new group of people are now telling us that we can never change our constitution to allow the creation of this scheme, but the fact is that change is inevitable. Indeed, moving from a mostly charge and money-based bail system to one based primarily on empirically-derived risk necessarily means that virtually all American bail laws are antiquated and must be changed.

This paper is designed to show a somewhat ideal process for making a release or detain decision, but with the realization that a particular state's bail laws may hinder that ideal process to a point where best practices are difficult or even impossible to implement. Nevertheless, until we know how the pretrial decision-making process should work (i.e., an in-or-out decision, immediately effectuated), we will never know exactly which changes we must make to further the goals underlying the "bail/no bail" process.

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In writing about judicial decision making, I am also indebted to the many judges with whom I have worked over the years. They include Judge Truman Morrison of the Superior Court of the District of Columbia, Judge Deanell Tacha and the other judges on the Tenth Circuit Court of Appeals during my employment as both law clerk and staff counsel, the judges of the Colorado Court of Appeals during my employment with that court, and the inspired and enlightened judges on the bench in Jefferson County, Colorado. I am especially thankful to Judges Margie Enquist, Thomas Vance, and Brooke Jackson, who understood the need for pretrial improvement before most, who worked to implement improvements against great opposition, and who continue to strive toward an ideal pretrial justice system where I live.

As with everything I have written in bail, I give my deepest thanks and appreciation to Claire Brooker (Jefferson County, Colorado) and Mike Jones (Pretrial Justice Institute), who helped with every aspect of this paper. Their contribution to the administration of bail transcends any particular paper, though, and continues to inspire me daily to think and write about important issues of pretrial justice.

Executive Summary

Our best understanding of how to make meaningful improvements to criminal justice systems points to justice stakeholders cultivating a shared vision, using a collaborative policy process, and enhancing individual decision making with evidence-based practices. Unfortunately, however, using secured money to determine release at bail threatens to erode each of these ingredients. Money cares not for systemwide improvement, and those who buy their stakeholder status from money have little interest in coming together to work on evidence-based solutions to systemwide issues.

Like virtually no other area of the law, when judges set secured financial conditions at bail, they are essentially abdicating their decision-making authority to the money itself, which in many ways then becomes a criminal justice stakeholder, with influence and control over such pressing issues as jail populations, court dockets, county budgets, and community safety. Money takes this decision-making authority and sells it to whoever will pay for the transfer, ultimately resulting in "decisions" that run counter to justice system goals as well as the intentions of bail-setting judges. The solution to this dilemma – a dilemma created and blossoming in only the last century in America – is for judges to fully understand the essence of their decision-making duty at bail, and in their adhering to a process in which they reclaim their roles as decision makers fully responsible for the pretrial release or detention of any particular defendant.

Judges can achieve this understanding through a thorough knowledge of history, which illustrates that bail has always been a process in which bail-setting officials were expected to make "bail/no bail," or in-or-out decisions, immediately effectuated so that bailable defendants were released and unbailable defendants were detained. The history of bail shows that when bailable defendants (or those whom we feel should be bailable defendants) are detained or unbailable defendants (or those whom we feel should be unbailable defendants) are released, some correction is necessary to right the balance. Moreover, the history shows that America's switch from a personal surety system using primarily unsecured bonds to a commercial surety system using primarily secured bonds (along with other factors) has led to abuses to both the "bail" and "no bail" sides of our current dichotomies, thus leading to three generations of bail reform in America in the last 100 years.

Judges can also achieve this understanding through a thorough knowledge of the pretrial legal foundations. These foundations follow the history in equating "bail" with release, and "no bail" with detention, suggesting, if not demanding an in-or-out decision by judicial officials who are tasked with embracing the risk associated with

release and then mitigating that risk only to reasonable levels. Indeed, the history of bail, the legal foundations underlying bail, the pretrial research, the national standards on pretrial release, and the model federal and District of Columbia statutes are all premised on a "release/detain" decision-making process that is unobstructed by secured money at bail. Understanding the nuances of each of these bail fundamentals can help judges also to avoid that obstruction.

Nevertheless, it is knowledge of the current pretrial research that perhaps provides judges with the necessary tools to avoid the obstruction of money and to make effective pretrial decisions. First, current pretrial research illustrates that not making an immediately effectuated release decision for low and moderate risk defendants can have both short- and long-term harmful effects for both defendants and society. It is important for judges to make effective bail decisions, but it is especially important that those decisions not frustrate the very purposes underlying the bail process, such as to avoid threats to public safety. Therefore, judges should be guided by recent research demonstrating that a decision to release that is immediately effectuated (and not delayed through the use of secured financial conditions) can increase release rates while not increasing the risk of failure to appear or the danger to the community to intolerable levels. Second, the use of pretrial risk assessment instruments can help judges determine which defendants should be kept in or let out of jail. Those instruments, coupled with research illustrating that using unsecured rather than secured bonds can facilitate the release of bailable defendants without increasing either the risk of failure to appear or the danger to the public, can be crucial in giving judges who still insist on using money at bail the comfort of knowing that their in-or-out decisions will cause the least possible harm.

These in-or-out decisions can be hindered by inadequate state bail laws, most of which are outdated due to their charge-based structure. In particular, states that do not allow detention based on risk are putting judges at a disadvantage because the existing laws will often force judges to choose between releasing a high risk yet bailable defendant (thus endangering the public) or detaining that otherwise bailable defendant to protect the public by using money. Judges are thus encouraged to follow the recommendation of the Conference of Chief Justices that they work within the criminal justice system to analyze state laws and to propose revisions supporting risk-based or risk-informed decisions.

Introduction

In nearly 50 years, we have greatly strengthened our ability to make meaningful improvements to the criminal justice system. In 1967, the President's Commission on Law Enforcement and Administration of Justice issued its report titled, "The Challenge of Crime in a Free Society." In that report, the Commission introduced America to a criminal justice "systems" perspective, emphasized the role of data-guided or research-based decision making, and stressed the need for the various criminal justice stakeholders to come together in "planning and advisory boards" to manage and improve justice systems – all novel concepts to a country accustomed to the fragmented and decentralized justice system of the first half of the twentieth century.[1] Since then, we have re-defined our notions of criminal justice systems, coming to a better understanding of various discretionary justice system decision points and their relationship to one another. Moreover, we have begun keeping data and evaluating programs and processes, activities slowly leading to a base of criminal justice literature and research designed to illuminate "what works" to achieve our justice system goals. And finally, we have experimented with, and refined our ideas about, systemwide collaboration by watching both the successes and failures of various policy planning teams created to put that research to use.

This evolutionary understanding of the principles articulated in 1967 culminated in 2008, when the National Institute of Corrections (NIC) partnered with the Center for Effective Public Policy, the Pretrial Justice Institute, the Justice Management Institute, and the Carey Group to create a criminal justice systemwide "framework." This framework is designed to maximize collaboration and research by allowing policy teams made up of criminal justice stakeholders to apply evidence-based practices to system issues found at the various decision points.[2]

The framework rests on several premises. One premise is that all criminal justice stakeholders share a similar vision that focuses on harm reduction and community wellness while embracing certain core values of the justice system, such as public safety, fairness, individual liberty, and respect for people's rights and the rule of law. A second premise is that these stakeholders work best when they work together, agreeing to apply the research shown best to accomplish the overall vision at each decision point. A

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[1] *See The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice* (Washington, D.C. 1967).

[2] *See A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (NIC 3rd ed. 2010) [hereinafter *NIC Framework*].

third premise is the need for collaborative policies to filter down to each person making each decision, creating a "value chain" comprised of multiple individual decision makers who follow, and ultimately benefit from, professional judgment enhanced with evidence-based knowledge.[3] When these premises are followed, 50 years of experience shows that criminal justice decision makers can not only manage the overall operations of a complicated justice system, they can also identify and agree to implement evidence-based solutions to seemingly insoluble problems such as jail crowding, inefficient resource allocation, and recidivism. When the premises are not followed, however, justice system effectiveness and the shared vision itself can suffer. In the field of bail and pretrial justice, the latter happens most frequently when judges use their professional judgment during the pretrial release or detention decision point to set secured financial conditions of bail without fully contemplating their usefulness or effects.

Financial conditions of bail (i.e., money or its equivalent in property) have been a part of the release process for 1,500 years, but for virtually all of that time whatever financial condition that existed on any particular bond was typically unsecured, or, like a debenture, secured only by the general credit of the personal sureties. It was a debt that would be owed only if the accused did not appear for court; accordingly, no amount of money stood in the way of the defendant being released immediately from jail. On the other hand, secured financial conditions – which effectively require money to be paid up-front by a defendant (or his or her family) or specific collateral to be pledged or obligated in the form of what we now call "cash bonds," "surety bonds," "deposit bonds," and "property bonds" before that defendant can be released from jail – have only been used extensively in America since about 1900. Since then, our emphasis on secured bonds at bail has led to issues that are conceivable only when wealth and profit become foundational to a process of release. For the most part, these issues all stem from the puzzling custom of judges routinely abdicating their roles as decision makers by setting monetary conditions that are largely dependent upon others to effectuate.

Recognition of this abdication of decision-making authority is not new. Indeed, in the 1960s numerous critiques of the commercial surety industry included the notion that those sureties were improperly usurping a role best left to judges. For example, in 1963 author Ronald Goldfarb wrote the following:

> A cardinal flaw even with the legitimate aspects of the bondsmen's present role, and it could be argued that this is in and of itself a fatal flaw, is his power to singlehandedly inject himself into the administration of

[3] *See id.* at 17-29.

> justice and impede or corrupt it. Once a judge sets bail in a given case, one would hope that the issue of the bailability of a defendant was settled. But because of the absolute power of the bondsmen to withhold his services arbitrarily, the matter is not settled by the judge. In fact the judge's ruling can be defeated by the caprice of the bondsman, who can refuse to provide bail for good reasons, bad reasons, or no reasons.[4]

Goldfarb went on to quote a now well-known court opinion, in which D.C. Circuit Court Judge J. Skelly Wright wrote:

> Certainly the professional bondsman system as used in this District is odious at best. The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety – who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.[5]

Observations such as these undoubtedly influenced the rationale behind at least one of the American Bar Association's (ABA) criminal justice recommendations surrounding pretrial release. In commentary, the ABA lists "four strong reasons" for its recommendation to abolish bail bonding for profit. Its second and third reasons are as follows:

> Second, in a system relying on compensated sureties, 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 the required fee and post the necessary collateral. Third, decisions of bondsmen – including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond – are made in secret, without any record of the reasons for these decisions.[6]

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[4] Ronald Goldfarb, Ransom: A Critique of the American Bail System at 115 (NY Harper & Row 1965).
[5] *Id.* at 115-16 (quoting *Pannell v. U.S.*, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion)).
[6] American Bar Association *Standards for Criminal Justice: Pretrial Release* (3rd ed. 2007), Std. 10-1.4(f) (commentary) at 45 [hereinafter *ABA Standards*].

In 1996, authors John Clark and D. Alan Henry provided a compelling rationale for why judicial delegation to bondsmen of a decision to release or detain can undermine the criminal justice system: "The goal of the commercial bonding agent – to maximize profits – provides no reconciliation of the two conflicting goals of the pretrial release decision-making process [i.e., to allow pretrial release to the maximum extent possible while trying to assure that the accused appears in court and will not pose a threat to public safety]."[7]

By focusing criticism on the for-profit bail industry, however, we are likely now missing a much broader and more important point. For even in states where bondsmen have been made unlawful or where they are actively avoided through non-commercial sureties, cash-only financial conditions, or deposit bond options, judges are still effectively abdicating their decision-making role by setting secured money bonds. In those states, as in states with commercial bail bondsmen, judges are often simply setting amounts of money and then assuming that the money will either facilitate release or detention. In fact, those amounts of money can lead to opposite, and sometimes tragic or absurd results.

For example, during a 14-week study of over 1,250 cases conducted in 2011, researchers in Jefferson County, Colorado, documented twenty cases in which defendants were ordered released but were unable to leave jail on bonds with cash-only financial conditions of $100 or less. In addition, 120 other defendants were ordered released but remained detained for failure to post the cash-only financial conditions of $1,000 or less.[8] In 2011, National Public Radio reported on Leslie Chew, who was arrested for stealing blankets and was ordered released with a $3,500 secured financial condition. At the time of the report, he had been detained for six months at a cost of over $7,000 to taxpayers for the lack of $350 to pay a for-profit bail bondsman.[9] Finally, in 2013, a Missouri judge set a $2 million secured financial condition on the bail bond of a college student arrested in connection with the murder of a local bar owner. When the Saudi Arabian government posted the $2 million, however, the judge refused to release the

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[7] John Clark & D. Alan Henry, *The Pretrial Release Decision Making Process: Goals, Current Practices, and Challenges,* at 21 (Pretrial Res. Servs. Ctr. 1996).

[8] *See* Claire M.B. Brooker, Michael R. Jones, & Timothy R. Schnacke, *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds,* 9-10 (PJI/BJA 2014).

[9] Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates*, found at http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates.

student, explaining that the amount of money was meant to detain him, even if that detention potentially violated the Missouri Constitution.[10]

In each of these cases, judges have made decisions to release or detain defendants, but by setting often arbitrary amounts of money as secured financial conditions of bail bonds, they have handed over the actual decision to release or detain to others – or to no one – thus giving the money a life of its own. Essentially, judges have elevated money to the status of criminal justice stakeholder, having influence and control over such pressing issues as jail populations, court dockets, county budgets, and, most importantly, community safety.

However, money should never be allowed stakeholder status. The NIC's framework document defines "stakeholders" as "those who influence and have an investment in the criminal justice system's outcomes."[11] Money, albeit influential, has no investment whatsoever in the justice system's outcomes. Money simply exists, and is capable of aiding and abetting outcomes (such as mere profit) running counter to justice system philosophies that more appropriately envision community wellness and harm reduction.

Moreover, money is content to hand over its stakeholder status to anyone willing and able to pay for the transfer. The framework document lists the typical key decision makers and stakeholder groups for any given justice system, and nowhere on the list is a defendant's cousin, grandmother, bail bondsman, or foreign government. These persons and entities certainly have a stake in the particular case, but they rarely have either the interest or commonality of purpose to be considered stakeholders for criminal justice system issues. Money as a criminal justice stakeholder erodes the very premises underlying what we know works to achieve systemwide improvements, including a shared vision, a collaborative policy process, and evidence-based enhancement of individual decisions. If fifty years of research, experimentation, and implementation have taught us how to best achieve legal and evidence-based criminal pretrial practices, the continued casual use of money at bail threatens to erode if not erase those lessons from our memory.

The solution to this dilemma is not as simple as eliminating money from the bail process, but the solution is potentially simple nonetheless. The solution comes from

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[10] Sarah Rae Fruchtnicht, *Missouri Judge Refuses to Release Saudi Student After He Posted $2M Bond*, found at http://www.freerepublic.com/focus/f-news/3027702/posts; Bill Draper, *Saudi Remains Behind Bars After $2M Bond Posted,* found at http://bigstory.ap.org/article/saudi-remains-behind-bars-after-2m-bond-posted.

[11] *NIC Framework*, *supra* note 2, at 36.

judges fully understanding the essence of their decision-making duty at bail, and in their adhering to a process in which they reclaim their roles as decision makers responsible for the pretrial release or detention of any particular defendant. Following the history of bail, the foundational legal principles of bail, the national best practice standards on release and detention, and the pretrial research, the judge's decision to release should be an "in-or-out," "release/detain" decision, immediately effectuated, with conditions (including, albeit rarely, financial conditions) set in lawful ways that do not impede or otherwise defeat the intent of the decision. To move forward in pretrial justice, we must examine this most important part of the bail process – the judge's decision to release or detain – and come to agreement on how that decision must be made using legal and evidence-based knowledge of the administration of bail.

This is not a paper that seeks to blame judges for "doing it wrong;" instead, it applauds judges for doing so well for so long, given a bail system with so many limitations. Indeed, throughout the history of bail, from the Middle Ages until the 1960s in America, bail-setting officials were only able to use one condition of release – money – to provide reasonable assurance of only one valid purpose for limiting pretrial freedom – court appearance. Our culture today is still one in which many persons equate the process of bail with money, and it is the rare judge who can see beyond the blurring of these two very different concepts. Moreover, judges are in no way assisted by prosecutors who continually request secured bonds in arbitrarily high amounts, defense attorneys who acquiesce and merely argue for lesser amounts, and public pressure, which can force judges to focus on the monetary condition of bail at the expense of all other conditions. Judges are often also hindered by bad bail statutes, some of which mandate secured financial conditions or even the use of monetary bail bond schedules. And finally, judges are given little training in bail and pretrial issues, leaving them with no alternative but to study the perhaps antiquated but customary practices of their colleagues when learning how to make effective bail decisions.

But since the 1960s America has embarked on a journey of infrastructure improvements in bail, including the creation and implementation of non-financial conditions and other alternatives to money-based releases, the development and refinement of transparent detention processes, and even a second constitutionally valid purpose for limiting pretrial freedom – public safety. These improvements, coupled with recent and significant research showing what works to best attain the goals of bail, give judges the foundation for making effective pretrial release and detention decisions despite whatever hurdles might stand in the way.

The remainder of this paper describes this new infrastructure by exploring how the history, law, model statutes, national pretrial standards, and pretrial research all

support and encourage an in-or-out, or "bail/no bail," decision as well as how and when to incorporate money into that decision. In the last section, I will explore how judges should view risk at bail and use the kind of tools specifically created for them to follow a more effective decision-making process leading to decisive and immediately effectuated orders to release or detain defendants pretrial.

Chapter 1. The History and the Law to the Twentieth Century

The history of bail and the law evolving through that history are intertwined. Historical events are often the catalyst for new laws, and the new laws often generate new practices, which, in turn, necessitate changes to the laws. In 1676 England, for example, officials arrested an individual known as Jenkes for making a speech upsetting to the King, charged him with sedition (a charge that technically required release on bail), and held him for two years using various procedural loopholes. His case, and other cases in which defendants were given a similar procedural "runaround" so that they remained detained, led parliament to pass the Habeas Corpus Act of 1679, which provided a procedure that "plugged the loopholes and made even the king's bench judges subject to penalties for noncompliance."[12] Unfortunately, recalcitrant judges quickly learned that they could obtain the same result by setting bonds in unattainable financial amounts, a practice ultimately leading to the English Bill of Rights, which prohibited excessive bail.[13] In these cases, historical events led to laws, which, in turn, affected historical events. Accordingly, it is logical and practical to discuss history and the laws together in terms of their authority for, and effect on, judicial decision making.

When discussing the history and law surrounding bail, they may be recounted either as a series of singular events or as phenomena or trends shaping the way we administer the bail process today. For purposes of this paper, it is most helpful to do the latter. Accordingly, viewed as historical phenomena, we see two main threads running through history that have the largest impact on current practices and judicial decision making.

[12] Caleb Foote, *The Coming Constitutional Crisis in Bail I,* 113 U. Pa. L. Rev 959, 967 (1965) [hereinafter Foote].
[13] *Id.* at 967-68.

The First Historical Thread: The Move from Unsecured Bonds Administered by Personal Sureties to Secured Bonds Administered by Commercial Sureties

The first historical thread is the gradual transformation, starting from the beginning of bail itself and moving through the Middle Ages to the present, from using mostly unsecured bonds administered through a personal surety system to using mostly secured bonds administered through a commercial surety system.[14] Fully understanding this thread is crucial because the trend toward using secured bonds has led to significant hindrances to the judges' decisions to release or detain once those decisions have been made. For purposes of this paper, however, it should suffice to say that the historical practice of using unsecured bonds administered through a personal surety system (i.e., a system in which the surety was a person or persons who were willing to take responsibility over the accused for no money and for no promise of reimbursement upon default) was the predominant practice from the beginning of our modern notions of bail in the Middle Ages until the 1800s in America. When thinking about the personal surety system, we focus on the significant differences in the ways in which money was used. In addition to the prohibition of profit and indemnification for the bail transaction in the personal surety system, any financial condition set at bail was always what we might call today an unsecured financial condition, meaning that it was not tied to any particular collateral; instead, it was secured only by the promise of the personal surety, and it was payable only upon default of the accused to come back to court.

In the mid-to-late 1800s, however, that practice gave way to using mostly secured bonds administered primarily through a commercial surety system when America began running out of willing personal sureties. Unlike unsecured financial conditions, secured financial conditions, such as in "cash bonds" or "surety bonds," mean that someone (typically a defendant or his family) must pay some amount of money up-front for the privilege of leaving the jail. Even when a bond is technically secured through bail insurance company assets, the defendant or the defendant's family must typically pay a fee and sometimes collateralize the bond to obtain a bondsman's assistance. Because secured bonds tend to cause pretrial detention for those unable to pay the up-front money, we have continually seen pretrial detention due to money throughout the twentieth century to the present time.[15] As we will see later, the collision of this

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[14] *See* Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (NIC 2014) [hereinafter *Fundamentals*].

[15] Though some who oppose bail reform doubt the premise, the history of American bail in the twentieth century is replete with literature describing pretrial detention due to the inability to pay the up-front costs of secured bonds. Most recently, the Bureau of Justice Statistics reported that, "About 9 in 10

historical thread with the second historical thread, discussed next, explains why America has had to endure two generations of bail reform in the twentieth century and is currently in the middle of a third.

The Second Historical Thread: The "Bail/No Bail" Dichotomy Leading to an In-or-Out Decision

The second historical thread is more relevant to the decision to release or detain and thus requires more explanation, for it involves the creation and nurturing through the centuries of a division of defendants into two mutually exclusive groups – what I have termed the "bail/no bail," or "release/detain" dichotomy. This historical and legal thread, once understood, is the thread that instructs judges that their pretrial decisions must not depend on the caprice of outside factors, and that their release and detention decisions should be in-or-out decisions that are immediately effectuated. The genesis of this thread takes us back to England in the Middle Ages.

After the Normans invaded Britain in 1066, they gradually established a criminal justice system beginning to resemble the one we see today. Once completely a private process, justice slowly became public. This was due to several important movements, but most relevant to the judge's decision to release or detain was the crown's initiation of crimes against the state by designating certain felonies "crimes of royal concern" (or "pleas of the crown") and by placing persons accused of those particular felonies under the control and jurisdiction of itinerant royal justices.[16] According to bail historian William Duker, "The writ *de homine replegiando,* which commanded the sheriff to release the individual detained unless he were held for particular reasons, probably dates from this point [and] although the writ is famous for being the first 'writ of liberty,' it actually established the first written list of nonbailable offenses."[17] This began a "code of

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detained defendants had a bail amount set but were unable to meet the financial conditions required to secure release. Those with a bail amount set under $5,000 (71%) were nearly 3 times as likely to secure release as defendants with a bail amount of $50,000 or more (27%)." Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009-Statistical Tables,* at 15 (BJS 2013).

[16] *See* Elsa De Haas, Antiquities of Bail, at 24-25, 60-63 (AMS Press, NY 1966) [hereinafter De Haas]; June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syr. L. Rev. 517, 521 (1983) [hereinafter Carbone].

[17] William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 44 (1977-78) (internal footnotes omitted) [hereinafter Duker].

custom" (akin to our notions of common law) surrounding bail that established bailable and nonbailable offenses.[18]

By the 1270s, however, the crown began to scrutinize this customary "bail/no bail" dichotomy and quickly found areas of abuse. As a result of the Hundred Inquests of 1274, the crown became aware that sheriffs (who at that time were responsible for release and detention of bailable and unbailable defendants) were committing two primary abuses: (1) they were extracting money from bailable defendants before releasing them (and sometimes even arresting innocent people for no reason to demand payment); and (2) they were releasing otherwise unbailable defendants, also for "considerable sums of money."[19] At the time, these abuses were likely considered equally egregious to the crown. However, while the history of bail is occasionally punctuated with abuses leading to unlawful releases, it is abundant with instances of unlawful detention, leading to the following more typical scenario, as recounted by author Hermine Herta Meyer:

> The poor remained in prison. Thus, it is reported that Ranulfo de Rouceby remained in prison for eight years, until he paid forty shillings to be pledged, although he could have been released on bail from the beginning. The answer to these abuses was the Statute of Westminster I, which was the first statutory regulation of bail. It was a reform statute, addressed to the sheriffs, undersheriffs, constables, and bailiffs and intended to give them definite guidelines in handling release on bail.[20]

The Statute of Westminster, enacted in 1275, sought to correct these abuses primarily by establishing criteria governing bailability, largely based on a prediction of the outcome of the trial by examining the nature of the charge, the weight of the evidence, and the character of the accused. While doing so, the Statute expressly categorized bailable and unbailable offenses, creating the first express legislative articulation of a "bail/no bail" scheme.

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[18] *Id.* at 45; *see also* Hermine Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139, 1154 (1971-72) [hereinafter Meyer].

[19] De Haas, *supra* note 16, at 91-97. A pure "release/no release" system structured around bailability through the local sheriffs was made more complex, however, through numerous exceptions based on who could later impact the bail decision (especially the Court of King's Bench) and the various writs that governed release, which also often required payment. *See* Meyer, *supra* note 18, at 1155-56; De Haas, *supra* note 16, at 51-127.

[20] Meyer, *supra* note 18, at 1155 (internal footnotes omitted).

More importantly, however, the Statute also made it clear that bailable defendants were to be released and unbailable defendants were to be detained. Thus, the "bail/no bail" dichotomy was mutually exclusive – if an accused were deemed bailable, he could not also be unbailable or treated as unbailable by being detained. Likewise, an accused who was deemed unbailable could not also be bailable or treated as bailable by being released. Sheriffs who disobeyed or abused this aspect of the dichotomy, especially by collecting money, did so at their peril. The following language was specifically written into the Statute:

> And if the Sheriff, or any other, let any go at large by Surety, that is not replevisable [i.e., unbailable], if he be Sheriff or Constable or any other Bailiff of Fee, which hath keeping of Prisons, and thereof be attainted, he shall lose his Fee and Office for ever: And if the Under-Sheriff, Constable, or Bailiff of such as have Fee for keeping of Prisons, [do it] contrary to the Will of his Lord, or any other Bailiff . . . , they shall have Three Years Imprisonment, and make Fine at the King's Pleasure. And if any withhold prisoners replevisable [i.e., bailable], after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King; and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall [be in the great mercy of] the King.[21]

In sum, the Statute "eliminated the discretionary power of the sheriffs and local ministers by carefully enumerating those crimes which were not replevisable and those crimes which were replevisable by sufficient sureties without further payment."[22] Thus, if bailable, the person "had to be released upon sufficient surety [i.e., persons],[23] without any additional payment to the sheriff."[24] At least so far as the sheriffs were concerned, nonbailable persons were to remain detained.[25]

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[21] De Haas, *supra* note 16, at 95-96 (quoting Statute of Westminster I, 3 Edward I, c. 15 (1275)).

[22] Duker, *supra* note 17, at 46 (internal footnotes omitted).

[23] The term "sufficient surety" had a particular meaning in thirteenth century England that we tend to forget today. As briefly mentioned previously, and as more fully described infra, it did not mean paying money up-front, what we might today call a secured bond or through any kind of commercial surety. Indeed, collecting money from an accused to pay for his or her release up-front was considered one of the abuses – essentially a bribe – that hindered release and that thus necessitated statutory remedy. Instead, "sufficient surety" referred specifically to the personal surety system then in place, which included the use of one or more reputable persons willing to take responsibility for the defendant's appearance in court without remuneration or indemnification.

[24] Meyer, *supra* note 18, at 1156.

[25] The crown and the crown's royal justices were still given wide latitude to continue granting bail to those deemed unbailable, typically through various technical writs governing release. *See* De Haas, *supra*

For the next 400 years, major bail reforms grew in response to other abuses, many of which also hindered the release of bailable defendants.[26] For example, when the sheriffs again began charging for release, author William Duker reports that Parliament enacted a law in 1444 declaring that,

> [S]heriffs and their subordinates were not to accept anything 'by Occasion or under Colour of their office' for their 'Use, Profit or Avail' offered by anyone subject to arrest or from anyone seeking mainprise or bail, under pain of fine . . . [and that] said officials were required to set at large those held for bailable offenses offering sufficient surety.[27]

In 1483, another statute gave justices complete discretion to release prisoners detained by the sheriffs "to remedy the great abuse of incarceration without opportunity for bail or mainprise."[28] In 1554, Parliament extended the reform provisions of the Statute of Westminster to those justices as well, apparently due to their own susceptibility to "the same corrupting influences which operated on the sheriffs in earlier periods."[29] But the most notable reforms came in the seventeenth century, primarily to "address[] circumvention of the bail process to detain individuals in disfavor with the Crown."[30]

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note 16, at 96. Later, as the power to initially grant or deny bail was transferred from sheriffs to justices of the peace, Parliament enacted laws similar to the Statute of Westminster for judges. *See* Meyer, *supra* note 18, at 1155-56. These complicating factors, along with other complex exceptions to all rules regarding the administration of bail in early England (albeit, importantly, all exceptions allowing discretion to release the unbailable, not to detain the bailable, *see* Carbone, *supra* note 16, at 522 n. 29), make the concept of a "bail"/"no bail" dichotomy in England an accurate yet admittedly simplified notion that was more fully realized in America.

[26] The period was also occasionally marked by laws designed to eliminate any right to bail. *See* Duker, *supra* note 17, at 56-57 ("Beginning in the latter part of the fourteenth century, statutes, ordinances, and proclamations, that made new offenses punishable by imprisonment, forbade bail or mainprise in such cases. . . . Thus, although the right to bail was on a progressive course, it existed in a rather precarious state.").

[27] *Id.* at 54 (quoting 23 Hen. 6, c. 9 (1444)).

[28] *Id.* at 55. This statute also attempted to curb the abuse of sheriffs allowing prisoners to escape upon payment of a fee. The statute apparently proved unsuccessful, however, and thus was repealed in 1486. *Id.*

[29] *Id.*

[30] Carbone, *supra* note 16, at 528.

"Bail" and "No Bail" in England in the Seventeenth Century

One of the first reforms came in the 1620s, when Charles I ordered five knights to be jailed without a charge, essentially circumventing the Statute of Westminster (and the Magna Carta, upon which the Statute was based) that triggered a bail determination based on the alleged charge. Responding to this particular abuse, Parliament passed the Petition of Right, which prohibited detention "without being charged with anything to which they might make answer according to law."[31] Likewise, as previously noted, when the crown's sheriffs and justices used procedural delays to avoid setting bail, Parliament responded by passing the Habeas Corpus Act of 1679, which provided procedures designed to prevent delays prior to bail hearings.[32] Specifically, the Act set strict time limits for acting on writs governing release, and stated that officials,

> 'shall discharge the said Prisoner from his Imprisonment, taking his or their Recognizance, with one or more Surety or Sureties, in any Sum according to their Discretion, having regard to the Quality of the Prisoner and Nature of the Offense, for his or their Appearance in the Court of the King's Bench . . . unless it shall appear . . . that the Party [is] . . . committed . . . for such Matter or Offenses for which by law the Prisoner is not bailable.'[33]

Unfortunately, by specifically acknowledging discretion, the Habeas Corpus Act effectively allowed financial conditions of bail to be set in unattainable amounts.[34] According to author William Holdsworth, the justices began setting high bail amounts only after James II failed in his attempts to repeal Habeas Corpus, which he considered to be a "destruction . . . of royal authority,"[35] and it appears to be the first time that a condition of bail, rather than the fact of bail itself, became a concern.[36] In response,

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[31] Duker, *supra* note 17, at 64 (quoting Petition of Right of 1650, 3 St. Tr. 221-24). For in-depth discussions of the Five-Knights Case, also known as Darnell's case, *see id* at 58-65; Meyer, *supra* note 18, at 1181-85.
[32] *See* Duker, *supra* note 17, at 66.
[33] *Id.* at 65-66 (quoting 31 Car. 2, c. 2. (1679)); *See* Carbone, *supra* note 16, at 528. A discussion of the illustrative case of Francis Jenkes is found in various sources. *See* Duker, *supra* note 17, at 65-66 (citing Jenkes Case, 6 St. Tr. 1190 (1676)); Carbone, *supra* note 16, at 528 (citing same); William Searle Holdsworth, A History of English Law, at 116-18 (Methuen, London, 1938) [hereinafter Holdsworth].
[34] *See* Duker, *supra* note 17, at 66.
[35] Holdsworth, *supra* note 33, at 118-19.
[36] This was a monumental shift, given that money was the only means of securing release at that time, and remained so until the advent of "pure" (i.e., no money) personal recognizance bonds and non-

William and Mary consented to the English Bill of Rights, which declared, among other things, that "excessive bail ought not to be required,"[37] a clause that appears in similar form in the Eighth Amendment to the United States Constitution.

In terms of practicality, it must be remembered that this prohibition on excessive bail in England existed within the context of the personal surety system. In England (and America until the late 1800s) the personal surety system operated by decision makers assigning a surety (i.e., a person or several people) to act as a "private jailer" [38] for the accused and to make sure the accused faced justice. The personal surety system had three essential elements: (1) a reputable person (the surety, sometimes called the "pledge" or the "bail"); (2) this person's willingness to take responsibility for the accused under a private jailer theory and with a promise to pay the required financial condition on the back-end – that is, only if the defendant forfeited his obligation; and (3) this person's willingness to take the responsibility without any initial remuneration or even the promise of any future payment after forfeiture. Thus, the accused was not required (or even permitted) to pay a surety or jailor prior to release. Excessiveness under a personal surety system meant that the financial condition was in a prohibitively high amount such that no person, or even group of persons, would willingly take responsibility for the accused.

Even before the prohibition on excessive amounts, however, financial conditions of bail were often beyond the means of any particular defendant or a single surety, thus requiring sometimes several sureties to provide "sufficiency" for the bail determination. Accordingly, it is likely that some indicator of excessiveness at a time of relatively plentiful sureties for any particular defendant was merely continued detention despite the amount of the condition being set. Nevertheless, before the abuses leading to the English Bill of Rights and Habeas Corpus Act, there was no real historical indication that high amounts required of the surety led to detention in England, and this trend followed into America: "although courts had broad authority to deny bail for

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financial conditions in America in the twentieth century. Nevertheless, money, when ordered in secured form, is typically the only limitation that acts as a condition precedent to release. Most bail bond conditions are conditions subsequent – that is, release is obtained, but if the condition occurs (or fails to occur, depending on its wording), it will trigger some consequence, and sometimes bring pretrial freedom to an end. Secured money at bail is the quintessential, and typically the only condition precedent. Unlike other conditions, some or all of a secured financial condition often must be paid first in order to initially obtain release.

[37] English Bill of Rights, 1 W. & M., 2d Sess., ch. 2 (1689).

[38] *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869).

defendants charged with capital offenses, they would generally release in a form of pretrial custody defendants who were able to find willing custodians."[39]

"Bail" and "No Bail" in America

Indeed, this notion that bailable defendants should necessarily obtain release naturally followed from England to America, a country founded on principles of liberty and freedom. Author F.E. Devine wrote as follows:

> Blackstone, writing in the last decade of America's colonial period, explains the workings of the bail system known to the founders of the United States. A suspected offender who was arrested was brought before a justice of the peace. After examining the circumstances, unless the suspicion was completely unfounded, the justice could either commit the accused to prison or grant bail. A justice of the peace who refused or delayed bail in the case of a suspect who was legally eligible for it committed an offense. Requiring excessive bail was also prohibited by the common law. However, Blackstone explained, what constituted excessive bail was left to the court upon considering the circumstances. Granting bail consisted of a delivery of the suspect to sureties upon their giving sufficient security for appearance. The individual bailed merely substituted, Blackstone remarked, their friendly custody for jail.[40]

Moreover, in colonial America excessiveness rarely played a factor in hindering that release to "friendly custody." In a review of the administration of bail in colonial Pennsylvania (1682-1787), author Paul Lermack concluded that "bail . . . continued to be granted routinely . . . to persons charged with a wide variety of offenses . . . [and] [a]though the amount of bail required was very large in cash terms and a default could ruin a guarantor, few defendants had trouble finding sureties."[41] This is likely because "[t]he form of bail in criminal cases, all of the common law commentators agree, was by

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[39] Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 Yale L. J. 320, 323-24 (1987-88); Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 Hous. L. Rev. 731, 748 (1996-97) (same).

[40] F.E. Devine, Commercial Bail Bonding: A Comparison of Common Law Alternatives, at 4 [hereinafter Devine] (citing William Blackstone, Commentaries on the Laws of England, at pp. 291, 295-97, Chitty ed. (Philadelphia: J.P. Lippincott, 1857) (Praeger Publishers, 1991)).

[41] Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L.Q. 475, 497, 505 (1977) [hereinafter Lermack].

recognizance,"[42] that is, with no requirement for anyone to pay money up-front. Sufficiency was often determined by requiring sureties (i.e., persons) to "perfect" or "justify" themselves as to their ability to pay the amount set, but they were not required to post an amount prior to release. Instead, the sureties were held to a debt that would become due and payable only upon their inability to produce the accused.[43] Because the sureties were not allowed to profit, or even be indemnified against potential loss, bonding fees and collateral also did not stand in the way of release.

For the most part, the American colonies applied English law verbatim, but differences in beliefs about criminal justice, differences in colonial customs, and even differences in crime rates between England and the colonies led to more liberal criminal penalties and, ultimately, changes in the laws surrounding the administration of bail.[44] Indeed, the differences between America and England at the time of Independence included fundamental dissimilarities in how to effectuate the "bail/no bail" or "release/detain" dichotomy. While England gradually enacted a complicated set of rules, exceptions, and grants of discretion that governed bailability, America leaned toward more simplified and liberal application by granting a nondiscretionary right to bail to all but those charged with the gravest offenses and by settling on bright line demarcations to effectuate release and detention.

According to Meyer, early American statutes "indicate that [the] colonies wished to limit the discretionary bailing power of their judges in order to assure criminal defendants a right to bail in noncapital cases." [45] This is a fundamental point worth explaining. In England, the Statute of Westminster listed bailable and unbailable offenses, but bailability was to be finally determined by officials also looking at things like the probability of conviction and the character of the accused, which were, themselves, carefully prescribed in the Statute. Accordingly, there was, even then, discretion left in the "bail/no bail" determination, which was ultimately retained throughout English history. America, on the other hand, chose bright line demarcations of bailable and unbailable offenses, gradually moving the consideration of things like evidence or character of the accused to determinations concerning conditions of bail or release, presumably so they would not interfere with bailability (or release) itself.

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[42] Devine, *supra* note 40, at 5. *See also* Lermack, *supra* note 41, at 504 ("Provision was sometimes made for posting bail in cash, but this was not the usual practice. More typically, a bonded person was required to obtain sureties to guarantee payment of the bail on default.").

[43] *See* Devine, *supra* note 40, at 5.

[44] *See* Carbone, *supra* note 16, at 529-30.

[45] Meyer, *supra* note 18, at 1162.

Thus, even before some of England's later reforms, in 1641 Massachusetts passed its Body of Liberties, creating an unequivocal right to bail for non-capital cases, and re-writing the list of capital cases. In 1682, "Pennsylvania adopted an even more liberal provision in its new constitution, providing that 'all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.'"[46] While this language introduced consideration of the evidence for capital cases, "[a]t the same time, Pennsylvania limited imposition of the death penalty to 'willful murder.' The effect was to extend the right to bail far beyond the provisions of the Massachusetts Body of Liberties and far beyond English law."[47] The Pennsylvania law was quickly copied, and as America grew "the Pennsylvania provision became the model for almost every state constitution adopted after 1776."[48] The Continental Congress, too, apparently copied the Pennsylvania language when it adopted the Northwest Territory Ordinance of 1787.[49]

In addition to their liberality, the commonality of these provisions is that they rested upon the Statute of Westminster's original template of a "bail/no bail" dichotomy.[50] In fact, the language that "all persons are bailable . . . unless or except," which is used in various forms in most state constitutions or statutes today, is the classic articulation of that dichotomy. Moreover, even in state bail schemes without constitutional right to bail provisions and with statutes that have tended to erode the notion that bail equal release, the "bail/no bail" dichotomy still exists because at the end of the enacted process, one can typically say that any particular defendant is considered either bailable or unbailable under the scheme. Today, it is more appropriately expressed as "release" or "detention," whether that language is constitutional or statutory, because the notion that bailability should lead to release was foundational in early American law.

Indeed, language from the United States Supreme Court supports the notion that bailability should equal release. In 1891, the Supreme Court described bail as a mechanism of release, even as the Court likely struggled with the potential for detention due to the declining number of personal sureties during the nineteenth

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[46] Carbone, *supra* note 16, at 531 (quoting 5 American Charters 3061, F. Thorpe ed. 1909) (internal footnotes omitted).

[47] *Id.* at 531-32 (internal footnotes omitted).

[48] *Id.* at 532.

[49] Meyer, *supra* note 18, at 1163-64 (citing 1 Stat. 13).

[50] *See Iowa v. Briggs*, 666 N.W. 2d 573, 579 n. 3 (Iowa 2003) ("The initial recognition of a right to bail of the Statute of Westminster underlies the language of a majority of state constitutions and successive forms of federal legislation guaranteeing bail in certain cases.").

century. In *United States v. Barber,* the Court wrote as follows:

> It is true that the taking of recognizance or bail for appearance is primarily for the benefit of the defendant, and in civil cases it is usual to require the costs of entering into such recognizances to be paid by the defendant or other person offering himself as surety. But in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time, and as these persons usually belong to the poorest class of people, to require them to pay the cost of their recognizances would generally result in their being detained in jail at the expense of the government, while their families would be deprived in many instances of their assistance and support. Presumptively they are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail, and, as the whole proceeding is adverse to them, the expense connected with their being admitted to bail is a proper charge against the government.[51]

Four years later, the Court similarly explained in *Hudson v. Parker* that the "power to permit bail to be taken" rests on grounds associated with release:

> The statutes of the United States have been framed upon the theory that a person accused of a crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail not only after arrest and before trial, but after conviction and pending a writ of error.[52]

Indeed, it was *Hudson* upon which the Supreme Court relied in *Stack v. Boyle* in 1951,[53] when the Court wrote its memorable quote equating the right to bail with the right to release and freedom:

> From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1),[54] federal law has unequivocally

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[51] *United States v. Barber,* 140 U.S. 164, 167 (1891).

[52] *Hudson v. Parker,* 156 U.S. 277, 285 (1895).

[53] *Stack v. Boyle,* 342 U.S. 1 (1951).

[54] In addition to the statutory grant of a right to bail, at that time Rule 46 required the bail bond to be set to "insure the presence of the defendant, having regard to the nature and circumstances of the offense

> provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[55]

In his concurring opinion, Justice Jackson elaborated on the Court's reasoning:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial, and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . providing: 'A person arrested for an offense not punishable by death shall be admitted to bail' . . . before conviction.[56]

Among other things, *Stack* has been read to stand for the proposition that bail may not be set to achieve invalid state interests,[57] and has been similarly cited by courts and scholars for the proposition that bail set with a purpose to detain would be invalid.[58]

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charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." *Id.* at 6 n. 3.

[55] *Id.* at 4 (internal citations omitted).

[56] *Id.* at 7-8.

[57] *See, e.g., Galen v. County of Los Angeles*, 477 F.3d 652, 660 (2007) ("The state may not set bail to achieve invalid interests.") (citing *Stack,* 342 U.S. at 5, and *Wagenmann v. Adams,* 829 F.2d. 196, 213 (1st Cir. 1987) (finding no legitimate state interest in setting bail with a purpose to detain)).

[58] *See, e.g.,* Duker, *supra* note 17, at 69 (citing cases); Daniel J. Freed & Patricia M. Wald, Bail in the United States: 1964, at 8 (Dept. of Just. & Vera Foundation 1964) [hereinafter Freed & Wald] ("In sum, bail in America has developed for a single lawful purpose: to release the accused with assurance he will return at trial. It may not be used to detain, and its continuing validity when the accused is a pauper is now questionable."). *Stack* held that "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [court appearance] is 'excessive' under the Eighth Amendment." 342 U.S. at 5. In his concurrence, Justice Jackson addressed a claim that the trial court had set bail in that case with a purpose to detain as follows: "[T]he amount is said to have been fixed not as a reasonable assurance of [the defendants'] presence at the trial, but also as an assurance they would remain in jail. There seems reason

Support for that proposition also comes from Justice Douglas, who had occasion to also write about bail in cases in which he sat as Circuit Justice.[59] In one such case, he commented on the interplay between the clear unconstitutionality of setting bail with the purpose to detain and de-facto detention:

> It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. See Foote, Foreword: Comment on the New York Bail Study, 106 U. of Pa. L. Rev. 685; Note, 106 U. of Pa. L. Rev. 693; Note, 102 U. of Pa. L. Rev. 1031. The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal.
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> In the light of these considerations, I approach this application with the conviction that the right to release is heavily favored and that the requirement of security for the bond may, in a proper case, be dispensed with. Rule 46 (d) indeed provides that 'in proper cases no security need be required.' For there may be other deterrents to jumping bail: long residence in a locality, the ties of friends and family, the efficiency of modern police. All these in a given case may offer a deterrent at least equal to that of the threat of forfeiture.[60]

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to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail." *Id.* at 10. While the Court in *Salerno* upheld purposeful pretrial detention pursuant to the Bail Reform Act of 1984, it did so only because the statute contained "numerous procedural safeguards" that are rarely, if ever, satisfied merely through the act of setting a high secured financial condition. *See United States v. Salerno*, 481 U.S. at 742-43, 750-51 (1987).

[59] In the most notable of these decisions, Justice Douglas uttered language that indicated his desire to invoke the Equal Protection Clause. *See Bandy v. United States*, 81 S. Ct. 197, 198 (1960) ("Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"); *Bandy v. United States*, 82 S. Ct. 11, 13 (1961) ("[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.").

[60] *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (internal footnote omitted).

If "it would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom," as Justice Douglas so wrote, then how is a judge to effectuate a decision to detain? The Supreme Court answered that question in *United States v. Salerno,*[61] in which the Court approved the federal detention statute (a new articulation of a "no bail" scheme) against facial due process and 8th Amendment challenges. Among other things, the *Salerno* Court purposefully mentioned *Stack* as a valid part of bail jurisprudence, thus retaining the relevance of *Stack's* language equating bail with release. More importantly, however, the *Salerno* opinion teaches us how exactly to implement the "no bail" side of the "bail/no bail" dichotomy. In particular, *Salerno* instructs that when examining a law with no constitutionally-based right to bail parameters (such as the federal law), the legislature may enact statutory limits on pretrial freedom (including detention) so long as they are not excessive in relation to the government's legitimate interests, they do not offend due process (either substantive or procedural), and they result in bail practices through which pretrial *liberty* is the norm and detention is the carefully limited exception to release.[62]

[61] 481 U.S. 739 (1987).

[62] *Id.* ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

Chapter 2. How American Pretrial Decision Making Got Off Track in the Twentieth Century

If the history of bail and the law that grew up around the history suggest, if not demand, a "release/detain" decision, then the critical questions become: "How did we get to where we are today – a point in time when decisions to release result in detention and decisions to detain result in release? How did we get to a point when judges are allowed to make 'decisions' that are not immediately effectuated or that are only effectuated through others with differing goals?" The answers to these questions are found in the collision of the two main historical threads in America in the nineteenth and twentieth centuries, and in a line of cases that was created out of necessity due to that collision.

The Collision of Historical Threads

As previously noted, until the 1800s America had adopted England's personal surety system to administer bail, a system with three primary elements: (1) a person, or surety, preferably known to the court; (2) willing to take responsibility for any particular defendant; and (3) for no money or even the promise of reimbursement upon default. Because the law required the release of bailable defendants, this personal surety system posed few barriers to the release decision because of these essential elements. Even though amounts of financial conditions might be chosen arbitrarily, and even though the amounts were often high, they were amounts that only needed to be paid on the back-end – that is, they were what we now call unsecured bonds, with financial conditions due and payable only upon default of the defendant. Because sureties were not allowed to profit from the bail transaction or to be indemnified, there were also no fees or any other front-end financial barriers to release. Finding a person or persons sufficient to cover the amount simply meant stacking sureties to the point that the decision maker had reasonable assurance of court appearance. This system worked so long as there were plentiful personal sureties, but in the 1800s, those sureties began to disappear.[63]

It is widely accepted that the personal surety system flourished for some time in England due to that country's limited geography and somewhat close-knit populace. But in America in the mid-nineteenth century, various factors were at play causing the

[63] *See generally, Fundamentals,* supra note 14 and sources cited therein.

demand for personal sureties to quickly outgrow the supply. Those factors included (1) "Americans' pursuit of the rapidly expanding frontier as well as the growth of impersonal urban areas [that] diluted the strong, small community ties and personal relationships supporting the personal surety system," and (2) "the unsettled frontier [that] increased the risks of a defendant's flight and created a further disincentive to the undertaking of a personal surety obligation."[64] On the other hand, demand for sureties in America was increased by an overall decline in the death penalty, and thus an expansion of the right to bail in noncapital cases after 1789.[65] These factors, coupled with ever-rising arbitrary bail bond amounts (financial conditions), meant that an alternative to the personal surety system was necessary to effectuate bail as a mechanism for release and to reduce the growing jail populations due to the detention of bailable defendants. Accordingly, states began experimenting with new ways to administer bail.

Interestingly, albeit for different reasons, England faced the same dilemma of unnecessary pretrial detention of defendants due to lack of personal sureties in the 1800s, but chose a different path toward correcting it. Author Hermine Herta Meyer recounts as follows:

> At about the same time, the English became aware of the fact that a system which inseparably connected freedom with money was harsh and unfair to those who were not able to pay the price. To remedy this injustice, the Bail Act of 1898 was enacted. The preamble recites that accused persons were sometimes kept in prison for a long time because of their inability to find sureties, although there was no risk of their absconding or other reason why they should not be bailed. The Act then provided that '[w]here a justice has power . . . to admit to bail for appearance, he may dispense with sureties, if, in his opinion, the so dispensing will not tend to defeat the ends of justice.'[66]

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[64] Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Non-financial Release Conditions*, 19 New Eng. J. on Crim. And Civ. Confinement 267, 274, n 38 (1993) [hereinafter Tobolowsky & Quinn]; *see also* Wayne H. Thomas, Jr., Bail Reform in America, at 11-12 (Univ. CA Press 1976); Freed & Wald, *supra* note 58, at 2-3.

[65] *See* Carbone, *supra* note 16, at 534-35; Tobolowsky and Quinn, *supra* note 64, at 274 n. 38.

[66] Meyer, *supra* note 18, at 1159 (quoting the Bail Act of 1898, 61 & 62 Vic., c. 7 (1898)) (internal footnote omitted).

In addition, England and other common law countries created laws to solidify their rules designed to keep commercial sureties out of the criminal justice system. According to author F.E. Devine,

> [D]uring the same period . . . courts in England, India, Ireland, and New Zealand had variously held agreements to indemnify bail sureties to constitute illegal contracts, and the likelihood of indemnification to be grounds to reject sureties and even to deny bail. They had also established that payment of any amount on behalf of the accused to a surety constituted partial indemnification. Thus any commercial development was effectively precluded. Agreement for any payment constituted an illegal contract, unenforceable in the courts, and suspicion of any payment was reason to reject the surety and sometimes to deny the bail. Eventually these become crimes.[67]

America, on the other hand, chose a different solution to the problem of unnecessary detention of bailable defendants for lack of sureties. For varying reasons throughout the nineteenth century, American courts began eroding historic rules against profiting from bail and indemnifying sureties, slowly ushering in the commercial bail bonding business at the end of the century.[68] By 1898, the first commercial bail bonding company opened for business, and by 1912, the U.S. Supreme Court had announced in *Leary v. United States* that "the distinction between bail and [personal suretyship] is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary."[69]

The differences in solutions between America and these other countries are significant, and illustrate an even more fundamental departure from the historic personal surety system. In England and nearly everywhere else, allowing judges to dispense with sureties allowed courts to continue releasing defendants without requiring any security paid or promised up-front.[70] In America, however, the introduction of commercial bail

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[67] Devine, *supra* note 40, at 6-7.

[68] *See generally* James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases*, 6 Fordham L. Rev. 387 (1937) [hereinafter Hayes]. This article describes the slow evolution from America's use of unsecured bonds administered through a personal surety system to its use of secured bonds administered through a commercial surety system primarily by courts questioning and eventually rejecting the historic policy against indemnifying sureties.

[69] *Leary v. United States*, 224 U.S. 567, 575 (1912).

[70] In their 1964 study, Freed and Wald observed that, "In England today, the bail surety relationship continues to be a personal one. At the same time, the discretionary nature of bail is sufficiently flexible to

bondsmen virtually assured the continued unnecessary detention of bailable defendants because even though bondsmen would provide a promise to pay the full amount of the financial condition upon a defendant's failure to appear, the bondsmen themselves would charge up-front fees and later require collateral for their services. The bondsmen chose defendants for their ability to pay these fees and offer collateral, and those who could not do so typically stayed in jail.[71]

Worldwide, America and the Philippines stand alone in their decision to introduce profit into pretrial release. As author Divine observed, except for those two countries, "the rest of the common law heritage countries not only reject [bail for profit], but many take steps to defend against its emergence. Whether they employ criminal or only civil remedies to obstruct its development, the underlying view is the same. Bail that is compensated in whole or in part is seen as perverting the course of justice."[72]

Accordingly, starting in the twentieth century, the historical thread toward using secured bonds administered through a commercial surety system directly collided with the historical thread creating and nurturing a "bail/no bail" dichotomy in which bailable defendants were expected to be released and nonbailable defendants were expected to be detained. Instead of being a solution to the problem of unnecessary detention of bailable defendants due to the lack of sureties, the advent of commercial bail in America virtually guaranteed that the problem would continue. Moreover, the reliance upon secured bonds proved also to interfere with the notion of an optimal "no

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permit denial in cases where the magistrate believes that the defendant is likely to tamper with the evidence or commit new offenses if released." Freed & Wald, *supra* note 58, at 2.

[71] Research documenting the negative effects of the for-profit bail system (including effects on victims, taxpayers, and criminal justice system employees in addition to defendants and their families) date back to the 1920s and are too numerous to list here. An overview of some of those effects is found in the American Bar Association's Standards for Criminal Justice on Pretrial Release (3rd Ed. 2007). Recent publications highlighting the negative aspects of the traditional money bail system include a three-part series from the Justice Policy Institute: Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail;* Spike Bradford, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice;* Jean Chung, *Bailing on Baltimore: Voices from the Front Lines of the Justice System* (2012) found at http://www.justicepolicy.org/research/4459, and in the following document authored by the Pretrial Justice Institute and the MacArthur Foundation: *Rational and Transparent Bail Decision Making; Moving From a Cash-Based to a Risk-Based Process* (2012) at http://www.pretrial.org/download/featured/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf.

[72] Devine, *supra* note 40, at 201; *See also* Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.,* New York Times (January 29, 2008), found at http://www.nytimes.com/2008/01/29/us/29bail.html?pagewanted=all&_r=0. Bail bonding for profit is also illegal in several American jurisdictions, including Wisconsin, which in 2013 once again rejected an attempt by commercial sureties to work in that state.

bail" side of the dichotomy; in addition to causing the unnecessary pretrial detention of bailable defendants, the traditional money-based bail system tended to allow for the release of persons who most would agree should be unbailable based on their risk to public safety or for failure to appear for court. In sum, the traditional money-based bail system in America has interfered with the historic notions of a "bail/no bail" system in which bailable defendants are released and unbailable defendants are detained. The traditional money bail system has little to do with actual risk, and expecting money to effectively mitigate risk, especially risk to public safety, is historically unfounded.

As previously discussed, the history of bail reveals that any interference with the "bail/no bail" dichotomy typically leads to reform. Unfortunately, however, the pace of twentieth century reform in America has been slow. One of the reasons for that slow pace is due to our courts, which, when confronted with the continued problem of bailable defendants being detained due to secured money bonds, created an unfortunate line of cases that has enabled judges to avoid making effective and immediately effectuated pretrial release and detention decisions.

The Unfortunate Line of Cases

That line of cases is well known and rarely questioned, but is actually a historical perversion of the idea that bail should equal release. Although worded differently by different courts, it is essentially the jurisprudential principle that bail is not excessive simply because the defendant is unable to pay it.[73] Bail scholars believe that this line of American decisions found its genesis in a case decided in 1835.

That case, *United States v. Lawrence,* [74] requires at least minimal background. Because it did not require up-front payments, the personal surety system in both England and America functioned so that bail could be set despite an accused's financial inability to

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[73] *See United States v. McConnell,* 842 F.2d 105 (1988) ("But a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement."). Interestingly, the *McConnell* court concluded the unattainable financial condition was not excessive despite language in the federal statute articulating that, "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." Relying on the legislative history of the federal law, however, the court wrote that while unattainable conditions of release may lead to detention, they should also trigger higher scrutiny and procedural processes such as those provided in the detention hearing. Despite its recognition of the need for a due process detention hearing, however, it appears that the *McConnell* court did not remand for that hearing because arguments concerning its absence were not raised on appeal. *See id.* n. 5 and accompanying text.

[74] 26 Fed. Cas. 887 (C.C. D.D. 1835) (No. 15,577).

pay. Indeed, as late as 1820, "[l]ower bonds for the poor were considered to violate, not vindicate, the principle of equal justice."[75] As the numbers of willing personal sureties declined in the 1800s, however, and as jurisdictions began to consider the notion of expanding allowances for defendants to self-pay, courts quickly realized that a defendant's inability to pay had direct relevance to the issue of detention. Thus, according to author June Carbone, it was *Lawrence* in which a federal court provided "the first recognition that prohibitive bond for the poor might be 'excessive,'" when it commented on the dilemma posed by monetary conditions on persons of limited means.[76]

In *Lawrence,* the bail-setting judge set a $1,000 financial condition for a defendant accused with attempting to kill President Andrew Jackson, and recited the following: "to require larger bail than the prisoner could give would be to require excessive bail and to deny bail in a case clearly bailable by law."[77] When the government objected, however, the court increased the amount to $1,500 and stated: "This sum, if the ability of the prisoner only were to be considered, is probably too large; but if the atrocity of the offense were alone considered, might seem too small."[78]

The judge's consideration of defendant *Lawrence's* ability to pay his own financial condition predated any formal federal declaration that the relevant statute did not require the giving of common law bail – i.e., personal surety with no remuneration or indemnification. That recognition came only after the Supreme Court's decision in *Leary v. United States,* mentioned previously, declaring that the personal surety system had given way to the commercial one. According to author James Hayes, it was because of *Leary* that at least one federal appeals court held eight years later that a federal judge had no right to refuse cash bail offered by a prisoner under the federal statue.[79] Nevertheless, because defendant Lawrence remained in jail, the case became known as the first to stand for the proposition that inability to pay does not make a financial

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[75] Carbone, *supra* note 16, at 549.
[76] *Id.* at 549; *see also id.* at 550.
[77] *Id.* at 549 (quoting 26 F. Cas. 887 (C.C. D.C. 1835) (No. 15,557)).
[78] Duker, *supra* note 17, at 90 (quoting 26 F. Cas. 887 (C.C. D.C. 1835) (No. 15,557)).
[79] *See* Hayes, *supra* note 68, at 403 (citing *Rowan v. Randolph,* 268 Fed. 529 (C.C.A. 7th, 1920)). In *Lawrence,* the judge mentioned the existence of "reputable friends" of the defendant, "who might be disposed to bail him," indicating, still, the existence of the personal surety system as the primary means of administering bail at that time. Caleb Foote wrote that "[t]he opinion is ambiguous as to whether the 1,500 dollars was designed to make it possible or impossible for Lawrence's 'reputable friends' to bail him; in either event, the bail issue was soon mooted when Lawrence was committed on the ground of insanity." Foote, *supra* note 12, at 992.

condition excessive per se.[80] Later in the nineteenth century, states began to counter this somewhat harsh outcome through legislative or judicial fiats requiring courts to consider the pecuniary circumstances of the accused as a measure of the reasonableness of any particular financial condition. This lessened the impact of the rule that monetary conditions need not be attainable, but the rule remained nonetheless.

Courts frequently cite to the rule with no rationale. When they do, the most frequent rationale is simply that the constitutional test for excessiveness is whether the condition provides reasonable assurance of a lawful purpose (or, in other words, whether the condition is greater than necessary to achieve a lawful purpose), not necessarily whether it is or is not attainable.[81] "Reasonable assurance," however, implies the requirement of some decently objective way of determining whether the amount is unconstitutional, and, ironically it is likely attainability that best provides that objective standard. Comparison of the amount of the financial condition, which is largely arbitrary to begin with, to other largely arbitrary amounts associated with other charges, or to the subjective notions of reasonableness of any particular judge, should not be deemed to meet any objective test. Too often judges choose an amount of money, declare it to be "reasonable assurance" without rationale, and then move to the next case. In his dissent in *Allen v. United States,* Judge Bazelon complained of this practice when he gave the following reason for why a district court bail decision to set a financial condition at $400 should not be affirmed when the defendant argued that he could only afford to pay $200:

> Nothing in the record supports the determination that a $400 deposit will insure appellant's appearance while a $200 deposit will not. Without such support, it appears that he is being deprived of pretrial release solely

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[80] *See* Carbone, *supra* note 16, at 549-51; Duker, *supra* note 17, at 90-92.

[81] *See, e.g., Galen v. County of Los Angeles,* 468 F.3d 563, 572 (2006). Other rationales include the fact that the various statutory factors do not include "financial condition of the defendant" or that the other factors outweigh the financial condition factor. Occasionally, a court will explain that permitting defendants to be released simply based on their lack of resources would place the defendants in control of the bail process. In 1965, Caleb Foote reported on the "barren state of the case law" surrounding how to reconcile excessive bail in the case of an indigent defendant. He noted the "circular reasoning" employed by current legal encyclopedias in attempting to reflect the "unfortunate" state of the law in which, simultaneously, it was said that bail may not be set in a prohibitory amount lest it deny one of the right to bail, but that setting an amount in a prohibitory amount was not necessarily excessive. *See* Foote, *supra* note 12, at 992-94.

> because he cannot raise the additional $200. This deprivation plainly violates both the letter and basic purpose of the Bail Reform Act.[82]

Putting aside the idea that a judge's decision to set an amount with an intention to detain is likely unconstitutional for lack of a proper purpose to limit pretrial freedom, the inability of any particular judge to articulate why one amount is adequate while another amount, either higher or lower, is not, is a hallmark of an arbitrary financial condition, and arbitrariness in the law is rarely, if ever, reasonable. Moreover, as we will later see, pretrial research is beginning to show that secured money amounts are not only arbitrary and unfair, but also that they might not even further the constitutional purposes for which they are set; in those cases, the reasonableness of any particular financial condition must similarly be questioned. Accordingly, even if inability to post a financial condition is not a part of the test of excessiveness, a closer look at "reasonable assurance," which is a part of that test, requires us to radically rethink the use of secured financial conditions at bail when doing so is arbitrary or irrational, and thus likely unreasonable.

This line of cases, which sprung from necessity to address the dilemma of indigent defendants, is unfortunate because it enables judges to set virtually any amount and declare that to be their release "decision." But setting a secured financial condition only creates an illusion of a decision, for the actual posting of that amount is now left to others – indeed, it is often left to chance – and a decision left to chance is no decision. This line of cases does not recognize that a judge's responsibility to decide matters before him or her is the essence of the judicial role in America, and it thus encourages decisions that rely on random forces to attain the desired result. Accordingly, the entire line of cases should be viewed as aberrations to the legal and historic notions that bail should equal release, and that a decision to release should be immediately effectuated.

In sum, the history of bail and the law that grew up around that history generally supports judicial decision making that equates "bail" with release and "no bail" with detention, strongly suggesting, if not necessitating, an in-or-out decision by judges in any particular case. If there were any doubts about the continuation of this trend from

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[82] *Allen v. United States,* 386 F.2d 634 (D.C. Cir. 1967). There appear to be few, if any, good reasons for setting a financial condition just beyond the reach of a defendant's stated limits. When a judge knows the financial limit of any particular defendant, and nonetheless sets a financial condition either much higher or even slightly above that limit without some record adequately explaining the difference, appellate courts should presume that the condition to release was set with an improper purpose to detain, which should lead to analysis for excessiveness and denial of due process. Interestingly, both the federal and D.C. bail statutes have attempted to eliminate the need for this line of cases by making it unlawful for a secured financial condition to result in the pretrial detention of the accused.

England to America, those doubts should have been erased by *Stack,* which emphasized release – i.e., the "bail" side of the dichotomy – and *Salerno,* which emphasized detention – i.e., the "no bail" side. Indeed, it is *Salerno* that provides the blueprint to properly effectuate the *Stack* ideal, in which those who are given a right to bail are in fact released. It does this through its approval of the federal preventive detention scheme, which itself is part of a statutory "bail/no-bail" or "release/detain" system, and which is appropriately titled "Release and Detention Pending Judicial Proceedings."[83] Understanding the federal statute's in-or-out scheme, as approved by the Supreme Court, is crucial to a full understanding of effective judicial decision making.

[83] The current version is codified at 18 U.S.C. § § 3141-56. The District of Columbia bail statute is significantly similar to the federal statute, and, like the federal statute, is often cited as a model release and detention template.

Chapter 3. "Bail" (Release) and "No Bail" (Detention) Under the Federal Statute

Section 3141 of Title 18 U.S.C. provides that, "A judicial officer authorized to order the arrest of a person . . . before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings, under this chapter."[84] This foundational release or detain mandate is effectuated through Section 3142, which requires the judge to order that the defendant be either: (1) released on personal recognizance or upon execution of an unsecured appearance bond; (2) released on a condition or combination of conditions; (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion; or (4) fully detained.[85]

On the "bail" side of the release or detain dichotomy, the statute creates a presumption of release on personal recognizance or with an unsecured appearance bond unless the judge finds that such release "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[86] In that case, the statute requires the judge to release the defendant on the conditions of not committing new crimes and participating in DNA testing, and "subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community."[87]

The statute then lists various conditions available to the judge to mitigate the risk for failure to appear or to public safety. Of the conditions listed, it is notable that the first condition is most like the historic personal surety system based on continued custody

[84] 18 U.S.C. § 3141 (a). This mandate to either release or detain any given defendant is superior to many state statutes, which do not contain such explicit requirements, and which lead to complacency over the puzzling but all-too-common situations in which defendants are ordered released and yet remain detained.
[85] *Id.* § 3142 (a).
[86] *Id.* § 3142 (b), (c) (1).
[87] *Id.* §3142 (c) (1) (A), (B). The notion of least restrictive conditions is fundamental to an in-or-out decision and an overall presumption of release. *See* ABA Standards, *supra* note 6, Std. 10-1.2 (commentary) at 39-40.

with a known and reputable person. That condition allows judges to order the defendant to:

> [R]emain 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 able reasonably to 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.[88]

It is equally notable that two of the last conditions listed in the statute deal with money, the second being a bail bond with solvent sureties. It is widely accepted by all but the for-profit bail industry that secured financial conditions, including so-called "surety bonds," are typically the most restrictive conditions at bail, and thus the statutory placement and order of the conditions themselves indicates further a federal preference to consider secured financial conditions last, in addition to its explicit preference for release on personal recognizance and unsecured appearance bonds.[89]

Perhaps the most significant provision concerning release in the federal statute, however, is found in Section 3142 (c) (2), which states, "The judicial officer may not impose a financial condition that results in the pretrial detention of the person."[90] This language is critical for assuring that secured money, as typically the only condition precedent to release,[91] does not cause unnecessary pretrial detention, or any detention whatsoever, without the sort of procedural due process safeguards approved by the Supreme Court in *United States v. Salerno*.

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[88] 18 U.S.C § 3142 (c) (1) (B) (i).

[89] The Bail Reform Act of 1966 mandated least restrictive conditions through a more explicit preferential order of conditions by requiring judicial officials to "impose the *first of the following* conditions of release" (emphasis added). That list started with personal supervision and ended with money and a catchall provision. *See* Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat, 214 (1966). The ABA Standards have retained the "first of the following" language when recommending options for release on financial conditions. *See* ABA Standards, *supra* note 6, Std. 10-5.3, at 110.

[90] 18 U.S.C. § 3142 (c) (2). The District of Columbia statute's similar provision, which was implemented in 1992 in the form of a mandate, was "critical to the success of the eradication of money in the District of Columbia." *See Remarks of Susan Weld Shaffer*, National Symposium on Pretrial Justice: Summary Report of Proceedings, at 35 (BJA/PJI May 23, 2011) [hereinafter National Symposium Report].

[91] As noted previously, secured money at bail is typically the only condition that must be met prior to release, and is the condition that typically causes unnecessary pretrial detention of bailable defendants. Although other conditions sometimes require money to administer, many pretrial services programs across America have created ways for indigent defendants to remain free even when they cannot pay all of the administrative costs for certain "non-financial" conditions, such as pretrial services supervision, drug and alcohol testing, and GPS monitoring.

Those safeguards, as articulated in the *Salerno* opinion, are incorporated into the "no bail" side of the "release/detain" dichotomy of the federal statute.[92] Section 3142 (e) provides that, "If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds 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, such judicial officer shall order the detention of the person before trial."[93] This early articulation of a gateway finding that "no conditions or combination of conditions" suffice for release is significant, as it guides judges toward thinking about the tools enabling those judges to release defendants before considering detention.

The rest of the federal detention provisions create a process that provides a relatively broad gateway based on offenses and risk and uses rebuttable presumptions toward detention for certain preconditions, but incorporates procedural safeguards designed to then limit detention to only those defendants who cannot be adequately supervised in the community. In *Salerno,* the United States Supreme Court summarized those statutory safeguards as follows:

> [The statute] operates only on individuals who have been arrested for a specific category of extremely serious offenses. Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.[94]

The Court also commented favorably on the detention hearing itself, in which it found relevant that the defendant could request counsel, could testify and present witnesses or even proffer evidence, and could cross-examine any adverse witnesses. Moreover,

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[92] The federal statute also has temporary detention provisions, which are unnecessary to discuss here.
[93] 18 U.S.C. § 3142 (e) (1).
[94] *United States v. Salerno,* 481 U.S. 739, 750 (1987) (internal citations omitted). Despite these safeguards, there are some who argue, often convincingly, that the detention rates in some federal courts have nonetheless grown to unacceptable levels.

the Court noted, the judges setting bail were required to follow certain statutory criteria in making their decisions and to articulate their reasons for detention in writing. Finally, the decision to detain was, and still is, immediately appealable.[95]

[95] *See id.* at 742-43; 18 U.S.C. § 3145.

Chapter 4. The National Standards on Pretrial Release

In 1968, the American Bar Association combined the law, the history of bail, and the existing pretrial research to create its first edition of *Standards Relating to Pretrial Release*,[96] which contained specific recommendations on virtually every criminal pretrial issue and was designed to help decision makers lawfully and effectively administer bail. The second edition standards, approved in 1979, were written, in part, "to assess the first edition in terms of the feedback from such experiments as pretrial release projects . . . and similar developments that had been initiated largely as a result of the influence of the first edition."[97] The second edition was revised in 1985, "primarily to establish criteria and procedures for preventive detention in limited category of cases."[98]Among other things, the most recent edition, completed in 2002 and published in 2007, includes discussion of public safety in addition to court appearance as a valid constitutional purpose for limiting pretrial freedom, and addresses pretrial release and detention in the wake of the United States Supreme Court's opinion in *United States v. Salerno,* which upheld the federal detention scheme against facial due process and Eighth Amendment claims.[99]

Overall, the current Standards make clear that the decision to release or detain is just that – an in-or-out or "bail/no bail" decision – that is expected to be effectuated at the time the decision is made. The Standards do this primarily by recommending a drastic reduction in the use of money at bail.

The Standards consider the judicial decision to release or detain a defendant pretrial to be a "crucial" decision, albeit complicated by the need to "strike an appropriate balance" between competing societal interests of individual liberty, public safety, and court appearance.[100] Indeed, this is the fundamental complexity of bail, which requires judges to simultaneously maximize release, court appearance, and public safety. Nevertheless, this is also why bail is inherently a judicial function. Some entities, such

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[96] American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release - Approved Draft,* 1968 (New York: American Bar Association, 1968).

[97] Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence,* 23 Crim. Just. 2-3 (2009). This article also illustrates the ABA Standards as important sources of authority by courts (including the United States Supreme Court and numerous state supreme courts) and legislatures across the country.

[98] ABA Standards, *supra* note 6, at 30 n. 3.

[99] *Id. passim.*

[100] *See id.*, Introduction, at 29-30. The Standards reflect a similar balance in their statement of the purpose of the release decision, which includes providing due process, avoiding flight, and protecting the public. *See id*, Std. 10-1.1 at 36.

as for-profit bail bondsmen or bail insurance companies, may show concern only for court appearance, even to the point of incorrectly stating that court appearance is the sole function of bail. Other criminal justice actors rightfully focus on public safety as a primary goal in striking the balance, just as defenders might emphasize liberty. Judges, however, are the only criminal justice actors who are required to make decisions (and, indeed, have those decisions reviewed for error) that incorporate all three goals of bail decision making – individual liberty, public safety, and court appearance.

Nevertheless, the Standards recognize that striking this balance is made most difficult when money is involved. Indeed, the Standards stress that "the problems with the traditional surety bail system undermine the integrity of the criminal justice system and are ineffective in achieving key objectives of the release/detention decision."[101] Even in the most recent edition, the Standards quote with approval the introduction to the 1968 version, which read as follows:

> The bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise – that risk of financial loss is necessary to prevent defendants from fleeing prosecution – is itself of doubtful validity. The requirement that virtually every defendant must post [financial conditions of] bail causes discrimination against defendants and imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependents on welfare. Moreover, bail is generally set in such a routinely haphazard fashion that what should be an informed, individualized decision is in fact a largely mechanical one in which the name of the charge, rather than the facts about the defendant, dictates the amount of bail.[102]

According to the Standards, the high stakes to the defendant and the community are best reflected in the two kinds of mistakes that can be made at bail: "a defendant who could safely be released may be detained or a defendant who requires confinement may be released."[103] And thus, the Standards are designed to meet two interrelated needs: "the need to foster safe pretrial release of defendants whenever possible, and the need

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[101] *Id.,* Introduction, at 30.
[102] *Id.* at 31 (quoting American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release – Approved Draft, 1967* (New York: American Bar Association, 1968), at 1.
[103] *Id.* at 35.

to provide for pretrial detention of those who cannot be safely released."[104] It is a "release/detain" scheme, effectuated rightfully by judges making in-or-out decisions.

The ABA Standards emphasize in commentary the importance of the in-or-out decision by articulating foundational principles upon which the relevant recommendations are made. The Standards summarize these principles as follows:

> [T]hese Standards view the decision to release or detain as one that should be made in an open, informed, and accountable fashion, beginning with a presumption (which can be rebutted) that the defendant should be released on personal recognizance pending trial. The decision-making process should have defined goals, clear criteria, adequate and reliable information, and fair procedures. When conditional release is appropriate, the conditions should be tailored to the types of risks that a defendant poses, as ascertained through the best feasible risk assessment methods. A decision to detain should be made only upon a clear showing of evidence that the defendant poses a danger to public safety or a risk of non-appearance that requires secure detention. Pretrial incarceration should not be brought about indirectly though the covert device of monetary bail.
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> The strong presumption in favor of pretrial release is tied, in a philosophical if not a technical sense, to the presumption of innocence. It also reflects a view that any unnecessary detention is costly to both the individual and the community, and should be minimized. However, the Standards make it clear that under certain circumstances the presumption of release can be overcome by showing that no conditions of release can appropriately and reasonably assure attendance in court or protect the safety of victims, witnesses, or the general public.[105]

In this recommended release and detention model, the Standards emphasize the fundamental legal principle of release on "least restrictive conditions," which, as illustrated in the above quotation, translates first into an explicit recommendation that judges adopt a presumption of release on recognizance. That presumption may be rebutted by evidence that there is: (1) a substantial risk of nonappearance or the need for additional release conditions; or (2) evidence that the defendant should be detained through an open and transparent detention process or on conditions while awaiting

[104] *Id.* at 33.
[105] *Id.* at 35-36.

diversion or some other alternative adjudication program.[106] Overall, the Standards create a recommended scheme in which the decision to release is effectuated through the use of least restrictive conditions, and the decision to detain is effectuated through a transparent detention process designed to work when *no condition or combination of conditions* suffice to reasonably assure court appearance or public safety. The Standards' underlying premise is that a defendant's perceived risk of nonappearance or public safety can typically be addressed *after release* through conditions that are designed to reasonably mitigate that risk.

The crux of the presumption of release under least restrictive conditions, however, as well as the notion that judges should make the final in-or-out decision for any particular defendant, is found in the Standards' recommendations dealing specifically with financial conditions. Commentary to the ABA Standards' general recommendation dealing with release on conditions states that, "Financial conditions . . . are to be imposed only to ensure court appearance and under the limits described more fully in Standard 10-5.3. The amount of bond should take into account the assets of the defendant and financial conditions imposed by the court should not exceed the ability of the defendant to pay."[107]

Standard 10-5.3, in turn, is specifically designed to effectuate a foundational premise "that courts . . . should make the actual decision about detention or release from custody."[108] Thus, while the Standards allow the use of secured financial conditions, they "greatly restrict"[109] their use through Standard 10-5.3, which is quoted here in full:

> **Standard 10-5.3 Release on financial conditions**
> (a) Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.
>
> (b) Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.

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[106] *See id.*, Std. 10-5.1 at 1; *see also id.*, Stds. 10-5.8, 5.9, 5.10 (grounds, eligibility, and procedures for pre-trial detention), at 124-38.
[107] *Id.*, Std. 10-5.2 (commentary) at 109.
[108] *Id.*, Std. 10-5.3 (commentary) at 111.
[109] *Id.*, Std. 10-1.4 (commentary) at 43.

(c) Financial conditions should not be set to punish or frighten the defendant or to placate public opinion.

(d) On finding that a financial condition of release should be set, the judicial officer should require the first of the following alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance: (i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not; (ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to ten percent of the face amount of the bond. The full deposit should be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or (iii) the execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

(e) Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to' the nature of the charge.

(f) Financial conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schedule.

(g) In appropriate circumstances, when the judicial officer is satisfied that such an arrangement will ensure the appearance of the defendant, third parties should be permitted to fulfill these financial conditions.[110]

In 1965, Professor Caleb Foote called the central problem of a money-based bail system administered to mostly poor defendants an insoluble "riddle."[111] In 2007, however, author John Clark correctly wrote that solving the riddle is now within our grasp

[110] *Id.* Std. 10-5.3 at 17-18; 110-111.

[111] *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* at 226-27 (Washington, D.C. Apr. 1965).

simply by following the ABA Standards, and especially Standard 10-5.3, quoted above. Indeed, Clark wrote, changing judicial decision making to reduce reliance on money bail is essential to effectuating an in-or-out decision that is the essence of good government:

> While such cherished concepts as equal justice and due process should always be stressed, the public also needs to understand the implications for society of a system that relies on money bail. When a judicial officer sets a money bail, the outcome of whether the defendant is released or held is out of the hands of that judicial officer. It is then left to the defendant, his or her family, or any of the bail bondsmen working in the community to determine if the defendant stays in jail or goes home.
>
> From a public policy perspective, this flies in the face of good government, because the result is that public officials have little control over the use of one of the most expensive and limited resources in any community – a jail bed.[112]

[112] John Clark, *Solving the Riddle of the Indigent Defendant in the Bail System,* Trial Briefs (Oct. 2007) at 34.

Chapter 5. Effective Pretrial Decision Making

If the history of bail and the law support a "bail/no bail" decision, and if the national best practice standards similarly recommend and justify through the law and research a "release/detain" or in-or-out decision, a decision through which virtually all bailable defendants are immediately released, and unbailable defendants are detained through a fair and transparent process of detention, then why do judges persist in setting secured financial conditions, the only condition known to significantly interfere with this decision-making process? Like dealing with indigent defendants, it is a riddle more complicated than it appears. Indeed, as recently as 2010 a single jurisdiction reported the difficulty in changing judicial decision making to better support legal and evidence-based practices at bail as reflected in the ABA Standards.

That year, judges in Jefferson County, Colorado, decided to spend 14 weeks setting bail by following, in the main, the ABA's National Standards on Pretrial Release as well as specific local recommendations for making judicial decisions that paralleled those Standards.[113] A report filed after the project showed progress toward adherence to certain best practices, but also showed "much room to improve" because, even despite trying to follow the ABA Standards, judges still insisted on: (1) using commercial sureties; (2) using money to protect the public; (3) avoiding release on unsecured bonds for a myriad of customary, albeit illogical or arbitrary reasons; and (4) setting secured financial conditions without any recorded rationale indicating that the judge considered the defendants' ability to meet them.[114] The study is significant for many reasons, but the fundamental point for purposes of this paper is that these judges were trying faithfully to follow the Standards during the study period, and yet, in many cases they still could or would not. Later studies of the same jurisdiction showed that despite the ABA's recommendation to use money only as a last resort due to its inequality and tendency to detain otherwise bailable defendants, the judges in Jefferson County were still considering money first, and still setting unattainable secured financial conditions resulting in defendants who were ordered released but who remained detained.

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[113] Many of the local recommendations were reflected in a Chief Judge Order creating the 14 week study. A general overview of the Jefferson County Bail Project may be found in the document presented at the National Symposium of Pretrial Justice. *See* Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, and Hon. Margie Enquist, *The Jefferson County Bail Project: Project Summary Presented to the Attorney General's National Symposium on Pretrial Justice* (May 23, 2011) found at http://www.pretrial.org/download/research/The%20Jefferson%20County%20CO%20Bail%20Project%20Summary%20May%202011.pdf.

[114] *See The Jefferson County Bail Impact Study: Initial Report on Process Data for the System Performance Subcommittee* (July 23, 2010), available from Jefferson County public records or through the author.

This is the historical dilemma concerning the Standards; despite their reputation as best-practice recommendations, courts have had difficulty in actually implementing them – especially those parts of the Standards that seek to reduce reliance on money at bail. Until recently, there was perhaps no answer to this dilemma. But that is beginning to change due to the current direction in pretrial research. While pretrial research has proceeded down a variety of substantive paths throughout the twentieth and into the twenty-first centuries, the research being conducted during this third generation of bail reform[115] is most relevant to helping judges make decisions to release or detain that are immediately effectuated and not contingent upon any other person or entity. That relevance comes from the research: (1) showing judges the negative effects of not making a "bail/no bail" or in-or-out decision; and (2) showing judges how to make a more effective "bail/no bail" or in-or-out decision so as to avoid those negative effects.

The Negative Effects of Not Making an Immediately Effectuated In-or-Out Decision

Research over the last several decades has consistently shown that compared to defendants released pretrial, defendants detained during the entirety of their pretrial phase fare considerably worse. Overall, "the research shows that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period. These relationships hold true when controlling for other factors, such as current charge, prior criminal history, and community ties."[116]

Most recently and more specifically, the Laura and John Arnold Foundation funded significant research examining a large, multi-state data set and ultimately showing that, controlling for all other relevant factors, defendants detained for their entire pretrial period are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison (and for longer periods in both cases) than defendants

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[115] Professor John Goldkamp first categorized twentieth century efforts at American pretrial reform in terms of "generations." *See* John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services,* 57 Fed. Probation 28, 34 n.3 (1993). For a brief description of the third generation, *see* Timothy R. Schnacke, Claire M.B. Brooker, and Michael R. Jones, *The Third Generation of Bail Reform,* D.U. Law Rev. Online (Mar. 14, 2011), found at http://www.denverlawreview.org/online-articles/2011/3/14/the-third-generation-of-bail-reform.html.

[116] *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process,* at 2 (PJI/MacArthur Found. 2012).

released at some point, and the results were even more pronounced for low risk defendants.[117] This is powerful new research, but only confirms what judges and others have presumably known for decades about the outcomes for defendants confined for their entire pretrial period.

More important, then, is additional Arnold Foundation research that is beginning to determine the public safety costs of keeping defendants in jail for even short periods of time. In a separate study, though again with a large data set, researchers found "strong correlations between the length of time low- and moderate-risk defendants were detained before trial, and the likelihood that they would reoffend in both the short- and long-term."[118] Specifically, the researchers found that when compared to defendants held no more than 24 hours, low risk defendants who were held for two to three days were 40% more likely to commit new crimes before trial and 22% more likely to fail to appear, and if held for 31 days or more were 74% more likely to commit new crimes pretrial and 31% more likely to fail to appear. Moderate risk defendants showed the same correlations, albeit at different rates. Moreover, the researchers found, low risk defendants held two to three days were more likely to commit a new crime within two years, and defendants held for eight to fourteen days were 51% more likely to recidivate long-term than defendants detained less than 24 hours.[119] Interestingly, for high risk defendants there was no relationship between pretrial detention and increased crime, "suggest[ing] that high-risk defendants can be detained before trail without compromising, and in fact enhancing, public safety and the fair administration of justice."[120]

Pretrial detention has always had costs (including jail bed costs, public welfare costs, such as for lost jobs or for money needed to support defendant families, and other, difficult to quantify social costs, such as denying the defendant the ability to help with his or her defense), but this research illuminates costs going to the very function of bail itself. Since we have known for some time that secured money bonds lead to detention – keeping some defendants in jail for the duration of their pretrial period and keeping some in for shorter periods of time until they can gather the money necessary for

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[117] Christopher Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (LJAF 2013).
[118] *Pretrial Criminal Justice Research* at 2 (LJAF 2013) found at http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.
[119] See Christopher Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (LJAF 2013).
[120] *Pretrial Criminal Justice Research, supra* note 118 at 4.

release[121] – this new research shows how a judge's decision to set a secured bond can actually lead to increased danger to public safety both in the short- and long-term. Concomitantly, because detaining high risk defendants does not lead to the same bad outcomes shown for low and moderate risk defendants, the research shows the importance of (1) determining defendants' risk; and (2) doing everything possible to make clear in-or-out decisions so that low to moderate risk defendants are released as quickly as possible and the highest risk defendants are detained.

Research Helping Judges to Avoid the Negative Effects

An in-or-out bail decision can be best effectuated using the other strand of pretrial research, which is a two-part strand that seeks to help judges make an effective "release/detain" determination. The first part of this strand is found in research developing empirical pretrial risk assessment instruments. The second part is found in the research dedicated to assessing whether certain conditions of bail or limitations on pretrial freedom are effective in furthering the various purposes underlying the bail process.

Part One – Risk Assessment Instruments

The majority of the most recent risk assessment instrument research is too new to be included in the ABA Standards. The Standards mention various attempts to assess predictors of pretrial performance, even going back to the 1920s, and over the years single jurisdictions, such as counties, have occasionally created risk instruments using generally accepted social science research methods, but their limited geographic influence and sometimes their lack of data from which to test multiple variables meant that research in this area spread slowly. That changed significantly in 2003, when the first multijurisdictional instrument, the Virginia Pretrial Risk Assessment Instrument,[122] was developed, only one year after the last edition of the Standards was approved.[123] Since then, other multi-jurisdictional risk instruments have been developed, including

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[121] *See* Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts* (BJS 2007) [hereinafter Cohen & Reaves]; *see also* Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI 2013).

[122] *See* Marie VanNostrand, *Assessing Risk Among Pretrial Defendants In Virginia: The Virginia Pretrial Risk Assessment Instrument* (Va. Dept. Crim. Just. Servs. 2003).

[123] The Standards nonetheless cite to Dr. VanNostrand's Virginia study as the latest in a long line of studies designed to empirically identify predictors of defendant pretrial performance. *See* ABA Standards, *supra* note 6, at 57 n. 22.

in Kentucky, Ohio, Colorado, Florida, and the federal system, and now other American jurisdictions, including single cities and counties, are working on similar instruments or borrowing other instruments while validating them to their own populations. As recently as 2013, the Laura and John Arnold Foundation developed a risk instrument created with enough cases to be generalizable across the United States.[124]

The Pretrial Justice Institute describes a pretrial risk assessment instrument as follows:

> A pretrial risk assessment instrument is typically a one-page summary of the characteristics of an individual that presents a score corresponding to his or her likelihood to fail to appear in court or be rearrested prior to the completion of their current case.
>
> * * *
>
> Responses to the questions are weighted, based on data that shows how strongly each item is related to the risk of flight or rearrest during pretrial release. Then the answers are tallied to produce an overall risk score or level, which can inform the judge or other decisionmaker about the best course of action.[125]

The creation and dissemination of these types of instruments across the country are part of the critical infrastructure judges need to set bail in a legal and evidence-based manner, which includes making an in-or-out decision that is immediately effectuated.

Stated simply, we know that out of every one hundred released defendants, some number of them will fail to appear for court or commit some new offense after being released. This has been true throughout history, and will continue to be true for as long as we allow pretrial release because human behavior cannot be completely predicted, and even someone whom we consider the lowest possible risk is still risky nonetheless. Moreover, we cannot avoid pretrial release, for the American system of criminal justice demands it, and, in fact, demands it in such a way that "liberty is the norm."[126] A judge's job, then, is to attempt to predict who these pretrial failures likely will be, recognizing that he or she will never predict them all. In the past, judges were given

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[124] *See Developing a National Model for Pretrial Risk Assessment* (LJAF 2013) found at http://arnoldfoundation.org/sites/default/files/pdf/LJAF-research-summary_PSA-Court_4_1.pdf.
[125] *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants* (PJI/BJA 2012), found at http://www.pretrial.org/download/advocacy/PJI%20Risk%20Assessment%20101%20(2012).pdf.
[126] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

their discretion and a number of somewhat intuitive statutory factors to make this prediction, but these factors may or may not have been actually predictive of pretrial success or failure, and they certainly were not weighted to tell those judges which factors were statistically more predictive than others. In the past, then, judges would often make decisions that may have been no better (and perhaps sometimes worse) than flipping a coin.

With the advent of the newest versions of statistical pretrial risk instruments that test the interrelated predictability of numerous variables, however, research has added an indispensable tool to allow any particular judge to do his or her job of trying to predict the inevitable failures. And while complete predictability will never be attained, a pretrial risk assessment tool nevertheless allows a judge to say, for example, "This defendant is scored as 'low risk' or 'category one,' and accordingly I know that his performance should look like that of other defendants in the past who have been scored the same, which means that he likely has a 95% chance of showing up for court and a 91% chance of not committing a new crime." This is not absolute assurance, but absolute assurance is not required by the law. Instead, the law requires us to embrace risk so that release is the norm, and then to mitigate that risk only to the level of *reasonable* assurance. Pretrial risk assessment instruments are tools that allow judges to both embrace and mitigate risk.

Part Two – Assessing Which Conditions are Effective for Their Lawful Purposes

The second part of the strand of research that helps judges make better "release/detain" decisions is the part that looks into which conditions of release, or limitations on pretrial freedom, are the most successful for achieving the various purposes of the bail decision-making process.

Researchers, bail historians, and even the National Judicial College state that the purpose of an effective bail decision is to maximize release while maximizing public safety and court appearance.[127] The ABA Standards state that the purposes of the

[127] Researchers have previously articulated a purpose of bail to include maximizing release in varying ways. *See* Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvements,* 1 Research In Corrections 3 (NIC 1988) ("Pretrial Release Policy in the American criminal justice system has two goals: (1) to allow pretrial release whenever possible and thus avoid jailing a defendant during the period between his arrest and court disposition, and (2) to control the risk of failure to appear and of new crimes released by defendants."); John Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services,* 57 Fed. Probation 1 (1993) ("Effective release may be most simply

release decision "include providing due process to those accused of crime [e.g., protecting one's liberty interest], maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger or interference."[128] The similarity of these two statements of purpose is not surprising; the history of bail and the law intertwined with that history demonstrate that the primary purpose of bail is to provide a mechanism of release or pretrial freedom, and that the purposes for limitations on that freedom are to further court appearance and public safety. Release, court appearance, and public safety are the three interrelated interests that must be balanced, whether one looks at the "effectiveness" or the "lawfulness" of any particular pretrial decision. Therefore, research that demonstrates how to maintain high release rates while maintaining high court appearance and public safety rates is superior to research that does not address all three.

Accordingly, the test today is whether any particular pretrial research helps judges to make an in-or-out decision so as to avoid the negative effects of pretrial detention (i.e., maximizing release, and, if possible, maximizing immediate release) that also maintains high court appearance and public safety rates. In the 2011 document titled, *State of the Science of Pretrial Release Recommendations and Supervision,*[129] judges can read about the

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defined as decision practices that foster the release of as many defendants as possible who do not fail to appear in court at required proceedings or commit crimes during the pretrial period."); John S. Goldkamp, Michael R. Gottfredson, Peter R. Jones, & Doris Weiland, *Personal Liberty and Community Safety: Pretrial Release in the Criminal Court* (New York: Plenum Press 1995) ("An effective pretrial release occurs when a defendant is released from jail, does not commit a new crime, and makes all court appearances."); John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services,* Topics in Community Corrections 4 (2008) ("The goal of pretrial services is to maximize rates of pretrial release while minimizing pretrial misconduct through the use of least restrictive conditions."). Most recently, researchers have hinted at a legal justification behind these statements favoring release beyond mere "effectiveness." *See* Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research* 2 (PJI 2012) ("Judges, prosecutors, defense attorneys, law enforcement, jail officials, victims' advocates, pretrial services programs, researchers, grantors, foundations, and national professional organizations have been working to determine the most legal, research-based, and cost-effective way to further the purpose of bail: to maximize the release of defendants on the least restrictive conditions that reasonably assure the safety of the public and defendants' appearance in court."). The ABA Standards articulate the "purposes of the release/detention decision," and not the purpose of bail itself, but state that "the law favors the release of defendants pending adjudication of charges," noting that the statement is "consistent with Supreme Court opinions [i.e., *Stack v. Boyle* and *United States v. Salerno*] emphasizing the limited permissible scope of pretrial detention." ABA Standards, *supra* note 6, Std. 10-1.1 (commentary) at 37, 38.

[128] ABA Standards, *supra* note 6, Std. 10-1.1, at 1, 36.

[129] Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (PJI/BJA 2011) [hereinafter *State of the Science*].

effectiveness of various release conditions and supervision techniques, such as court date notifications, drug testing, electronic monitoring, and pretrial supervision, which all have varying literatures supporting their ability to achieve one or more of the interrelated purposes. Research in these areas is ongoing. For example, as recently as late 2013 researchers studying pretrial supervision found that "supervised defendants [especially moderate to high risk defendants] were significantly more likely to appear for court" and that "[p]retrial supervision of more than 180 days may also decrease the likelihood of NCA [new criminal activity]."[130] To the extent that pretrial supervision helps judges to maximize release, then this study is an especially good one because it provides useful information that furthers the threefold purpose of the bail process.

Nevertheless, non-financial conditions, like those mentioned above, rarely cause unnecessary pretrial detention. Secured financial conditions, on the other hand, do cause unnecessary pretrial detention because they are typically the only condition precedent to release. As noted previously, the research has consistently shown what logic should suffice to tell us: secured financial conditions cause detention, with higher amounts of money leading to higher detention rates. Accordingly, what has been needed in the pretrial field is research that specifically addresses money, and, more particularly, addresses how judges who still believe that they must set financial conditions of bail can do so in ways that simultaneously maximize quick release, public safety, and court appearance rates.

Generally speaking, the relevant research looking at money releases up to now has focused on "bond types" or "release types" because historically bail bonds have been labeled or "typed" based on their use of money. For example, a "surety bond" is a type of bond that is written through and backed by a for-profit surety company. An "unsecured personal recognizance bond" is a bond that requires no money up-front, but which requires the defendant to pay some amount of money if he or she fails to appear for court. Creating and defining bond "types" based on how they use a single condition of release – i.e., money – represents an antiquated way of describing a process of release or detention, but because it is prevalent in our current administration of bail, the relevant research typically discusses findings based on types.

Moreover, generally speaking, the relevant research up to now has suffered from serious drawbacks. As reported by Marie VanNostrand, et al. in 2011, "Nearly all state court research conducted on a national level in an attempt to identify the most effective term of release (release on own recognizance, unsecured bail, secured bail), has been

[130] Christopher Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* at 17 (LJAF 2013).

completed using the State Court Processing Statistics (SCPS) data."[131] Unfortunately, however, and as noted by the Bureau of Justice Statistics itself (which compiles the SCPS information), the SCPS data contains several significant limitations that preclude any ability to meaningfully compare release or bond types.[132] For this and other reasons, researchers Kristen Bechtel, et al., explain that previous research attempting to make these comparisons has suffered from methodological limitations, has not accounted for alternative explanations, or, most importantly for purposes of this paper, has only focused on one purpose underlying the bail process – court appearance – at the expense of public safety and release rates.[133]

To date, only one study specifically focusing on the use of money at bail has accounted for all of the limitations previously unaccounted for and has measured effectiveness of the studied phenomenon on all three purposes of the release decision. Published in 2013, Michael R. Jones, Ph. D., compared release on unsecured bonds (meaning that money was promised by a defendant but did not have to be paid unless and until the defendant failed to appear) versus secured bonds (meaning that money was required to be paid prior to release, either through the defendant, the defendant's friends and family, or to a bail bondsman for a fee) in approximately 2,000 Colorado cases consisting of defendants in all known risk categories. Controlling for all other factors, including risk, Dr. Jones reported the following:

> [T]he type of monetary bond posted [secured versus unsecured] does not affect public safety or defendants' court appearance, but does have a substantial effect on jail bed use. Specifically, when posted, unsecured bonds (personal recognizance bonds with a financial condition) achieve the same public safety and court appearance results as do secured (cash and surety) bonds. This finding holds for defendants who are lower, moderate, or higher risk for pretrial misconduct. However, unsecured bonds achieve these public safety and court appearance outcomes while using substantially (and statistically significantly) fewer jail resources. That is, more unsecured bond defendants are released than are secured

[131] *State of the Science, supra* note 129, at 33-34.
[132] *See* Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010).
[133] *See* Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research, passim* (PJI, 2012).

> bond defendants, and unsecured bond defendants have faster release times than do secured bond defendants.[134]

As noted previously, secured bonds tend to keep some defendants in jail for the entire pretrial period and keep others in for some shorter amount of time until they find the money to pay for release. Measuring this particular phenomenon, Dr. Jones found that it took four days longer for defendants with secured bonds to reach a given release threshold as defendants with unsecured bonds due to delays likely inherent in a money-based release process:

> After judicial officers set defendants' bonds, unsecured bonds enable defendants to be released from jail more quickly than do secured bonds. This finding is expected because nearly all defendants who receive unsecured bonds can be released from custody immediately upon signing their bond, whereas defendants with secured bonds must wait in custody until they or a family member or friend negotiates a payment contract with a commercial bail bondsman or their family member or friend posts the full monetary amount of a cash bond at the jail. This finding indicates that the process of posting a secured bond takes much longer than the process of posting a unsecured bond for released defendants. Furthermore, this finding is consistent with previous research using data from across the United States that shows released defendants with secured bonds remained in jail longer than did released defendants with bonds that did not require a pre-release payment (Cohen & Reaves, 2007).[135]

Recent data from Kentucky similarly indicates that judicial decisions that rely less on secured bonds can, in fact, positively affect all three purposes underlying the bail process. In 2012, Kentucky Pretrial Services released a report on the impact of House Bill 463, a law substantially altering the bail statute to better incorporate risk while including presumptions for release on recognizance and unsecured bonds as well as an overall decrease in the use of money.[136] The report found that these changes in the administration of bail in Kentucky led not only to higher release rates, but also higher

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[134] Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, at 19 (PJI 2013).

[135] *Id.* at 15.

[136] *See Pretrial Reform in Kentucky* (Kentucky Pretrial Services, Jan. 2013) at 13, found at http://www.apainc.org/html/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%20(Final).pdf.

court appearance and public safety rates for those who were released.[137] These data, along with the virtually moneyless administration of bail performed each day in the District of Columbia,[138] strongly suggest that secured financial conditions are not necessary for public safety and court appearance, and should make judges seriously question altogether the continued use of money as the prime determinate of release.

Secured financial conditions have always been unfair, and so even without research judges should avoid ordering them due to their tendency to cause unnecessary pretrial detention. Nevertheless, the impact of research showing the effectiveness of unsecured compared to secured financial conditions, combined with research documenting the negative effects associated with even short-term detention, is potentially monumental. Specifically, it provides a solution for those judges who are not completely comfortable with eliminating the use of money, but who nonetheless want to make a release decision that: (1) is immediately effectuated; (2) avoids creating any additional risk to public safety, court appearance, or any other number of deleterious effects caused by even short amounts of unnecessary pretrial detention; (3) follows the law and the history by promoting the actual release of bailable defendants (indeed, through a centuries-old method of using unsecured financial conditions); (4) follows the ABA's Standards by using a fairer and less-restrictive form of financial condition; and (5) avoids money taking on a life of its own and becoming a stakeholder or decision maker in an otherwise rational pretrial bail process. The solution is for judges simply to use unsecured financial conditions instead of secured financial conditions whenever they deem that money is absolutely necessary.

The question of whether money motivates at bail is still largely unknown. The ABA Standards state that the premise is doubtful, and supply ample recommendations to steer judges from release decisions that require money to effectuate them. For those judges who still believe money to be some motivation, however, making the financial condition an unsecured one – one that requires nothing to gain release and that is due and payable only upon forfeiture of the condition – is one that will avoid virtually every problem associated with the traditional money bail system when it comes to the release of bailable defendants. In fact, a release decision using unsecured financial conditions

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[137] *See Report on Impact of House Bill 463: Outcomes, Challenges, and Recommendations* (KY Pretrial Servs. June 2012).

[138] See *The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth,* found at http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf. According to the D.C. Pretrial Services Agency website, 89% of released defendants were arrest-free during their pretrial phase in 2012 (with only 1% of those arrested for violent crimes) and 89% of defendants did not miss a single court date. *See* at http://www.psa.gov/.

coupled with pretrial services supervision is the closest thing we have today to the historic system of personal surety release that worked in both England and America for centuries.

Chapter 6. The Practical Aspects of Making an Effective "Release/Detain" or In-or-Out Decision

Effective bail decisions maximize release while simultaneously maximizing public safety and court appearance. They apply the law to embrace pretrial risk so that liberty is the norm, but with the understanding that extreme pretrial risk can and should lead to pretrial detention in carefully limited situations. They take advantage of the law and the pretrial research to properly mitigate known risk for released defendants when risk mitigation is necessary. Effective "no bail" decisions are comparably simpler, but require judges to use transparent and due process-laden procedures to ensure that those rare cases of detention are done fairly. If judges are lucky, then their guiding bail laws will contain a framework that allows them to make effective release and detention decisions. If they are not so lucky, they can still attempt to make reasonable decisions while, as recommended by the Conference of Chief Justices, "analyz[ing] state law and work[ing] with law enforcement agencies and criminal justice partners to propose revisions that are necessary to support risk-based release decisions . . . and assure that non-financial release alternatives are utilized and that financial release options are available without the requirement for a surety."[139]

The need for judges to help seek revisions to the law (or to practices, such as money bail schedules, that can be mandated by law or simply thrust upon judges through court tradition) that will support risk-based or risk-informed decisions cannot be overstated. Most, if not all, of American bail laws today are antiquated simply because they are based primarily on charge and not risk. For example, in Colorado the Constitution provides a right to bail for all except certain defendants who may be detained if they are charged with certain crimes along with various preconditions, such as being on probation or parole, along with a finding of "significant peril" to the community. It is a "bail/no bail" scheme, albeit based mostly on top charge, which means that an extremely high risk defendant charged with a serious crime not listed in the constitution or with a crime listed but without the preconditions, for example, cannot lawfully be detained without bail. Instead, judges are forced to order those high risk defendants released, set conditions of release, and hope that they cannot pay whatever secured financial condition might lead to de facto detention. Judges in Colorado routinely set extremely high cash-only bonds for high risk defendants, presumably in an attempt to detain them. Unfortunately, as mentioned previously, that practice is

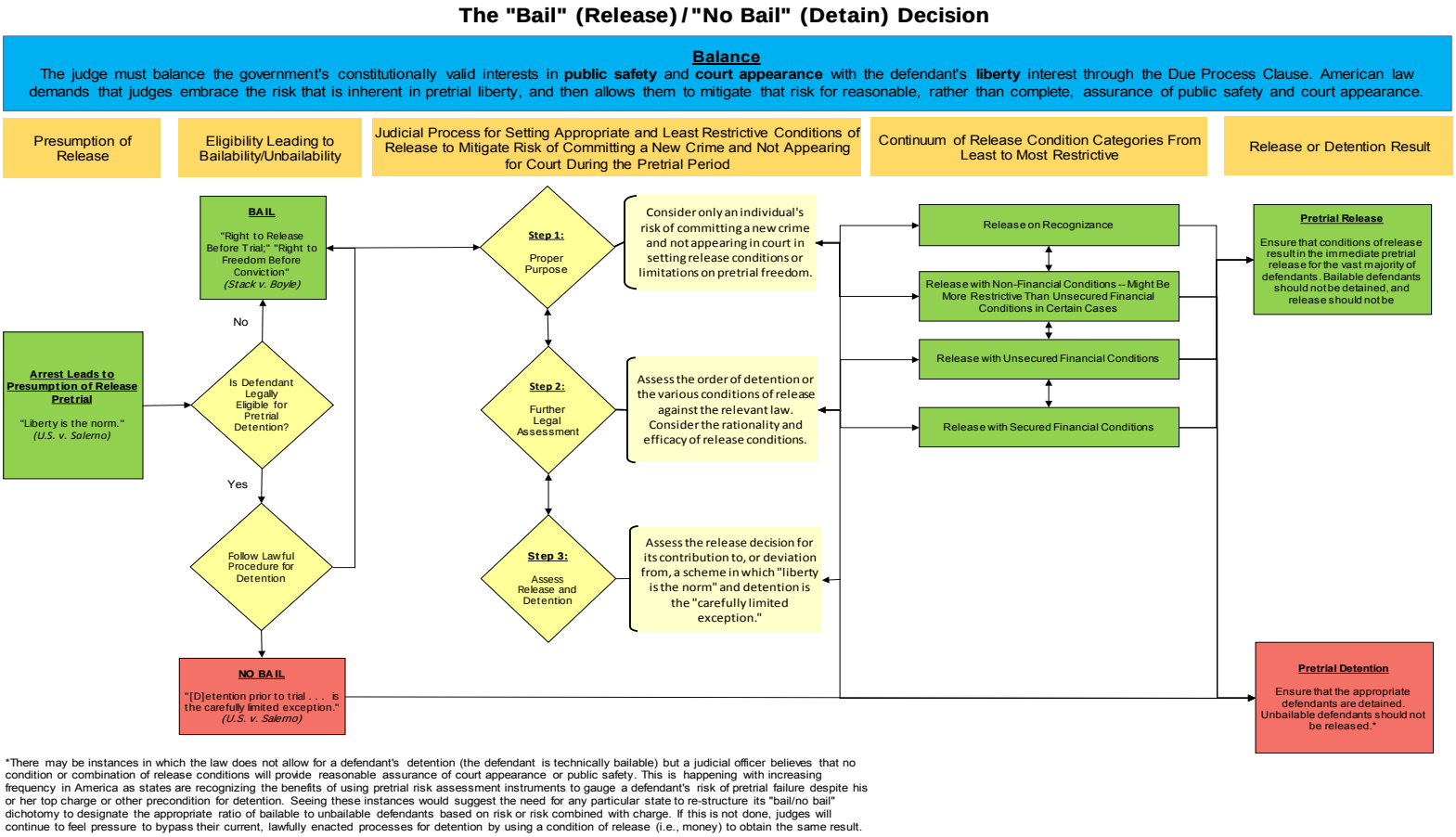
[139] Conference of Chief Justices, *Resolution Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release* (2013).

likely unlawful under more than one legal theory. Until states like Colorado create a more effective "release/detain" framework based on risk, however, judges will be forced to use money. Moreover, as long as money is necessary for at least one purpose, it will be used for others. Accordingly, much of the necessary future work of bail reform must include discussions on changing our bail statutes to better incorporate risk. Judges should lead these discussions.

Assessing any particular bail statute for such a risk-based framework can be done by holding it up to what pretrial legal experts currently consider to be model bail laws. In 2014, the federal statute and the District of Columbia statute (which is substantially similar to the federal law), are considered to be the closest we have to "model" American bail laws, representing to a good degree the embodiment of the ABA's National Pretrial Standards as well as much of what we know to date concerning the history of bail and the law flowing from that history.[140] Both are based on historic notions of a "bail/no-bail" or "release/detain" dichotomy. Both incorporate pretrial services program supervision, which can be viewed as a twentieth century re-creation of the personal surety system through its placement of responsible persons in charge of defendants for no profit, and which today provides assurance of both court appearance and public safety for all defendants despite their amount of wealth. Moreover, both statutes dramatically restrict the role of secured money at bail, which has proven to be a disappointing experiment in our attempt not only to maximize release, but also to provide reasonable assurance of court appearance for those who are released.

The following illustration represents how these statutes and the ABA Standards lead to a framework for an effective "release/detain" pretrial decision.

[140] Historically, the 1966 federal statute served as a national model during the first generation of bail reform and the 1971 Court Reform and Criminal Procedure Act for the District of Columbia, along with the 1984 Federal Bail Reform Act, served as models during the second generation of bail reform. In 2011, the National Symposium on Pretrial Justice recommended using the federal law as a model law for current pretrial reform. *See* National Symposium Report, *supra* note 90, at 42. Nevertheless, recent pretrial research, such as research better illuminating defendant risk, has caused persons interested in pretrial justice to further assess those models, and has led to interest in creating a new national model based on the most recent pretrial studies.



*There may be instances in which the law does not allow for a defendant's detention (the defendant is technically bailable) but a judicial officer believes that no condition or combination of release conditions will provide reasonable assurance of court appearance or public safety. This is happening with increasing frequency in America as states are recognizing the benefits of using pretrial risk assessment instruments to gauge a defendant's risk of pretrial failure despite his or her top charge or other precondition for detention. Seeing these instances would suggest the need for any particular state to re-structure its "bail/no bail" dichotomy to designate the appropriate ratio of bailable to unbailable defendants based on risk or risk combined with charge. If this is not done, judges will continue to feel pressure to bypass their current, lawfully enacted processes for detention by using a condition of release (i.e., money) to obtain the same result.

Bail or No Bail?

The initial determination flowing from this illustration involves evaluating which defendants are bailable and which are not bailable in any particular jurisdiction. Most states have constitutional language articulating some right to bail, and those that do not typically have statutory language either granting the right to all “except” some class of defendants, by presuming release, or by separating defendants based on whether they should be released or detained, all of which are indicative of a “bail/no bail” dichotomy. The “bail/no bail” or “release/detain” dichotomy, in turn, drives the judicial decision.

Bailablility is often separated into two main inquiries: (1) eligibility; and (2) bailability, with defendants thus said to be eligible for either bail or no bail, but with some procedure in place to finalize the determination. For example, in my state of Colorado, the constitutional scheme articulates that “all persons shall be bailable except,” and then lists various crimes, preconditions, and findings that must be present in order to detain defendants without bail. Under that scheme, there is a clear presumption for bailability or release (following the Supreme Court’s admonition that pretrial liberty be the norm),

with relatively few persons even eligible for detention. Moreover, even if one is eligible for detention in Colorado, the process required by the constitution may nonetheless lead to a determination that the defendant is actually bailable – for example, if there is no finding of "significant peril" to the community. Likewise, the federal statute includes a relatively broad category of offenses that make one eligible for detention, but the detention hearing process itself may nonetheless lead to a determination of bailability or release.

There are variations on these themes in bail schemes across the United States (from schemes with bright-line bailability determinations to schemes that, like their earlier English counterparts, infuse significant judicial discretion into the determination), and often there may be considerable overlap of processes. For example, when a judge must determine whether a person is unbailable because "no condition or combination of conditions" may suffice to protect the public, that judge is necessarily analyzing conditions normally used for bailability, which involves assessing them for proper purpose, lawfulness, and effectiveness – an assessment that is discussed in more detail under the decision-making process for bailable defendants. In the end, however, after using whatever process is in place to determine bailability, one can typically look at any particular defendant and say that the defendant is either bailable or unbailable.

In an appropriately structured "bail/no bail" dichotomy, all bailable defendants would be released and all unbailable defendants would be detained, with exceptions only in extremely rare cases. The dichotomy is just that – a division of defendants into two mutually exclusive groups. One should not be treated as bailable and unbailable at the same time. If an accused is bailable, the process moves toward release. If he or she is presumptively unbailable, it moves toward detention but can result in release if ultimately determined to be bailable.

Following a particular state's existing dichotomy is crucial to following the law, even when that law is considered in need of amendment. Thus, whenever judges (1) purposefully or carelessly treat a bailable defendant as unbailable by setting unattainable release conditions, or (2) treat an unbailable defendant as bailable in order to avoid the lawfully enacted detention provisions, they are not faithfully following the existing "bail/no bail" dichotomy, and should therefore be compelled to do so. Such digressions, however, also suggest that the balance of the dichotomy should be changed. Indeed, in the second American generation of bail reform, judges were treating technically bailable defendants as unbailable by setting unattainable financial conditions to protect public safety. They were not following the law, but they were not faulted and instead the laws were changed. Overall, the second generation of bail reform led to changes in "bail/no bail" dichotomies of many states by better defining

classes of defendants so that judges could ultimately detain the right persons (i.e., very high risk) through a transparent and moneyless process of detention.

Judges are expected to follow the law, but the lessons for state legislators are these: If the proper "bail/no bail" balance has not been crafted through a particular state's constitutional or statutory preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to purposefully detain defendants through the use of unattainable secured financial conditions.[141] On the other hand, if the proper balance is created so that high risk defendants can be detained through a fair and transparent detention scheme, money can be virtually eliminated from the bail process without negatively affecting public safety or court appearance rates.[142] Such a scheme can also prevent the unnecessary detention of lower and moderate risk defendants who can be effectively managed in the community, thus saving the government from wasting taxpayer funds and preventing the unwitting contribution to increased criminal activity and failures to appear for court.

The Right to Bail

As indicated in the illustration, and as previously discussed, the "bail/no bail" dichotomy is largely based on the right to bail, and the right to bail should equate to the "right to freedom before conviction" and the "right to release before trial," as articulated by the Supreme Court in *Stack v. Boyle*.[143] Any other interpretation of the right to bail would run counter to the history of bail (which has always considered someone who is bailable to be entitled to release), and the law (which desires, presumes, and very nearly demands release, but which has for too long tolerated bail's opposite effect). Properly defining the right to bail will naturally lead jurisdictions to further question how they define the term "bail" itself. Accordingly, if the right to bail is

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[141] As mentioned earlier, using money to *intentionally* detain bailable defendants is likely unconstitutional. In addition, when money is tolerated for high risk defendants, it appears to grow more tolerable for lower risk defendants, which then leads to the *unintentional* detention of bailable defendants, which poses legal and social problems beyond the un-effectuated decision.

[142] The District of Columbia appears content with its balance between bailable and unbailable defendants (resulting in the release of approximately 85% of pretrial defendants), which has allowed it to virtually eliminate money from the bail process and thus allow the release of nearly every bailable defendant with high public safety and court appearance rates. *See Remarks of Susan Weld Shaffer,* National Symposium Report, *supra* note 90, at 25.

[143] 342 U.S. 1, 4. At the date of this writing, nine states do not have constitutional right-to-bail clauses, and thus, as in the federal system, any substantive right to bail or release would have to originate within those states' statutory schemes.

properly defined as the right to release and freedom, jurisdictions that define the term "bail" as money will be seen as erroneous. As shown in the illustration, money at bail is a condition of bail – a limitation on pretrial release and not release itself – which, like all conditions of release or limitations on freedom, must be assessed for lawfulness and effectiveness in any individual defendant's case. And although money has been used for centuries as the primary means for obtaining release, it should never be equated with the overall concept of bail, which is most appropriately defined as a process of conditional release.[144] Concomitantly, the purpose of any particular condition of bail, or limitation on pretrial freedom, can only be associated with court appearance and/or public safety, and therefore should not be confused with the purpose of bail, which is to provide a mechanism for that conditional release.[145]

When assessing the overall right to bail, the ABA Standards remind us that the law favors release, relying on *Stack* and *Salerno* as opinions "emphasizing the limited permissible scope of pretrial detention."[146] Explicit guidance for that notion comes from a single sentence in the *Salerno* opinion*:* "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[147] This statement provides at least some outer boundary to keep jurisdictions from slowly eroding the right to pretrial freedom by over-expanding the "no-bail" side of the dichotomy through either the use of money or even a more lawful, transparent detention process.

Using the rest of the *Salerno* opinion as a guide, however, one can look at any particular jurisdiction's bail scheme to assess whether that scheme appears, at least on its face, to presume liberty and restrict detention by incorporating the numerous elements from the federal statute that were approved by the Court. For example, if a particular state has enacted a provision in either its constitution or statute opening up the possibility of detention for *all* defendants no matter what their charges, the scheme should be assessed for its potential to over-detain based on *Salerno's* articulated approval of a

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[144] Bail defined as a process of conditional release is in accord with Supreme Court language, modern dictionary definitions, and various state laws that have redefined the term to take into account changes in the administration of bail in the twentieth century such as release without financial conditions, the use of non-financial conditions of release, public safety as a constitutionally valid purpose for limiting pretrial freedom, and preventive detention.

[145] A review of historical documents reveals that the original purpose of bail in Medieval England was to avoid a blood feud or private war. Later, as jails were erected, the purpose of bail evolved as a means to effectuate the defendant's release from jail while maintaining some control over him. *See* Duker, *supra* note 17, at 41-42; Meyer, *supra* note 18, at 1175-76.

[146] ABA Standards, *supra* note 6, Std. 10-1.1 (commentary) at 38.

[147] 481 U.S. 739 at 755.

statute that instead limited detention to defendants "arrested for a specific category of extremely serious offenses."[148] Likewise, any jurisdiction that does not "carefully" limit detention – that is, it detains carelessly, arbitrarily, or irrationally through the casual use of money in any amount or form affecting traditional bond types – is likely to be seen as running afoul of this foundational principle.

By favoring release, the law necessarily commands judges to embrace the risk that is inherent in our American system of bail, and to recognize that mitigation of that risk can never provide complete insurance of public safety or court appearance due to the unpredictability of human behavior. The late Supreme Court Justice Robert H. Jackson summed it up as follows:

> Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them.[149]

It must be remembered that this statement was made when America had only one constitutionally valid purpose for limiting pretrial freedom – court appearance – but the same concept holds true today. There is also always some risk that defendants may commit new offenses while on pretrial release. Nevertheless, lawmakers in America have specifically anticipated this by providing provisions dealing with those situations as well. To be an American means to live in a country that favors, if not demands liberty before trial, and reasonable assurance, rather than complete assurance of public safety and court appearance when limiting pretrial freedom. We follow the legal and evidence-based pretrial practices so as to hold on to those fundamental precepts.

Following legal and evidence-based pretrial practices is not necessarily complicated, either. To move from a largely arbitrary, charge and money-based bail system to an individualized, risk-informed bail system, judges setting bail must only answer the following question: "Is this defendant someone who should remain in jail or be released pending trial?" To answer this question, the judge must determine whether that defendant's risk to public safety and for failure to appear for court is manageable within the community and outside of a secure facility. All defendants pose risk – the question

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[148] *Id.* at 750. A similar overall limitation would be a constitutional or statutory provision that allowed detention only for certain high risk individuals. Given that risk is a better indicator of pretrial misbehavior than charge, it is unlikely that the Supreme Court would oppose a scheme using risk instead of charge as the gateway toward detention.

[149] *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

is whether that risk is manageable. Some defendants pose such a great risk that they are unmanageable in the community – i.e., no condition or combination of conditions of a bail bond can provide reasonable assurance of public safety or court appearance. However, the great majority of defendants only pose risks that are manageable to reasonable levels outside of the jail.

Conditions

As seen in the illustration, release through the bail process is always conditional. Every bond is an appearance bond, and thus has at least one condition: the defendant must show up for court at a time and date certain. Even the broadest definition of bail, which would include release by law enforcement on a summons, includes this basic condition. Virtually every state also incorporates as a standard condition the requirement that the defendant not commit any more offenses, and these two conditions are illustrative of the only constitutionally valid purposes thus far for limiting pretrial freedom, which are court appearance and public safety.[150] Technically, detention also has conditions, which is likely why the Supreme Court spoke of "conditions of release or detention" in

[150] There are some who have said that "integrity of the judicial process" is a third constitutionally valid purpose for limiting pretrial freedom, but that particular phrase is a term of art in the field of bail that is typically articulated without definition or that has been further defined as, or sums up, a number of variables related to risk affecting court appearance and public safety. For example, the American Bar Association states that the purpose of the pretrial release decision includes "maintaining the integrity of the judicial process by securing defendants for trial." ABA Standards, *supra* note 6, Std. 10-1.1. Other jurisdictions use the phrase when describing the threat of intimidating or harassing witnesses, arguably clear risks to public safety. The phrase "ensure the integrity of the judicial process" was used in *United States v. Salerno*, 481 U.S. 739, 753 (1987), but only in a passing reference to the argument on appeal. Reviewing the court of appeals ruling, however, sheds some light on that argument. The principle contention at the court of appeals level was that the Bail Reform Act of 1984 violated due process because it permitted pretrial detention of defendants when their release would pose a danger to the community or any person. *See United States v. Salerno,* 794 F.2d 64 (2d Cir. 1986), *rev'd,* 481 U.S. 739, 753 (1987). As the appeals court noted, this contention was different from what it considered to be the clearly established law that detention was proper to prevent flight or threats to the safety of those solely within the judicial process, such as to witnesses or jurors. The appeals court found the idea of potential risk to the broader community "repugnant" to due process and, had the Supreme Court not reversed, the distinction between those within the judicial process, such as witnesses and jurors, and those outside of it might have remained. However, by upholding the Bail Reform Act's preventive detention provisions, the Supreme Court forever expanded the notion of public safety to encompass consideration of all potential victims, whether in or out of the judicial process. Today, use of the phrase "protecting the integrity of the judicial process" typically requires further definition so as to clarify whether judicial integrity means specifically court appearance or public safety, more general compliance with all court-ordered conditions of one's bail bond, or some other relevant factor.

articulating a new test for excessiveness in *United States v. Salerno.*[151] Nevertheless, conditions of detention are typically only the two primary conditions – appear for court and abide by the law – which, along with a myriad of other behaviors, are adequately monitored and effectuated by secure detention. Indeed, when a defendant is detained, often these two primary conditions are assumed and thus unarticulated. Accordingly, when we speak of conditions, we speak almost exclusively of conditions of release.

As also shown by the illustration, conditions can be either "financial" or "non-financial," and the financial conditions can also be broken down into secured and unsecured conditions. As discussed previously, secured financial conditions typically require some up-front payment as a condition precedent to release. Unsecured financial conditions, like virtually all non-financial conditions, are conditions subsequent – that is, release is obtained, but if the condition occurs (or fails to occur, depending on its wording), it will trigger some consequence, and sometimes bring pretrial freedom to an end. Moreover, as noted previously, when conditions of release are set, it should be assumed that the judge is operating under the "bail" side of the dichotomy, thus indicating a decision to release. Finally, in a bail scheme that aspires to follow *Salerno's* directive that pretrial freedom be the norm, financial conditions should be recognized as the most restrictive conditions and used only when other, non-financial conditions cannot provide adequate assurance of court appearance. Finally, financial conditions should never be set to provide reasonable assurance of public safety.

This last concept is crucial to understand. There is no empirical evidence for using money to provide assurance of public safety. Indeed, some jurisdictions make it unlawful to set financial conditions for public safety, and the laws in virtually every state make money forfeitable only for failure to appear for court, meaning that there is no legal basis in those states for using money for public safety purposes. In those cases, using money for public safety would be irrational and thus potentially unlawful.

It is critical that judges understand what "tools" they have in the way of non-financial bail conditions to provide reasonable assurance of public safety and court appearance. Judges with few tools, such as the supervision methods and techniques discussed in the ABA's national standards, are at a disadvantage and will often resort to money when it appears that their jurisdiction lacks the sort of infrastructure designed to implement those methods and techniques. But judges should also understand two fundamental points. First, just as we are beginning to see that money at bail may be ineffective at achieving its lawful purpose of deterring flight, non-financial conditions also may or may not be effective to achieve their proper purposes based on the current research

[151] *See* 481 U.S. 730, 754 (1987).

literature. Unless they are effective, there is no advantage to having them as tools, and thus they may also be deemed excessive or at least irrational, thereby triggering due process analysis. Second, across America, we tend to over-supervise defendants, and the research is becoming clear that unnecessary supervision of lower risk defendants can actually harm both those defendants and society at large (also implicating excessiveness and due process).[152] It is thus important for judges and other pretrial practitioners to stay abreast of the pretrial research so that they can determine which tools actually work best to achieve the purposes underlying the bail process.

Balance

Overall, the decision to release or detain a defendant pretrial involves a judicial officer balancing the government's constitutionally valid interests in court appearance and public safety with the defendant's liberty interest through the Due Process Clause. It is this balance that makes bail a quintessentially judicial function, for no other criminal justice actor is required in such a degree to fully incorporate the law and constitutional rights of defendants into his or her bail decisions.[153] Indeed, this balance is often lacking in systemwide attempts to improve the administration of bail, where there is an overabundance of concern for public safety but little attention paid to the rights of defendants.

Step One – Proper Purpose

According to the illustration, the first step toward lawful and effective bail decision making involves judges articulating a proper purpose for detention or the release conditions, and this is likely true whether analyzed under the Eighth Amendment, the Due Process Clause, or even the Equal Protection Clause. In bail, motive matters, and so it makes a difference what Congress or a state legislature intended when it passed any

[152] *See. e.g.,* Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court,* at 6 (U.S. DOJ 2009). Many jurisdictions are learning that an effective (and evidence-based) supervision method for all defendants is simple court date reminders, through phone calls, text messages, or emails. Other jurisdictions are experimenting with motivating defendants by conditioning appearance through the defendant exchanging his or her driver's license for a letter from the court allowing conditional driving privileges during the pretrial phase. There is much research on the former method, *see, e.g., Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court Date Reminders,* 48 Court Rev. 86 (AJA 2013), but very little, if any, research on the latter.

[153] While prosecutors are duty bound to seek justice, which may hint at the same sort of balance, there are significantly different checks on prosecutorial discretion than those applied to judicial decision making to assure adequate consideration of the defendant's liberty interest.

particular bail law,[154] or what a judge intended when he ordered detention or any particular condition of release.[155] Certain state interests are clearly invalid, such as setting bail to punish a defendant.[156] Others are inferentially so, such as setting a financial condition with a purpose to detain the defendant.[157] This makes the existence of a written record of bail hearings indispensable, which is why the federal law requires (and the ABA national standards recommend) judges to provide explicit reasons on the record for detaining any particular defendant.[158]

Step Two – Legal Assessment

The second step toward lawful and effective bail decision making involves further assessing (beyond its lawful purpose) the order of detention or the various conditions of release against the relevant law. This step involves holding them up against both federal and state law, or occasionally against court rules, and it is typically the step in which jurisdictions not faithfully following the "bail/no bail" dichotomy get into trouble. If a person is bailable, and thus presumed to have a right to release, his or her conditions of release will be less likely to foster objection, appeal, remand, or reversal under the law when they actually lead to release. But when judges set unattainable release conditions that cause a bailable defendant to more resemble someone who is legally unbailable under the law, those conditions of release are more likely to run afoul of the law. This happens particularly frequently when judges set secured financial conditions of release, which can trigger due process, excessiveness, and even equal protection analysis when they lead to the detention of bailable defendants.

Steps one and two are somewhat interrelated. For example, if a judge was to set a secured financial condition with a purpose to detain a bailable defendant outside of a lawful process of detention, the improper purpose itself would likely drive analysis for excessiveness or fundamental unfairness. On the other hand, if a judge was to set a secured financial condition to protect public safety (technically a proper purpose even though it might, in fact, lead to detention) in a state that does not allow the forfeiture of money for breaches in public safety (virtually all states), the condition would make no sense and thus might offend legal principles that require rationality as their basis, such

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[154] *See Salerno,* 481 U.S. 739, 746-752 (assessing Congress' intent in determining a facial due process challenge); 752-55 (assessing Congress' intent on in determining facial 8th Amendment challenge).
[155] *See Galen v. County of Los Angeles,* 477 F. 3d 652, 660 (2007).
[156] *See Salerno,* 481 U.S. at 746; *Bell v. Wolfish,* 441 U.S 520, 535 – 537 and n. 16 (1979).
[157] *See* notes 57-60, *supra,* and accompanying text.
[158] *See* 18 U.S.C. § 3142 (i) (1); ABA Standards, *supra* note 6, Std. 10-5.10 (g).

as excessiveness or due process. Moreover, in either case (proper purpose or not), detention caused by money set in a perfunctory bail hearing will invite procedural due process analysis to determine whether that decision sidestepped the sort of due process safeguards attendant to a proper detention scheme, such as the one approved by the Supreme Court in *Salerno*.[159]

Even when detention is unintentional, a relatively low secured money bond can have the effect of detaining a bailable defendant, again implicating excessiveness and due process deprivations. Moreover, when a judge is apprised of the continued detention based on a relatively low monetary amount, that judge's decision not to alter the amount could be seen as *intentional* detention of a bailable defendant. In a well-crafted "bail/no bail" legal scheme, not only does the law reflect the principle that liberty is the norm, it also reflects the courts' and the general public's satisfaction with the ratio of defendants (bailable to unbailable) as reflected in the dichotomy. In the end, most defendants will be bailable and thus released, and some unusually high risk defendants will be deemed unbailable and thus detained.

It is also during this second step that judges should keep in mind the rationality required under traditional analyses for due process, equal protection, and excessive bail. Additionally, judges should be especially mindful of the principle of using "least restrictive" bond conditions, a principle often articulated by the appellate courts as using the "least onerous" means or imposing the "least amount of hardship" on a particular defendant during his or her pretrial release. The phrase "least restrictive conditions" is a term of art, which has a particular meaning in bail.

The ABA Standard recommending release under the least restrictive conditions states as follows:

> This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act and the District of Columbia release and pretrial detention statute, as well as in the laws and court rules of a number of states. The presumption

[159] *See* 481 U.S. at 752 ("Given the legitimate and compelling regulatory purpose of the [Bail Reform] Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment."). As indicated by the quote, *Salerno* involved a facial challenge; an "as applied" challenge to any particular bail decision could theoretically present a stronger case for arguing that the detention or conditions of release were unlawful.

> constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.[160]

This principle is foundational, and is expressly reiterated throughout the Standards when, for example, those Standards recommend citation release versus arrest,[161] and the use of nonfinancial over financial conditions.[162] Moreover, the Standards' overall scheme creating a presumption of release on recognizance,[163] followed by release on non-financial conditions,[164] and finally, release on financial conditions,[165] is directly tied to the premise of release on least restrictive conditions. Indeed, the least restrictive principle transcends the Standards and flows from even more basic understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty.

More specifically, however, the ABA Standard's commentary on financial conditions makes it clear that the Standards consider secured money bonds to be a more restrictive alternative to both unsecured bonds and non-financial conditions: "When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first."[166] Moreover, the Standards state, "Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unsecured bond because such a bond requires no 'up front' costs to the defendant and no costs if the defendant meets appearance requirements."[167] These principles are well founded in logic: setting aside, for now, the argument that money at bail might not be of any use at all, it at least seems reasonable that secured financial conditions (requiring up-front payment) are always more restrictive than unsecured ones, even to the wealthiest defendant. Moreover, in the

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[160] ABA Standards, *supra* note 6, Std. 10-1.2 (commentary) at 39-40 (internal footnotes omitted).
[161] *See id.*, Std. 10-1.3, at 41.
[162] *See id.*, Stds. 10-1.4 (commentary) at 43, 44; 10-5.3 (commentary) at 111-14.
[163] *Id.*, Std. 10-5.1 at 101.
[164] *Id.*, Std. 10-5.2 at 106-107.
[165] *Id.*, Std. 10-5.3 at 110-111.
[166] *Id.*, Std. 10-1.4 (c) (commentary) at 43-44.
[167] *Id.*, Std. 10-5.3 (a) (commentary) at 112.

aggregate, we know that secured financial conditions, as typically the only condition precedent to release, are highly restrictive compared to virtually all non-financial conditions and unsecured financial conditions in that they tend to cause pretrial detention. Like detention itself, any condition causing detention should be considered highly restrictive.[168]

This second step would necessarily require judges to also question the continued use of traditional monetary bail bond schedules, which list amounts of money as presumptive secured financial conditions of release for all persons arrested on any particular charge. Despite whatever good intentions existed for creating them, traditional money bail schedules are the antithesis of an individualized bail setting,[169] unfairly and irrationally separate defendants based on wealth,[170] are typically arbitrary,[171] and displace judicial discretion at bail[172] if not unlawfully delegate judicial authority altogether. Whether judges have helped to create these schedules or have simply had the schedules thrust

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[168] *See* Cohen & Reaves, *supra* note 121, at 3 ("There was a direct relationship between the bail amount and the probability of release . . . The higher the bail amount the lower the probability of pretrial release.").

[169] According to LaFave, et al., the ruling and language of *Stack v. Boyle* "would indicate that use of a bail schedule, wherein amounts are set solely on the basis of the offense charged, violates the Eighth Amendment except when resorted to as a temporary measure pending prompt judicial appearance for a particularized bail setting." Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, *Criminal Procedure* (5th ed., West Pub. Co. 2009) § 12.2 (a), at 681. Indeed, some high courts have invalidated money bail schedules because they conflict with individualized bail schemes. *See, e.g., Clark v. Hall,* 53 P.3d 416 (Okla. Crim. App. 2002) ("[The provision] sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances. We find the statute is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination to bail.").

[170] The relevant ABA Standard "flatly rejects the practice of setting bail amounts according to a fixed schedule based on charge. . . . The practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount required by the bail schedule. They also enable the unsupervised release of more affluent defendants who may present real risks of flight or dangerousness, who may be able to post the required amount." ABA Standards, *supra* note 6, Std. 10-5.3(f) (commentary) at 113.

[171] The use of round numbers alone prompted bail researcher Arthur Beeley to call using standard amounts for specific offenses arbitrary as early as 1927. *See* Arthur L. Beeley, *The Bail System in Chicago*, at 31-32 (Univ. of Chicago Press, 1927). Further illustrating the arbitrary nature of the numbers themselves, jurisdictions have made both blanket increases and decreases to their schedules. *See Fewer to Get Out of Jail Cheap,* Colorado Springs Gazette (May 27, 2007) (reporting that the 4th Judicial District was raising the bond amounts for all crimes so that they would be more aligned with those in other judicial districts throughout the state); *see also Supreme Court Lowers Amount Iowans Need to Get Out of Jail,* Des Moines Register (August 16, 2007) (reporting blanket bond reductions for non-violent felonies and misdemeanors with no explanation for the reductions); *see also Lowered Bail Bonds Make System More Equitable,* Quad City Times (Aug. 31, 2007).

[172] *See* Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?* 26 Crim. Just. (ABA 2011).

upon them, all judges should find ways around them while working toward their ultimate revision or elimination.

Finally, this second step includes analysis to assure the efficacy of any particular condition, financial or non-financial, because conditioning release upon something that does not work to achieve its own purpose would be irrational and thus likely unlawful. Setting a seemingly rational condition of GPS monitoring, for example, would be no different than requiring a defendant to wear a particular color of shoes if it is ultimately shown that GPS monitoring does not further the purposes underlying the bail process.[173] Likewise, but perhaps less intuitively, if a secured financial condition does not work to achieve its lawful purpose, or if it works no better than less restrictive alternatives, then the condition should be assessed under any variety of legal principles that guide judges toward non-arbitrary and rational decision making. Finally, and most importantly, if a condition actually works to further an outcome that is the *opposite* of its intended outcome, it should be avoided altogether. This can be the case with secured financial conditions, which, in causing even short-term detention, can actually increase the risk to public safety and failure to appear for court.

Step Three – The Release and Detention Result

The third and final step toward lawful and effective bail decision making involves assessing the decision for its contribution to, or deviation from, a legal scheme in which "liberty is the norm" and detention is the "carefully limited exception" pursuant to *Salerno.* If judges, looking at the jail data, see that high numbers of defendants are detained pretrial for even short periods of time, then those judges must purposefully question what is hindering pretrial liberty. The requirement that detention be "carefully limited" is especially important as it guards against judicial decision making that is arbitrary, irrational, or random. It is at this point that money at bail becomes especially acute, for there is little that is "careful" about a decision that is unintended or that may or may not be effectuated by others depending on their access to money or perhaps their desire to yield an acceptable profit.

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[173] As noted by researchers Marie VanNostrand, Kenneth J. Rose, and Kimberly Weibrecht, while studies have not shown electronic monitoring, including GPS monitoring, to increase court appearance or public safety rates, the studies so far indicate that electronic monitoring might nonetheless increase release rates while maintaining the same court appearance and public safety rates. *See State of the Science, supra* note 129, at 27.

Conclusion

The judicial decision to release or detain a defendant pretrial is the core of the bail process, often the focal point of the defendant's first appearance, and the moment at which the law and research come together for practical implementation with critically important short- and long-term ramifications to both defendants and the public. The decision is inherently a judicial function because judges are in the best position (and with the proper appellate checks) to simultaneously balance the defendant's liberty interest with the broader societal interests of public safety and court appearance.

The history of bail, the law intertwined with that history, the pretrial research, the national pretrial best-practice standards, and the model federal and District of Columbia statutes all point to a judicial decision that is an in-or-out decision, based on any particular jurisdiction's "bail/no bail" or "release/detain" dichotomy. Moreover, they point to judicial decision making that is immediately effectuated, with nothing unnecessarily hindering or delaying either the release or detention of any particular defendant. Finally, they point to a decision that is not left to outside persons to effectuate, despite its potential for immediacy. The history of bail illustrates that when a decision to release is left to others, typically because of the existence of a secured financial condition, that decision is either delayed or thwarted altogether in a significant number of cases for reasons not necessarily shared by the criminal justice system or society at large.

While many of the historical, legal, and research-related concepts underlying the decision might seem complicated, the decision-making process itself involves simply trying to determine which defendants can be safely managed outside of a secure facility and which cannot. Nevertheless, it involves judges fully understanding the history and law so that they are comfortable embracing the risk inherent in the decision. Moreover, it involves judges fully understanding the research so that they are comfortable with how and when to mitigate that risk through lawful and effective conditions of release by following a few relatively simple steps designed to faithfully pursue the correct release or detention path based on defendant bailability. Finally, the decision-making process involves radically re-thinking about how to use money at bail – possibly to the extent of using only unsecured bonds whenever money is deemed to be absolutely necessary. Unsecured financial conditions were used for centuries in England and in America up until the 1800s, and so they should never be considered as "alternatives" to secured financial conditions. Historically, unsecured financial conditions came first; similarly, they should come to mind first whenever a judge is considering the need to use money at bail.

Secured financial conditions, on the other hand, have shown in their relatively short history to undermine the entire bail decision-making process. Put simply, secured financial conditions at bail skew judges' understanding of risk, delay and sometimes prohibit the release of bailable defendants, do not always prohibit the release of defendants who should rightfully be detained pretrial, and often are ineffective at achieving the very purposes for which they are ordered. Finally, if allowed the status of criminal justice stakeholder by allowing it to have influence over the case, secured money fails because it cares nothing for the system's vision or goals and is quick to hand over its stakeholder status to anyone willing to pay the price.

The best pretrial infrastructure, the best overall understanding of pretrial risk, and even the best bail laws can be rendered meaningless without effective judicial decision making at the criminal justice system's pretrial release and detention decision point. Our society has given judges the extraordinary role as arbiters of liberty and justice, but those judges have only recently been given the tools they need to adequately fulfill that role at bail. To take full advantage of our current knowledge of legal and evidence-based pretrial practices, we must now work together to help judges fully understand risk, mitigation of risk through lawful and effective conditions of release, and the appropriateness of money at bail, and to help judges to reclaim their roles as sole decision makers responsible for the pretrial release or detention of any particular defendant. Bail belongs to judges, and we must all do our part to help judges take back their responsibility for it. American pretrial justice hangs in the balance.

72 S.Ct. 525
Supreme Court of the United States

CARLSON et al.
v.
LANDON, District Director of Immigration & Naturalization, United States Department of Justice.
BUTTERFIELD, Director of Immigration & Naturalization Service, Detroit, Mich.
v.
ZYDOK.

Nos. 35, 136.
|
Argued Nov. 26, 1951.
|
Decided March 10, 1952.
|
Rehearing Denied June 9, 1952.
|
See 343 U.S. 988, 72 S.Ct. 1069.

Synopsis

Habeas corpus proceedings by four aliens against Herman R. Landon, District Director of Immigration and Naturalization, United States Department of Justice, and a habeas corpus proceeding by another alien against James W. Butterfield, Director of the Immigration and Naturalization Service, Detroit, involving question of detention of aliens without bail in deportation proceedings. To review a judgment of the Court of Appeals in the first case, 187 F.2d 991, Stephens, Circuit Judge, affirming an order of the District Court, Ben Harrison, J., denying the writ and to review a judgment of the Court of Appeals in the second case, 187 F.2d 802, Hicks, Chief Judge, reversing an order of the district court, 94 F.Supp. 338, Thomas P. Thornton, J., which denied the writ, the petitioners in the first case and defendant in the second case brought certiorari. The Supreme Court, Mr. Justice Reed, held that there was no abuse of discretion in denial of bail, that placing of discretion as to grant of bail in Attorney General was not an unconstitutional delegation of legislative authority, that denial of bail did not violate constitutional prohibition against excessive bail and that, on rearrest of an alien who had been released on bail, a new warrant should be obtained.

Judgment in the first case reaffirmed and in the second case vacated and cause remanded with directions.

Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas, and Mr. Justice Burton dissented.

Attorneys and Law Firms

****527 *525** No. 35:

Mr. ***526** John T. McTernan, Los Angeles, Cal., for petitioners.

Mr. John F. Davis, Washington, D.C., for respondent.

No. 136:

Mr. John F. Davis, Washington, D.C., for petitioner.

Mrs. Carol King, New York City, for respondent.

Opinion

Mr. Justice REED delivered the opinion of the Court.

These cases present a narrow question with several related issues. May the Attorney General, as the executive head of the Immigration and Naturalization Service,[1] after taking into custody active alien communists on warrants,[2] charging either membership in a group that advocates ***527** the overthrow by force of this Government[3] or inclusion in any prohibited classes of aliens,[4] continue them in custody without bail, at ****528** his discretion pending determination as to their deportability, under s 23 of the ***528** Internal Security Act?[5] Differing views of the Courts of Appeals led us to grant certiorari. 342 U.S. 807, 72 S.Ct. 26; 342 U.S. 810, 72 S.Ct. 42.

1 Reorganization Plan No. V, 54 Stat. 1238, 5 U.S.C.A. s 133t note.

2 Sec. 19 of an Act to regulate the immigration of aliens to, and the residence of aliens in, the United States, 39 Stat. 889, February 5, 1917, as amended, 8 U.S.C. s 155, 8 U.S.C.A. s 155: '* * * any alien who shall have entered or who shall be found in the United States in violation of this chapter, or in violation of any other law of the United States; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * *'

[3] Act of October 16, 1918, 40 Stat. 1012, as amended, 8 U.S.C., 1946 ed., s 137, 8 U.S.C.A. s 137, see note 15 infra:
'(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law * * *.'

[4] Internal Security Act of 1950, September 23, 1950, s 22, subsection 4(a), amending the Act of October 16, 1918, see 8 U.S.C. s 137: 'Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1(1) or section 1(3) of this Act or * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.' 8 U.S.C.A. s 137—3.
Id., s 22, 8 U.S.C.A. s 137:
'That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
'(1) Aliens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States;
'(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
'(A) Aliens who are anarchists;
'(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;
'(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;
'(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; * * *.
'(3) Aliens with respect to whom there is reason to believe that such aliens would, after entry, be likely to (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security; (B) engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unconstitutional means; or (C) organize, join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950.'

[5] Internal Security Act of 1950, s 23, 8 U.S.C.A. s 156: '* * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. * * *'

I. Facts.—The four petitioners in case No. 35 were arrested under warrants, issued after the enactment of the Internal Security Act of 1950, charging each with being an alien who was a member of the Communist Party of the United States.[6] The warrants directed that they be held in custody,[7] pending determination ***529** of deportability.[8] Petitions for habeas corpus were promptly filed alleging that the detention without bond was in violation of the Due Process Clause of the Fifth Amendment[9] and the Eighth Amendment to the Constitution of the United States, and that s 20 of the Immigration Act, as amended, was also unconstitutional. See note 5, supra. The allegation appears below.[10]

[6] See s 22(1), Internal Security Act, note 4, supra.

[7] See note 5, supra.

[8] Before the passage of the Internal Security Act the four petitioners had been arrested and admitted to bail on warrants charging membership in groups advocating the overthrow of the Government by force and violence. In our view of the issues now here, these former happenings are immaterial to our consideration of this writ of certiorari.

[9] 'Excessive bail shall not be required, nor excessive fines

imposed, nor cruel and unusual punishments inflicted.'

10 'That section 20 of the Immigration Act of February 5, 1917, as amended by section 23 of Public Law 831, 81st Congress (8 U.S.C.A. s 156) (commonly known as Subversive Activities Control Act of 1950) and section 1 of the Act of October 16, 1918 (8 U.S.C. 137 (8 U.S.C.A. s 137)), as amended, are, and each of them is, unconstitutional and void in that they deprive persons, including petitioner, of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States in that they abridge the freedom of persons, including petitioner, of speech, the press and assembly and the right to petition the government for redress of grievances, in violation of the First Amendment to the Constitution of the United States, and in that they purport to authorize indefinite detention of persons, including petitioner, without bond prior to final determination of deportability.'

Respondent filed returns defending his orders of detention on the ground that there was reasonable cause to believe that petitioners' ****529** release would be prejudicial to the public interest and would endanger the welfare and safety of the United States. These returns were countered by petitioners with allegations of their many years' residence spent in this country without giving basis for fear of action by them inimical to the public welfare during the pendency of their deportation proceedings, ***530** their integration into community life through marriage and family connections, and their meticulous adherence to the terms of previous bail, allowed under a former warrant charging deportability. See note 8, supra. On consideration of these undenied allegations, the trial court determined that the Director had not been shown to have abused his discretion.[11] This order was reversed on the ground that the Director 'must state some fact upon which a reasonable person could logically conclude that the denial of bail is required to protect the country or to secure the alleged alien's presence for deportation should an order to that effect be the result of the hearing.'[12]

11 Carlson v. Landon, 9 Cir., 186 F.2d 183, 186; Stevenson v. Landon, 9 Cir., 186 F.2d 190.

12 Id., 186 F.2d 189.

On rehearing, the Director made allegation, supported by affidavits, that the Service's dossier of each petitioner contained evidence indicating to him that each was at the time of arrest a member of the Communist Party of the United States and had since 1930 participated or was then actively participating in the Party's indoctrination of others to the prejudice of the public interest. There was no denial of these allegations by any of the petitioners, except Hyun, or any assertion that any of them had completely severed all Communist affiliations or connections.[13] As to Hyun the denial was formal and did not include any affidavit denying the facts stated in the Director's affidavit. As the allegations are set out by the Court of Appeals in the carefully detailed opinion of Circuit Judge Stephens, we refrain from any further restatement ***531** here.[14] The Court of Appeals affirmed the District Court's determination that there was substantial evidence to support the discretion exercised in denying bail.

13 28 U.S.C. s 2248, 28 U.S.C.A. s 2248:
'The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.'

14 Carlson v. Landon, 9 Cir., 187 F.2d 991.

Respondent Zydok, in case No. 136, was arrested in August 1949 under a recent warrant charging that he was subject to deportation as an alien with membership in an organization advocating the violent overthrow of the Government. Act of October 16, 1918, as amended, 8 U.S.C. (1946 ed.) s 137, 8 U.S.C.A. s 137. At that time he was released on $2,000 bail. Later a deportation hearing was held by the Immigration and Naturalization Service but this Court's decision in Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616, necessitated a second deportation hearing.

After the effective date, September 23, 1950, of the Internal Security Act of 1950, 64 Stat. 987, respondent was again taken into custody by petitioner on the 1949 warrant, pursuant to radiogram direction from the Acting Commissioner of Immigration and Naturalization referring to s 20 of the Immigration Act of 1917, as amended by s 23 of the Internal Security Act, 8 U.S.C.A. s 156. The respondent was held without bail by petitioner under an order from the Acting Commissioner of Immigration. The rearrest was based on s 22 of the Internal Security Act of 1950 which provides ****530** for the deportation of aliens who are members of or affiliated with the Communist Party. 8 U.S.C. (Supp. IV) s 137, 8 U.S.C.A. s 137.
Thereupon respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern

District of Michigan, challenging the validity of his detention without bail. The District Court found that petitioner was an alien and had been and was on arrest a member of the Communist Party. The court determined ***532** that there had been no abuse of administrative discretion in refusing bail and denied the petition for habeas corpus, 94 F.Supp. 338.[15]

15 Quite properly, we think, no question is raised as to the applicability of the Internal Security Act amendments relating to membership in the Communist Party and allowance of bail, notes 4 and 5, supra, to detention under a warrant based on 8 U.S.C., 1946 ed., s 137(c), 8 U.S.C.A. s 137(c), note 3, supra. Cf. Internal Security Act, 64 Stat. 987, Title I, s 2, 50 U.S.C.A. s 781.

The Court of Appeals for the Sixth Circuit, 187 F.2d 802, reversed the District Court, holding that in determining denial of bail the Attorney General could not rest on membership alone in the Communist Party but was under the duty to consider also the likelihood that the alien would appear when ordered to do so under the circumstances as developed in the habeas corpus hearing. The court thought the failure of the Attorney General to allow bail was an abuse of discretion.

That court agreed that the District Court was correct in finding that Zydok was a member of the Communist Party and had been in 1949 the financial secretary of its Hamtramck Division. The respondent's testimony justifies the District Court's finding set out in the margin.[16] The record shows other information in the files of the Attorney General, such as attendance at closed meetings of the Party and the Michigan State Convention. The opinion succinctly sets out the facts concerning respondent's integration into American life. We adopt that statement.[17] It was said: 'Discretion does not mean decision upon one particular fact or set of facts. It means rather a just ***533** and proper decision in view of all the attending circumstances. The Styria v. Morgan, 186 U.S. 1, 9, 22 S.Ct. 731 (734), 46 L.Ed. 1027. There are many circumstances which involve decision.' 187 F.2d 802, 803.

16 'That the petitioner, while under cross-examination by the Chief Assistant United States Attorney, was a consistently evasive witness and his evasive demeanor in testifying in relation to his communistic activities convinces this Court that he is knowingly and wilfully participating in the Communist movement.'

17 187 F.2d at page 803:
'Appellant was seventeen years of age when he arrived in this country from Poland in 1913. Since then he has lived continuously in the State of Michigan. He has been a waiter in an English speaking restaurant in Hamtramck, Mich., for seventeen years and for a great part of that time he was head waiter. He owns his own home in Detroit and has a family consisting of his wife, two sons, a daughter, and five grandchildren. Both sons served in the armed services of the United States in World War II. His children and grandchildren were born in this country and his daughter married here. During World War II while appellant was head waiter in the restaurant he sold about $50,000.00 worth of U.S. War Bonds and during that period he donated blood on seven occasions to the Red Cross for the United States Army.
'Before his second arrest and while he was at large on bail he reported regularly to the Department of Immigration and Naturalization Service. The record fails to disclose that he has violated any law or that he is engaged or is likely to engage in, any subversive activities.'

The Court of Appeals concluded: 'We think that a fair consideration of the factors above set out in their aggregate require that appellant should have been granted bail in some reasonable amount. This view is more nearly in accordance with the spirit of our institutions as it relates even to those who seek protection from the laws which they incongruously seek to destroy. See Carlson v. Landon, Dist. Director, 9 Cir., 186 F.2d 183; ****531** United States ex rel. Potash v. Dist. Director, 2 Cir., 169 F.2d 747, 752.' 187 F.2d 804.

II. The Issues.—Petitioners in No. 35, the Carlson case, and respondent in No. 136, the Zydok case, seek respectively reversal or affirmance principally on the same grounds. It is urged that the denial of bail to each was arbitrary and capricious, a violation of the Fifth Amendment; ***534** that where there is no evidence to justify a fear of unavailability for the hearings or for the carrying out of a possible judgment of deportation, denial of bail under the circumstances of these cases is an abuse of discretion and violates a claimed right to reasonable bail secured by the Eighth Amendment to the Constitution. Zydok urges, also, that there was an abuse of discretion in rearresting him, when there was no change of circumstances, after his previous release under bond on the same warrant. There are other minor contentions as to irregularities in the proceedings that appear to us immaterial to our consideration of these cases.

[1] [2] The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no reexamination. When legally admitted, they have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign

nationals they are entitled in their persons and effects to the protection of our laws. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.[18]

18 Nishimura Ekiu v. United States, 142 U.S. 651, 659, 12 S.Ct. 336, 338, 35 L.Ed. 1146; Fong Yue Ting v. United States, 149 U.S. 698, 707, 13 S.Ct. 1016, 1019, 37 L.Ed. 905; Bugajewitz v. Adams, 228 U.S. 585, 33 S.Ct. 607, 57 L.Ed. 978; Ng Fung Ho v. White, 259 U.S. 276, 280, 42 S.Ct. 492, 493, 66 L.Ed. 938; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255; Eichenlaub v. Shaughnessy, 338 U.S. 521, 528, 70 S.Ct. 329, 332, 94 L.Ed. 307; III Hackworth's Digest of International Law 725 (1942).

[3] [4] Changes in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation.[19] The ***535** passage of the Internal Security Act of 1950 marked such a change of attitude toward alien members of the Communist Party of the United States. Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the Government of the United States, but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation.[20] The reasons for the exercise of power are summarized in Title I of the Internal Security Act. It is sufficient here to print s 2(15), 50 U.S.C.A. s 781(15).[21] We have ****532** no doubt that the doctrines and practices of ***536** Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien communists under its power to regulate the exclusion, admission and expulsion of aliens.[22] Congress had before it evidence of resident aliens' leadership in communist domestic activities sufficient to furnish reasonable ground for action against alien resident Communists. The bar against the admission of Communists cannot be differentiated as a matter of power from that against anarchists upheld unanimously half a century ago in the exclusion of Turner.[23] Since '(i)t is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful,'[24] the fact that petitioners, and respondent Zydok, were made deportable after entry is immaterial. They are deported for what they are now, not for what they were.[25] Otherwise, when an alien once legally became a denizen of this country he could not be deported ***537** for any reason of which he had not been forewarned at the time of entry. Mankind is not vouchsafed sufficient foresight to justify requiring a country to permit its continuous occupation in peace or war by legally admitted aliens, even though they never violate the laws in effect at their entry. The protection of citizenship is open to those who qualify for its privileges. The lack of a clause in the Constitution specifically empowering such action has never been held to render Congress impotent to deal as a sovereign with resident aliens.[26]

19 For example compare Act of December 17, 1943, 57 Stat. 600, with Act of May 6, 1882, 22 Stat. 58.

20 See note 4, supra. The extension of the proscription of residence to aliens believing in the overthrow of Government by force or violence has been progressive, as can be readily observed by following the successive enactments of laws to regulate the residence of aliens since the Act of February 5, 1917, 39 Stat. 874. See 8 U.S.C. ss 137 and 155, 8 U.S.C.A. ss 137, 155.

21 '(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.'

22 I Trotsky, History of the Russian Revolution, 106, 120, 141, 144, 151; Lenin, Collected Works (1930), Vol. XVIII, pp. 279—280; Lenin, The State and Revolution, August, 1917, Foreign Languages Publishing House, Moscow (1949), 28, 30, 33. Translations furnished

indicate the same attitude on the part of Stalin. Collected Works, Vol. I, pp. 131—137, 185—205, 241—246; Vol. III, pp. 367—370. And see Leites, The Operational Code of the Politburo (1950), c. xiii, 'Violence.' See also Immigration and Naturalization Systems of the United States, S.Rep.No.1515, 81st Cong., 2d Sess., Senate Committee on the Judiciary, Part 3, Subversives, c. I, B, Alien Control; c. II, C, Deportation of Subversive Aliens.

23 Turner v. Williams, 194 U.S. 279, 24 S.Ct. 719, 48 L.Ed. 979; Schneiderman v. United States, 320 U.S. 118, Mr. Justice Douglas concurring at page 165, 63 S.Ct. 1333, 1355, 87 L.Ed. 1796.

24 Bugajewitz v. Adams, 228 U.S. 585, 591, 33 S.Ct. 607, 608, 57 L.Ed. 978; Ng Fung Ho v. White, 259 U.S. 276, 280, 42 S.Ct. 492, 493, 66 L.Ed. 938.

25 Mahler v. Eby, 264 U.S. 32, 39, 44 S.Ct. 283, 286, 68 L.Ed. 549: '(Congress) was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society.' See also Eichenlaub v. Shaughnessy, 338 U.S. 521, 530, 70 S.Ct. 329, 333, 94 L.Ed. 307. Compare Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512.

26 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255.

[5] III. Constitutionality.—A. Arbitrary, capricious, abuse of discretion.—The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial **533 review of their action as congress may see fit to authorize or permit.' This power is, of course, subject to judicial intervention under the 'paramount law of the constitution.'[27]

27 Fong Yue Ting v. United States, 149 U.S. 698, 713—715, 728, 13 S.Ct. 1016, 1022, 1027, 37 L.Ed. 905; Nishimura Ekiu v. United States, 142 U.S. 651, 659, 12 S.Ct. 336, 338, 35 L.Ed. 1146; The Japanese Immigrant Case, 189 U.S. 86, 97, 23 S.Ct. 611, 613, 47 L.Ed. 721; Zakonaite v. Wolf, 226 U.S. 272, 33 S.Ct. 31, 57 L.Ed. 218; Wong Wing v. United States, 163 U.S. 228, 231, 16 S.Ct. 977, 978, 41 L.Ed. 140.
A claim of citizenship has protection. Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938.

[6] [7] Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.[28] Since deportation is a particularly drastic remedy where aliens have *538 become absorbed into our community life,[29] congress has been careful to provide for full hearing by the Immigration and Naturalization Service before deportation. Such legislative provision requires that those charged with that responsibility exercise it in a manner consistent with due process.[30] Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings. Of course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail, as set out in note 5, supra.[31]

28 Turner v. Williams, 194 U.S. 279, 290—291, 24 S.Ct. 719, 722, 48 L.Ed. 979; Zakonaite v. Wolf, 226 U.S. 272, 275, 33 S.Ct. 31, 32, 57 L.Ed. 218; Bugajewitz v. Adams, 228 U.S. 585, 591, 33 S.Ct. 607, 608, 57 L.Ed. 978; Mahler v. Eby, 264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549.

29 Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433; Jordan v. De George, 341 U.S. 223, 231, 71 S.Ct. 703, 707, 95 L.Ed. 886.

30 The Japanese Immigrant Case, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721; Vajtauer v. Commissioner, 273 U.S. 103, 47 S.Ct. 302, 71 L.Ed. 560.

31 The former provision read as follows: '* * * Pending the final disposal of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than $500 with security approved by the Attorney General, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States.' 8 U.S.C., 1946 ed., s 156, 8 U.S.C.A. s 156.
On December 7, 1951, at the request of this Court, the Government furnished us a list of the Bail or Detention

> Status, as of the period just prior to December 7, of deportation cases, involving subversive charges, pending on the date of the enactment of the Internal Security Act, September 23, 1950. The list indicates that the modest bonds or personal recognizances of the far larger part of the aliens remained unchanged after the bond amendment to the Immigration Act. Of those detained without bond on order of the Service, the courts have released all but a few. It is quite clear from the list that detention without bond has been the exception.

[8] The change in language seems to have originated in H.R. 10, 81st Cong., 1st Sess., introduced by Representative Sam Hobbs of Alabama on January 3, 1949. It was ***539** intended to clarify the procedure in dealing with deportees and to 'expressly authorize the Attorney General, in his discretion, to hold arrested aliens in custody.'[32] The need for clarification arose from varying interpretations of the authority to grant bail under the former bail provision. Note 31, supra. In Prentis v. Manoogian, 16 F.2d 422, 424, the Court of Appeals for the Sixth Circuit had held that by the earlier provision 'Congress intended to grant to the alien a right, and that its failure to follow with some such phrase as 'at the discretion of the commissioner' vests the discretion to avail himself of the opportunity afforded in the alien, and not the ****534** discretion to allow bail in the commissioner or director.' On the other hand in United States ex rel. Zapp v. District Director, 120 F.2d 762, the Court of Appeals for the Second Circuit construed the provision to the contrary. It said: 'The natural interpretation of the language used, that the alien 'may be released under a bond,' would indicate that the release is discretionary with the Attorney General; and that appears to be borne out by other provisions of this section, as well as other sections of the immigration laws, where the choice of words appears to have significance.' 120 F.2d at page 765.

32 H.R.Rep.No.1192, 81st Cong., 1st Sess., p. 6; S.Rep.No.2239, 81st Cong., 2d Sess., p. 5.

In the later case of United States ex rel. Potash v. District Director, 169 F.2d 747, the same court applied its Zapp opinion to explain that the Service's discretion as to bail was not untrammeled but subject to judicial review.[33] It ***540** was in the light of these cases that Congress inserted in the bail provisions the phrase 'in the discretion of the Attorney General,' the lack of which very phrase the Manoogian case held made bail a right of the detained alien. The present statute does not grant bail as a matter of right.

33 169 F.2d at page 751: 'The discretion of the Attorney General which we held to exist in the Zapp case is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail. However, in any consideration of his denial of bail it should always be borne in mind that the court's opinion as to whether the alien should be admitted to bail can only override that of the Attorney General where the alien makes a clear and convincing showing that the decision against him was without a reasonable foundation.' See U.S. ex rel. Doyle v. District Director, 2 Cir., 169 F.2d 753; U.S. ex rel. Pirinsky v. Shaughnessy, 2 Cir., 177 F.2d 708; U.S. ex rel. De Geronimi v. Shaughnessy, 2 Cir., 187 F.2d 896. (This is the only case from the Second Circuit Court of Appeals since the Internal Security Act. It leaves open the question of the reviewability of the Attorney General's action under that Act.)

[9] The Government does not urge that the Attorney General's discretion is not subject to any judicial review, but merely that his discretion can be overturned only on a showing of clear abuse.[34] We proceed on the basis suggested by the Government. It is first to be observed that the language of the reports is emphatic in explaining Congress' intention to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse. We think the discretion reposed in the Attorney General is at least as great as that found by the Second Circuit in the Potash case, supra, to be in him under the former bail provision. It can only be ***541** overridden where it is clearly shown that it 'was without a reasonable foundation.'

34 The proposed bills at one time contained a provision: '(f) No alien detained under any provision of law relating to the exclusion or expulsion of aliens shall, prior to an unreviewable order discharging him from custody, be released by any court, on bond or otherwise, except pursuant to the order of a Federal court composed of three judges.' S.Rep.No.2239, 81st Cong., 2d Sess., p. 3. This was introduced to allow for possible release from custody pending deportation hearings. Id., at p. 9. The clause did not survive.

[10] [11] The four petitioners in the Carlson case were active in Communist work. In the Zydok case the only evidence is membership in the Party, attendance at closed sessions and the holding of the office of financial secretary of its Hamtramck Division. This evidence goes beyond

unexplained membership and shows a degree, minor perhaps in Zydok's case, of participation in Communist activities. As the purpose of the Internal Security Act to deport all alien Communists as a menace to the security of the United States is established by the Internal Security Act itself, Title I, s 2, we conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention to all these parties without bail as a ****535** menace to the public interest. As all alien Communists are deportable, like Anarchists, because of Congress' understanding of their attitude toward the use of force and violence in such a constitutional democracy as ours to accomplish their political aims, evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention. It cannot be expected that the Government should be required in addition to show specific acts of sabotage or incitement to subversive action. Such an exercise of discretion is well within that heretofore approved in Knauff v. Shaughnessy, 338 U.S. 537, 541, 70 S.Ct. 309, 311, 94 L.Ed. 317.[35] There is no ***542** evidence or contention that all persons arrested as deportable under s 22 of the Internal Security Act, note 4, supra, for Communist membership are denied bail. In fact, a report filed with this Court by the Department of Justice in this case at our request shows allowance of bail in the large majority of cases. The refusal of bail in these cases is not arbitrary or capricious or an abuse of power. There is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.

35 Even though we also take into consideration the factor of probable availability for trial, which we do not think is of great significance in cases involving security from communist activities of alien communists, the past record of these aliens is far from decisive against the Attorney General's action. The Internal Security Act made membership sufficient for deportation and set up a procedure that could be carried out. s 22(2)(C), note 4, supra, and s 23. Deportation became more likely for alien communists by these amendments.

[12] [13] B. Delegation of Legislative Power.—This leaves for consideration the constitutionality of this delegation of authority. We consider first the objection to the alleged unbridled delegation of legislative power in that the Attorney General is left without standards to determine when to admit to bail and when to detain. It is familiar law that in such an examination the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections. Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose.[36] Congress need not make specific standards for each subsidiary executive action in carrying out a policy.[37] The bail provision applies to many ***543** classes ****536** of deportable aliens other than those named in the classes listed in s 22 of the Internal Security Act. See note 4, supra.[38] A wide range of discretion in the Attorney General as to bail is required to meet the varying situations arising from the many aliens in this country.[39]

36 Buttfield v. Stranahan, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525; Union Bridge Co. v. United States, 204 U.S. 364, 386, 27 S.Ct. 367, 374, 51 L.Ed. 523; United States v. Grimaud, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563; Panama Refining Co. v. Ryan, 293 U.S. 388, 421, 55 S.Ct. 241, 248, 79 L.Ed. 446: 'The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.'

37 Wayman v. Southard, 10 Wheat. 1, 43—48, 6 L.Ed. 253; St. Louis, I.M. & S.R. Co. v. Taylor, 210 U.S. 281, 286, 28 S.Ct. 616, 617, 52 L.Ed. 1061; Intermountain Rate Cases, 234 U.S. 476, 486—489, 34 S.Ct. 986, 991—992, 58 L.Ed. 408; Fahey v. Mallonee, 332 U.S. 245, 249, 67 S.Ct. 1552, 1553, 91 L.Ed. 2030. See Yakus v. United States, 321 U.S. 414, 424—425, 64 S.Ct. 660, 667, 88 L.Ed. 834: 'The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct * * *. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is not objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.'

38 Any alien becoming a public charge within five years of entry may be subject to deportation. Likewise any alien sentenced more than once for any crime involving moral turpitude, and certain illegal entrants. See 8 U.S.C. s 155, 8 U.S.C.A. s 155.

39 Approximately 85,000,000 people citizens and aliens, are said to have crossed our borders in the 1949 fiscal year. Some many times. , five million aliens are reported to have registered under the Alien Registration Act of 1940, 54 Stat. 670. S.Rep.No.1515, pp. 630—631, supra, n. 22.

[14] [15] [16] [17] The policy and standards as to what aliens are subject to deportation are, in general, clear and definite. 8 U.S.C. ss 137 and 155, 8 U.S.C.A. ss 137, 155. Specifically when dealing with alien Communists, as in these cases, the legislative standard for deportation is definite. See notes 3 and 4, supra. In carrying out that policy the Attorney General is not left with untrammeled discretion as to bail. Courts review his determination. Hearings are had, and he must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity. The legislative judgment of evils calling for the 1950 ***544** amendments to deportation legislation is set out in the introductory sections of the Subversive Activities Control Act.[40] So far as pertinent to these proceedings, the new legislation was designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of certain noncitizens, including members of the Communist Party. When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained. Compare Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834, and Bowles v. Willingham, 321 U.S. 503, 515, 64 S.Ct. 641, 647, 88 L.Ed. 892. This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards. The authority to detain without bail is to be exercised within the framework of the Subversive Activities Control Act to guard against Communist activities pending deportation hearings. Cf. Mahler v. Eby, 264 U.S. 32, 40, 44 S.Ct. 283, 286, 68 L.Ed. 549. We do not see that such discretion violates the Due Process Clause of the Fifth Amendment.

40 See for example s 2(15), quoted above at note 21.

[18] C. Violation of Eighth Amendment.—The contention is also advanced that the Eighth Amendment to the Constitution, note 9, supra, compels the allowance of bail in a reasonable amount. We have in the preceding sections of this opinion set out why this refusal of bail is not an abuse of power, arbitrary or capricious, and why the delegation of discretion to the Attorney General is not unconstitutional. Here we meet the argument that the Constitution requires by the Eighth Amendment, note 9, supra, the same reasonable bail for alien Communists under deportation charges as it accords citizens charged with bailable ***545** criminal offenses. Obviously the cases cited by the applicants for habeas corpus fail flatly to support this argument.[41] We have found none that do.

41 Attention is called to United States ex rel. Potash v. District Director, 2 Cir., 169 F.2d 747, 752: 'If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness we have set forth regarding the exercise of discretion by the Attorney General are observed.'
United States ex rel. Klig v. Shaughnessy, D.C., 94 F.Supp. 157, 160: 'It is not unappropriate to refer here to the Eighth Amendment to the Constitution of the United States, one of that series of amendments collectively known as the Bill of Rights, which prohibits the imposition of excessive bail. Certainly, the principle inherent in that amendment applies to deportation proceedings, whether or not such proceedings technically fall within its scope. That principle cannot be reconciled with the government's denial of bail to these relators under the circumstances here set forth.'

The bail clause was lifted with slight changes from the English Bill of Rights ****537** Act.[42] In England that clause has never been thought to accord a right to bail in all cases,[43] but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.[44] The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death.[45] Indeed, ***546** the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.

42 1 Wm. & Mary Sess. 2, c. II, s I(10).

43 Petersdorff, on Bail, 483 et seq.

44 I Annals of Congress 753.

45 ,1 Stat. 91, s 33; Federal Rules of Criminal Procedure, 46(a), 18 U.S.C.A.
Similarly, on appeal from a conviction by the trial court, a defendant is not entitled to bail if he does not present a substantial question. Fed.Rules Crim.Proc., 46(a)(2), 18 U.S.C.A.; Bridges v. United States, 9 Cir., 184 F.2d 881, 884; Williamson v. United States, 2 Cir., 184 F.2d 280, 281; Baker v. United States, 8 Cir., 139 F.2d 721.
In England, there was a series of crimes and situations where the arrested person could 'have no other sureties but the four walls of the prison.' Blackstone's Commentaries, Book IV, 298.

It should be noted that the problem of habeas corpus after unusual delay in deportation hearings is not involved in this case. Cf. United States ex rel. Potash v. District Director, 2 Cir., 169 F.2d 747, 751.

[19] [20] IV. Rearrest.—Finally, respondent Zydok argues that his rearrest on the outstanding warrant, after he had once been released on bai, was improper. The inquiry on habeas corpus is limited to the propriety of Zydok's present detention. McNally v. Hill, 293 U.S. 131, 136, 55 S.Ct. 24, 26, 79 L.Ed. 238. While the Attorney General has made a satisfactory showing that he has good cause for detaining Zydok without bail, no order based on a new warrant has been entered.[46] Zydok did not allow the proceedings to run along but objected promptly by habeas corpus to detention under the warrant. It has been said that the rule in criminal cases is that a warrant once executed is exhausted.[47] This guards against precipitate rearrest. Where, however, the rearrest comes after the discovery of error in release, a new warrant is not necessarily required.[48] State cases have held that an escaped person or one who secured his ***547** release by trick may be rearrested without a new warrant.[49] Although a warrant for ****538** rearrest is required by statute, when a convicted person is paroled his status on violation of the parole is the same as that of an escaped prisoner.[50] When a prisoner is out on bond he is still under court control, though the bounds of his confinement are enlarged. His bondsmen are his jailers.[51] While the bailsmen may arrest without warrant, the court proceeds under bench warrant to retake a prisoner. Cf. 18 U.S.C. s 3143, 18 U.S.C.A. s 3143.

46 See United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 158, 44 S.Ct. 54, 57, 68 L.Ed. 221, and cases there cited; Mahler v. Eby, 264 U.S. 32, 45, 44 S.Ct. 283, 288, 68 L.Ed. 549. These cases had valid orders entered subsequent to an invalid arrent.

47 See United States ex rel. Hikkinen v. Gordon, 8 Cir., 190 F.2d 168 19; Doyle v. Russell, 30 Barb., N.Y., 300.

48 People ex rel. Wolfe v. Johnson, 230 N.Y. 256, 130 N.E. 286.

49 Voll v. Steele, 141 Ohio St. 293, 47 N.E.2d 991. Cf. Porter v. Garmony, 148 Ga. 261, 96 S.E. 426. Bail once allowed by a magistrate, pending trial, may not in some instances be refused by a higher court. In re Marshall, 38 Ariz. 424, 300 P. 1011.

50 Anderson v. Corall, 263 U.S. 193, 196, 44 S.Ct. 43, 44, 68 L.Ed. 247.

51 Taylor v. Taintor, 16 Wall. 366, 371, 21 L.Ed. 287.

[21] Although in a civil proceeding for deportation the same branch of government issues and executes the warrant, we think the better practice is to require in those cases also a new warrant.

The judgment of the Court of Appeals in the Zydok case will be vacated and the cause remanded to the District Court for further proceedings in accordance with this opinion, with directions to order the release of the respondent Zydok unless within a reasonable time in the discretion of the court he is rearrested under a new warrant.[52]

52 See Dowd v. Cook, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215; Mahler v. Eby, 264 U.S. 32, 45, 44 S.C. 283, 288, 68 L.Ed. 549.

No. 35 is affirmed; No. 136 is vacated.

Mr. Justice BLACK, dissenting.

Today the Court holds that law-abiding persons, neither charged with nor convicted of any crime, can be held in jail indefinitely, without bail, if a subordinate Washington

bureau agent believes they are members of the Communist ***548** Party, and therefore dangerous to the Nation because of the possibility of their 'indoctrination of others.' Underlying this harsh holding are past decisions of this Court declaring that Congress may constitutionally direct the summary deportation of aliens for any reason it sees fit. I agree with Mr. Justice DOUGLAS for the reasons he gives in his dissenting opinion in Harisiades v. Shaughnessy, 342 U.S. 580, 598, 72 S.Ct. 512, 523, that these prior declarations should now be reconsidered and rejected. This would dispose of these cases. But the Court today not only adheres to, but greatly expands the constitutional doctrine of the former cases. The Court also relies on the Internal Security Act of 1950, 64 Stat. 987, for its holding. Mr. Justice FRANKFURTER presents strong arguments for construing the Act so as to reach an opposite result. But even if authorized by that Act, as the majority holds, the denial of a right to bail under the circumstances of these cases strikes me as a shocking disregard of the following provisions of the Bill of Rights: Eighth Amendment's ban against excessive bail;[1] First Amendment's ban against abridgment of thought, speech and press;[2] Fifth Amendment's ban against depriving a person of liberty without due process of law.[3] Before a detailed discussion of my several grounds of dissent it is necessary to state the facts and the precise issues the records present.

1 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' U.S.Const., Amend. VIII.

2 'Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *.' U.S.Const., Amend. I.

3 'No person * * * shall be * * * deprived of life, liberty, or property, without due process of law; * * *.' U.S.Const., Amend. V.

Respondent Zydok, petitioners Carlson and others were all arrested ('detained') in connection with proceedings which might lead to their deportation. A subordinate of the Commissioner of Immigration, not the ***549** Attorney General, directed that they be held in prison without bail. Of necessity, consideration of these deportation proceedings by bureaus and courts may last for years. Carlson's has already dragged on for over four years. Moreover, even deportation orders at the end of such proceedings might not end their indeterminate jail sentences since the foreign countries to which they ****539** are ordered might refuse to admit them. Such refusals have prevented deportation in thousands of cases.[4] Thus denial of bail may well be the equivalent of a life sentence, at least for Zydok, 56 years old, and Carlisle whose health is bad. Such has become the fate of ordinary family people selected and classified, on secret information, as 'dangerous' by Washington bureau agents.

4 96 Cong.Rec.10449; H.R.Rep.No.1192, 81st Cong., 1st Sess., pp. 7, 9, 10.

Zydok's case illustrates what is happening. He has lived in this country 39 years, owns his home, has violated no law, is 'not likely to engage in any subversive activities,' has a wife, two sons, a daughter and five grandchildren, all born in the United States. Both sons served in the armed services in World War II. Zydok himself, then a waiter, sold about $50,000 worth of U.S. war bonds and 'donated blood on seven occasions to the Red Cross for the United States Army.' This jailing of Zydok, despite a patriotic record of which many citizens could well be proud, is typical of what actually happens when public feelings run high against an unpopular minority.

While the Court gives Zydok a momentary technical respite, its holding means that he too, pursuant to the government's present program, can and will be held in jail without bond as a 'dangerous' character. The others, with equally enviable records as law-abiding persons, are not even given a technical respite. Mrs. Stevenson is the wife of a citizen and is the mother of a young man who ***550** is also a citizen. Her son has long been subject to attacks of undulant fever. He and his 70-year-old grandmother need Mrs. Stevenson's help as does her husband who does her housework while she is 'detained' as 'dangerous' to our national security. The District Judge tried to persuade the representatives of the Immigration Bureau and the Attorney General to agree for him to enter an order fixing bail for her and for Mr. Carlisle. His request was refused.

The record does not leave us in doubt as to why bail was denied Mrs. Stevenson, Mr. Carisle, or any of these allegedly 'dangerous' aliens. Denial was not on the ground that if released they might try to evade obedience to possible deportation orders. The District Judge in No. 35 conceded that 'there is nothing here to indicate the Government is fearful that they are going to leave the jurisdiction'; he said, 'I am not going to release men and women that the Attorney General's office says are security risks'; he also said, 'I am not going to turn these people loose if they are Communists, any more than I would turn loose a deadly germ in this community. If that is my duty let the Circuit Court say so and assume that burden.'[5] These

remarks to counsel show that he kept these people in jail only because he thought Communists, as such, were too dangerous to the Nation to be allowed to associate with other people. The Court of Appeals' denial of bail was also based on the premise that Communists were too dangerous to the Nation to be left out of jail, not on the premise that deportation would be delayed or frustrated by granting bail. 9 Cir., 187 F.2d 991. ***551** And the Solicitor General has admitted here that 'the only evidence advanced to support their detention without bail was that they had been active in the Communist movement.' The majority here also appears to rest on the same basis. It must, unless it is now drawing inferences that some might flee and be unavailable for deportation. As the Government admits, there is not a vestige of support for such an inference.[6] Besides, ****540** an alien 'who shall willfully fail or refuse to present himself for deportation * * * shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years * * *.' 64 Stat. 987, 1012.

[5] And the District Judge in No. 35 said 'When there is a claim, and I don't know whether it is true or not * * * that these people are security risks and that their release is dangerous to the security of the United States, until that is either disproved or proved I am not going to release them. My first vote in that respect is for the security of the country. We have had 42,000 casualties already.'

[6] In this state of the record and particularly in view of the Solicitor General's contrary admission, I am at a loss to understand note 35 in the Court's opinion. It is there intimated that these aliens might flee and be unavailable for deportation. I cannot believe that the Court is resting, or would rest, its approval of denial of bail on a ground which even the Solicitor General had not deemed supportable by the record.

Thus it clearly appears that these aliens are held in jail without bail for no reason except that 'they had been active in the Communist movement.' From this it is concluded that their association with others would so imperil the Nation's safety that they must be isolated from their families and communities. On this premise they would be just as dangerous whether aliens or citizens, deportable or not. Since it is not necessary to keep them in jail to assure their compliance with a deportation order, their imprisonment cannot possibly be intended as an aid to deportation. They are kept in jail solely because a bureau agent thinks that is where Communists should be. A power to put in jail because dangerous cannot be derived from a power to deport. Consequently prior cases holding that Congress has power to deport aliens provide no support at all for today's holding that Congress ***552** has power to authorize bureau agents to put 'dangerous' people in jail without privilege of bail.

The stark fact is that if Congress can authorize imprisonment of 'alien Communists' because dangerous, it can authorize imprisonment of citizen 'Communists' on the same ground. And while this particular bureau campaign to fill the jails is said to be aimed at 'dangerous' alien Communists only, peaceful citizens may be ensnared in the process. For the bureau agent is not required to prove that a person he throws in jail is an alien, or a Communist, or 'dangerous.' The agent need only declare he has reason to believe that such is the case. The agent may be and here apparently was acting on the rankest hearsay evidence. The secret sources of his 'information' may have been spies and informers, a class not usually rated as the most reliable by people who have had experience with them.[7] In this record the nearest approach to any identifiable source of information is that some of the jailed persons had admitted past membership in organizations listed by the Attorney General as 'Communist,' or 'Communist ***553** front.' These listings are made by the Attorney General ex parte on secret dossiers containing statements from sources that the Attorney General refuses to reveal. A majority of this Court has held that such listings are illegal. Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817. This alone should be enough to reverse the judgments in No. 35. My own judgment is that Congress has not authorized the Bureau of Immigration to hold people in jail without bond solely because it believes them 'dangerous.' ****541** Nor do I think that Congress has power to grant any such authority even if it had attempted to do so.

[7] 'Anonymous informations ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent, and is quite foreign to the spirit of our age.' Written near 100 A. D. by Emperor Trajan to Pliny the Younger in response to Pliny's interesting report of his prosecution of Christians. 9 Harvard Classics, 428. Pliny was 'in great doubt' even then as to whether the very profession of Christianity, unattended with any criminal act, or only the crimes themselves inherent in the profession are punishable * * *.' Supra, 426. 'If they [informers against Christians] succeeded in their prosecution, they were exposed to the resentment of a considerable and active party, to the censure of the more liberal portion of mankind, and to the ignominy which in every age and country, has attended the character of an informer. If, on the contrarym they failed in their proofs, they incurred the severe, and perhaps capital, penalty which, according to a law published by the emperor Hadrian, was inflicted on those who falsely attributed to their fellow-citizens the crime of Christianity.' 2 Gibbon, The History of the Decline and Fall of the Roman Empire (Oxford Univ. Press), 107,

108.

First. Section 23 of the Internal Security Act, 64 Stat. 987, 1011, 8 U.S.C. § 156, provides that "Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole." I read this language as attempting to authorize the Attorney General to hold aliens without bail within his discretion. I think that means the Attorney General's discretion, not that of a subordinate in the Bureau of Immigration. This record does not show that these people were jailed by virtue of an exercise of discretion by the Attorney General. Decision to put deportable aliens in jail without bond (with very minor exceptions) was made by subordinates in the Bureau of Immigration. I agree with Mr. Justice FRANKFURTER that this decision to jail aliens en masse was not based on the kind of 'discretion' the Act intended. But I further think § 23 should not be construed as permitting the Attorney General to delegate this tremendous power to others.

The Government finds a power to so delegate in provisions of the Alien Registration Act of 1940, 8 U.S.C. § 458(a), ***554** 8 U.S.C.A. § 458(a), and in the President's Reorganization Plan No. 2 of 1950, 5 U.S.C. (Supp. IV) following § 133z-15, 5 U.S.C.A. § 133z-15 note. These provisions are in such broad general terms that they could be read as allowing the Attorney General to delegate all his discretionary duties. But the gravity of a discretionary power to seize people and keep them in jail without a right of bail warns against implying such an unlimited power to delegate it. It is bad enough to read an Act as vesting even the Nation's chief prosecutor with power to determine what individuals he prosecutes should be held in jail without bail. Delegating and redelegating this dangerous power to subordinates entrusted with duties like those of deputy sheriffs and policemen raises serious procedural due process questions. I am not willing to imply that Congress has granted power to make such delegations which so ominously threaten the liberty of individuals. Consequently, assuming constitutionality of § 23, I would hold that it vests power in the Attorney General alone to decide whether a person should be denied bail.

Second. The Fifth Amendment commands that no person shall be deprived of liberty without due process of law. I think this provision has been violated here.

Surely it is not consistent with procedural due process of law for prosecuting attorneys or their law enforcement subordinates to make final determinations as to whether persons they accuse of something shall remain in jail indefinitely awaiting a decision as to the truthfulness of the accusations against them. In effect that was done here. I have already referred to the trial judge's statement in No. 35 that he was not going to release people the Attorney General deemed to be bad security risks. Moreover, the immigration official's mere belief based on statements coming from unidentified persons was accepted by both trial judges as casting on each alleged "alien Communist" the burden of proving he was not a Communist 555¢ by clear and convincing evidence. And their refusal to incriminate themselves by denying the immigration officer's suspicions was accepted as sufficient proof to keep them behind the jail doors. I think that condemning people to jail is a job for the judiciary in accordance with procedural "due process of law."[8] To farm out this responsibility to the police and prosecuting attorneys is a judicial abdication in which I will have no part.

[8] See Mozorosky v. Hurlburt, 106 Or. 274, 198 P. 556, 211 P. 893, 15 A.L.R. 1076 and note pages 1079-1083.

Third. As previously pointed out, the basis of holding these people in jail is a fear that they may indoctrinate people with Communist beliefs. To put people in jail for fear of their talk seems to me to be an abridgment of speech in flat violation of the First Amendment. I have to admit, however, that this is a logical application of recent cases watering down constitutional liberty of speech.[9] I also realize that many believe that Communists and "fellow travelers" should not be accorded any of the First Amendment protections. My belief is that we must have freedom of speech, press and religion for all or we may eventually have it for none. I further believe that the First Amendment grants an absolute right to believe in any governmental system, discuss all governmental affairs, and argue for desired changes in the existing order. This freedom is too dangerous for bad, tyrannical governments to permit. But those who wrote and adopted our First Amendment weighed those dangers against the dangers of censorship and deliberately chose the First Amendment's unequivocal command that freedom of assembly, petition, speech and press shall not be abridged. I happen to believe this was a wise choice and that our free way of life enlists such respect and love that ***556** our Nation cannot be imperiled by mere talk. This belief of mine may and I suppose does influence me to protest whenever I think I see even slight encroachments on First Amendment liberties. But the encroachment here is not small. True it is mainly those alleged to be present or past 'Communists' who are

now being jailed for their beliefs and expressions. But we cannot be sure more victims will not be offered up later if the First Amendment means no more than its enemies or even some of its friends believe it does.

[9] See, e. g., American Communications Assn. v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925; Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 328, 95 L.Ed. 267, 295.

Fourth. I think § 23 as construed and as here applied violates the command of the Eighth Amendment that "Excessive bail shall not be required * * *." Under one of the Government's contentions, which the Court apparently adopts, the Eighth Amendment's ban on excessive bail means just about nothing. That contention is that Congress has power, despite the Amendment, to determine "whether or not bail may be granted, or must be granted, and the Constitution then forbids the exaction of excessive bail * * *." Under this contention, the Eighth Amendment is a limitation upon judges only, for while a judge cannot constitutionally fix excessive bail, Congress can direct that people be held in jail without any right to bail at all. Stated still another way, the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away. The Amendment is thus reduced below the level of a pious admonition. Maybe the literal language of the framers lends itself to this weird, devitalizing interpretation when scrutinized with a hostile eye. But at least until recently, it has been the judicial practice to give a broad, liberal interpretation to those provisions of the Bill of Rights obviously designed to protect the individual from governmental oppression. I would follow that practice here. The Court refuses to do so because (1) the English Bill of Rights "has never been thought to accord a right to bail in all cases * * *" ***557** and (2) "in criminal cases bail is not compulsory where the punishment may be death." As to (1): The Eighth Amendment is in the American Bill of Rights of 1789, not the English Bill of Rights of 1689. And it is well known that our Bill of Rights was written and adopted to guarantee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution. See Bridges v. California, 314 U.S. 252, 264-265, 62 S.Ct. 190, 194, 86 L.Ed. 192. As to (2): It is true bail has frequently been denied in this country "when the punishment may be death." I fail to see where the Court's analogy between deportation and the death penalty advances its argument unless it is also analogizing the offense of indoctrinating talk to the crime of first degree murder.

Another governmental contention isthis: "The bail provisions of the Eighth Amendment and of the statutes relating thereto have always been considered as applicable only to criminal proceedings. Since proceedings are not criminal in character, the Eighth Amendment has no application." I reject the contention that this constitutional right to bail can be denied a man in jail by the simple device of providing a "not criminal" label for the techniques used to incarcerate. Imprisonment awaiting determination of whether that imprisonment is justifiable has precisely the same evil consequences to an individual whatever legalistic liable is used to describe his plight. Prior to this Amendment's adoption, history had been filled with instances where individuals had been imprisoned and held for want of bail on charges that could not be substantiated. Official malice had too frequently been the cause of imprisonment. The plain purpose of our bail Amendment was to make it impossible for any agency of Government, even the Congress, to authorize keeping people imprisoned a moment longer than was necessary to assure their attendance to ANSWER WHATEVER ***558** LEGAL burden or obligation might thereafter be validly imposed upon them. In earlier days of this country there were fond hopes that the bail provision was unnecessary, that no branch of our Government would ever want to deprive any person of bail. On this subject Mr. Justice Story said, "The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government would authorize or justify such atrocious conduct." Story on Constitutional Law, 5th Ed., Vol. 2, p. 650. Perhaps the word 'atrocious' is too strong. I can only say that I regret, deeply regret, that the Court now adds the right to bail to the list of other Bill of Rights guarantees that have recently been weakened to expand governmental powers at the expense of individual freedom.

I am for reversing in No. 35 and affirming in No. 136.

Mr. Justice FRANKFURTER, whom Mr. Justice BURTON joins, dissenting.

If the Attorney General, after the Internal Security Act, had made a general ruling that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party--an undiscriminating, unindividualized class determination--it would disregard the clear direction of Congress for this Court not to hold that the Attorney General had exceeded the limits of his discretion. It would wilfully disregard the adjudications on bail in deportation cases which preceded the Act and the unambiguous legislative history of the law based upon this judicial history. Congress unequivocally chose not to give nonreviewable discretionary power to the Attorney

General to deny bail. In substance though not formally he has made such a general ruling. The records before us disclose that since the Internal Security Act the Attorney ***559** General has in fact followed the general practice of denying bail to all active Communists. Such blanket exercise of the power granted him by the Act calls for review and cannot stand.

The controlling questions in this case are: What standards of discretion does the Internal Security Act of 1950[1] impose upon the Attorney General in granting or denying bail to persons arrested for deportation proceedings; and has the Attorney General here observed those standards? The Government concedes that Congress made reviewable the discretion of the Attorney General on the bail question. This subjection of the Attorney General's action to judicial scrutiny is not to be formally or lightly exercised. The bill which ultimately became § 23 of the Internal Security Act was initially passed by the House with a provision making absolute and unreviewable the Attorney General's action.[2] The bill as enacted, however, omitted the finality clause; the Attorney General's authority was thus defined: 'Pending final determination of the deportability of any alien * * * [he] may, *in the discretion of the Attorney General* (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or ***560** (3) be released on conditional parole.'[3] Before the passage of Act Congress had before it conflicting views of Courts of Appeals: according to Prentis v. Manoogian, 6 Cir., 16 F.2d 422, bail was a matter of the alien's right; the Second Circuit ruled that it was a matter within the Attorney General's discretion subject to judicial review. United States ex rel. Potash v. District Director, 2 Cir., 169 F.2d 747.[4] Congress chose the latter view. It deserves emphasis that it was discretion that was given the Attorney General, not power to decide arbitrarily.[5] ***561**

1 Pub.L.No. 831, 81st Cong., 2d Sess., 64 Stat. 987.

2 H.R. 10,81st Cong., 1st Sess. read in relevant part thus: "(g) No court shall have jurisdiction to release on bond or otherwise any alien detained under any provision of law relating to the exclusion or expulsion of aliens at any time prior to a decision of court in his favor which is not subject to further judicial reviews." See 96 Cong.Rec. 10448-10460. H.R.Rep. No. 1192, 81st Cong., 1st Sess. 10-11 had this comment: "The provision is designed to leave the question of releasing an alien from custody in an immigration case entirely in the hands of the Attorney General * * *. It in no way denies the right of any alien to test the legality of his detention through the courts; it merely states that the alien cannot be released by the court until judicial proceedings have been finally terminated in the alien's favor."

3 Internal Security Act of 1950, § 23, 64 Stat. 987, 1010, 8 U.S.C. (Supp. IV) § 156(a), 8 U.S.C.A. § 156(a) (emphasis added).

4 H.R.Rep.No.1192, 81st Cong., 1st Sess. 5-6, commenting on H.R. 10, which made the Attorney General's discretion unreviewable, yet gave 'discretion' to the Attorney General, said: "This [existing law] has often been found to be lacking in clarity and doubtful in purpose when questions have arisen concerning procedure following arrest of an alien, or during the interim between his arrest and his hearing and decision on his case * * *. The committee believes that this bill will greatly simplify such details."
A memorandum from a lawyers' group which was read into the record urged that to make the decision of the Attorney General unreviewable "flouts the recent decision of the circuit court of appeals of the second circuit," citing United States ex rel. Potash v. District Director, 2 Cir., 169 F.2d 747. 96 Cong.Rec. 10454.

5 Compare the language "in the discretion of the AttorneyGeneral" with the clause "Where the Controller has reasonable grounds to believe," which the Privy Council had before it in Nakkuda Ali v. Jayaratne, [[[1951] A.C. 66. It was held, in the judgment of Lord Radcliffe, 'that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power' conferred. And for this reason: "After all, words such as these are commonly found when a legislature or law-making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith: but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality." Id., at 77.

In granting the Attorney General discretion subject to judicial review, Congress legislated against a historical background which gives meaning to bail provisions. Only the other day this Court restated the concept of bail traditional in American thought and reflected in Constitution:

"This traditional right to freedom before conviction [or before order for deportation] permits the unhampered preparation of a defense, and services to prevent the

infliction of punishment prior to conviction. * * * Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. * * * To infer from the fact of indictment [or warrant for deportation] alone a need for bail in an unusually high amount is an arbitrary act." Stack v. Boyle, 342 U.S. 1, 4, 5, 6, 72 S.Ct. 1, 3, 4.

"The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trail has found them guilty. * * * Each defendant stands before the bar of justice as an individual. * * * Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them." 342 U.S. at pages 7, 8, 9 (concurring opinion), 72 S.Ct. 1, 5, 6. ***562**

This historical meaning of 'bail,' familiar even to laymen, must infuse our interpretation of the words of a Congress of whom, in fact, a majority were lawyers. When Congress provided for bail, within the Attorney General's discretion, for persons arrested for deportation proceedings, it was extending to resident aliens still lawfully in our midst the same privileges that are granted as a matter of course to dangerous criminals. The factors relevant to the exercise of discretion are factors that pertain to each individual as an individual. "Discretion is only to be respected when it is conscious of the traditions which surround it and of the limits which an informed conscience sets to its exercise."[6]

6 Professor Mark De Wolfe Howe in The Nation, Jan. 12, 1952, p. 30. 72 S.Ct. 35.

If these aliens, instead of awaiting deportation proceedings, were held for trial under a Smith Act indictment, 18 U.S.C.A. § 2385, they could not be denied bail merely because of the indictment. Stack v. Boyle, supra. Membership in the Communist Party--the charge which is the foundation for the deportation proceedings--is surely not as great a danger as a leading share in a conspiracy to advocate the overthrow of the Government by force, which was the essence of the indictment in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. And the opportunity for "the unhampered preparation of a defense" is quite as important to the alien arrested for deportation proceedings as it is to the Smith Act defendant. We would hesitate to impute to Congress, in the absence of some more explicit command, an intent to make bail more readily available to those held on a serious criminal charge than to those awaiting proceedings to determine the question of deportability. Congress made no such distinction. Instead, it cast the Attorney General's authority in terms descriptive of the ***563** customary power of commissioners or district judges in admitting to bail.

The factors stated by the Second Circuit in the Potash case, supra, at page 751 of 169 F.2d, which guided the enactment, are presumably the standards which Congress expected to be observed: "The discretion of the Attorney General * * * is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail."

Congress thus made provision for a fair assurance of each alien's availability in the event he is eventually ordered deported. There is, however, not the slightest indication in the Government's returns or in the records before us that each petitioner's ties to family and community and each one's behavior under an earlier warrant against him do not assure his presence throughout the deportation proceedings and thereafter. The records affirmatively indicate the contrary. Moreover, in deportation cases--as compared, for example, with prosecutions under the Smith Act--the consideration that the individuals concerned may depart from the country is minimized in significance, first, because compulsory departure from the United States is just what they are contesting, and secondly, if they do depart, the purpose of the deportation proceedings is realized.

It would be unfair to Congress to deny that it followed the traditional concept of bail by making "the danger to the public safety of his presence within the community" a criterion for bail ability. No less must it be presumed that Congress required that each criterion should be applied in the traditional manner, that is, by individualized application to each alien. In each case, the alien's anticipated personal conduct--ant that alone--must ***564** be considered. Also, how expeditiously each deportation proceeding can be concluded, and therefore how long the bail in each case need be in effect, are relevant considerations.

But it is argued that, since an introductory section of the Internal Security Act makes a "legislative finding" of the threat represented by the Party,[7] Congress intended membership in the Communist Party alone to serve as a reasonable basis for believing individual aliens too dangerous to leave at large. Such an interpretation renders meaningless the discretion granted the Attorney General wherever the deportation charge is membership in the Communist Party. The argument means that he may

exercise discretion as to bail only to deny bail. Congress did not write such a Hobson's choice into law. True, the bail provisions apply to deportation proceedings brought on other grounds. However, the absorbing concern of Congress in the Internal Security Act was with the problem of the Communist Party; that Act for the first time explicitly made membership in the Communist Party a ground for deportation.[8] It puts Congress in a stultifying position to suggest that it gave with one hand only to take away with the other.

7 Internal Security Act of 1950, § 2, 64 Stat. 987, 50 U.S.C.A. § 781.

8 Internal Security Act of 1950, § 22, 64 Stat. 987, 1096, 8 U.S.C. (Supp. IV) §§ 137, 137-3, 8 U.S.C.A. §§ 137, 137-3.

In these cases the Attorney General has not exercised his discretion by applying the standards required of him. He evidently thought himself under compulsion of law and made an abstract, class determination, not an individualized judgment. When the five aliens were arrested originally (one as late as June, 1950), all were released on bail, ranging from $5,000 for one to $1,000 for another; three were released on $2,000 bail. Much is made of the fact that the enactment of the Internal Security Act on ***565** September 22, 1950, intervened between the original grant of bail and the subsequent rearrest and detention of the aliens. The only change in that Act relevant to these deportation proceedings was the provision making membership in the Communist Party specifically a basis for deportation.[9] New warrants charging membership in the Communist Party at some time after entry were served on the rearrested aliens in Los Angeles, though not on Zydok in Detroit. The immigration authorities were by the Act relieved of proving--in order to make a prima facie case--that the Communist Party is an "organization * * * that believes in, advises, advocates, or teaches * * * the overthrow by force or violence of the Government."[10] But in the circumstances of today a legislative definition of the Communist Party as an organization advocating violent overthrow of government made little difference in the required proof.[11] At any rate, a complete answer is that nowhere--either in his returns to the writs of habeas corpus or elsewhere--has the Attorney General made any assertion that the Internal Security Act eased the proof of deportability, indicating by his silence that such a factor did not influence his judgment.[12] The returns in the Los Angeles cases supported the denial of bail solely by the statement, "said facts cause the said Acting Commissioner ***566** to believe that if the said petitioner[s] were enlarged on bail [they] would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States." The return in Zydok's case stated no reasons for the Attorney General's decision. The only evidence at the hearings was also directed solely to the Communist activities of the aliens.

9 Ibid.

10 40 Stat. 1012, 8 U.S.C. § 137(c), 8 U.S.C.A. § 137(c).

11 See Dennis v. United States, 341 U.S. 494, 510-511, 71 S.Ct. 857, 867-868, 95 L.Ed. 1137, and the concurring opinion of Mr. Justice Jackson in American Communications Assn. v. Douds, 339 U.S. 382, 422, 70 S.Ct. 674, 695, 94 L.Ed. 925.

12 A radiogram to the District Director of Immigration and Naturalization in Los Angeles from the Acting Commissioner in Washington compendiously justified holding the four Los Angeles aliens without bail thus: "* * * the instruction * * * was issued only after the cases had been examined in the light of the Internal Security Act * * * and the spirit and intention thereof and all of the factors concerning the likelihood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued detention might impose."
The radiograms, in October, 1950, to the District Director in Detroit ordering Zydok's rearrest and detention without bail gave no reasons for the action.

The insubstantiality of the evidence for showing any danger in freeing each individual alien on bail raises ample doubt whether the Attorney General exercised a discretion as instructed by statute. In Zydok's case the claim is that he had been a member of the Communist Party and financial secretary of a Hamtramck, Michigan, section in 1949, a year before his rearrest and denial of bail on October 23, 1950. From Zydok's failure to deny present membership during his testimony, the District Court drew the conclusion that he was "knowingly and wilfully participated in the Communist movement." This was clearly a violation of Zydok's privilege against self-incrimination, which he many times claimed.[13] But assuming that the Attorney General had evidence before him that Zydok was at present a member of the Communist Party, that alone is insufficient to show danger in freeing him on bail during the deportation proceeding. To deny bail, the Attorney General should have a reasonable basis

for believing that the circumstances attending Zydok present too hazardous a risk in leaving him at large.

13 See 20 Stat. 30, 18 U.S.C. § 3481, 18 U.S.C.A. § 3481; Wilson v. United States, 149 U.S. 60, 66, 13 S.Ct. 765, 766, 37 L.Ed. 650. See also Blau v. United States, 340 U.S. 159, 71 S.Ct. 223, 95 L.Ed. 170. ***567**

There is also no evidence on the activities of the other four aliens that is more recent than 1949--a year before the issuance of the relevant warrants for deportation and the denials of bail here under review--with the exception of a newspaper article by Carlson published in late 1950. In fact, in the case of Carlisle and Stevenson the Government had no evidence of activity or membership in the Communist Party more recent than the 1930's. Since all these aliens when previously arrested were released on bail, we cannot escape the conclusion that the Attorney General after the enactment of the Internal Security Act did not deny bail from an individualized estimate of "the danger to the public safety of [each person's] presence within the community."[14]

14 In a case just decided, the Court of Appeals for the Second Circuit found a not unreasonable exercise of discretion by the Attorney General in circumstances that are here wanting. An extract from the opinion of Judge A. N. Hand illumines the differences: "In his petition for the writ, Young alleged facts indicating that if released he would be available for any further proceedings at which his presence would be required. The return to the writ, however, contained allegations which, if accepted, established a reasonable foundation for the denial of bail by the Attorney General. Thus the return, in additional to containing allegations of membership in the Communist party, alleged that Young had once before escaped from custody during earlier proceedings; that he had previously attempted to enter the United States by furnishing a false identity and with a fraudulent passport; and that during his present detention he refused to answer questions relating to prior identification, places of residence, employment and home life. Section 2248 of the Judicial Code, 28 U.S.C. § 2248 [[28 U.S.C.A. § 2248], requires that the facts alleged in the return be taken as true unless impeached, and Young in his traverse to the return did not refute those statements, nor did he in his motion for reargument, make any offer to prove the contrary, nor did he assert new facts, which under 28 U.S.C. § 2246 [28 U.S.C.A. § 2246] could have been accomplished by affidavit. As the Supreme Court has recently said in Stack v. Boyle, 342 U.S. 1, 4, 72 S.Ct. 1, 3: "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty."" United States ex rel. Young v. Shaughnessy, 2 Cir., 194 F.2d 474. ***568**

We are confirmed in this conclusion by the Attorney General's practice. For we are advised by the Solicitor General that it has been the Government's policy since the Internal Security Act to terminate bail for all aliens awaiting deportation proceedings whom it deems to be present active Communists, barring only those for whom special circumstances of physical condition or family situation compel an exception. The ordinary considerations of availability to respond to the final judgment of the courts have apparently been ruled out by the Attorney General since the enactment of the Internal Security Act. All those whom the Government believes to be active Communists are considered unbailable without individualized consideration of risk from their continued freedom. It must therefore be inferred that the Attorney General acted on the assumption that, because he was convinced that the aliens here were present Communist Party members, they were not bailable. These persons should have the benefit of an exercise of discretion by the Attorney General, freed from any conception that Congress had made them in effect unbailable. We think that the California case should be returned to the District Court for discharge of the four persons detained unless the Attorney General within a reasonable time makes a new determination on the bail question using the standards here outlined. And of Zydok is rearrested under a new warrant, the Attorney Gernal will have a fresh opportunity to exercise his discretion in setting bail.

Mr. Justice DOUGLAS, dissenting.

My reasons for dissent strike deeper than the bail provisions of the Eighth Amendment. According to the warrants of arrest issued on October 31, 1950, the petitioners in No. 35 are being detained for deportation because they were formerly members of the Communist Party of the United States. Zydok, the respondent ***569** in No. 136, was arrested for present Communist Party membership, but no charge has been made that he has been guilty of any seditious conduct or that he has committed any overt act endangering our national security. If the Constitution does not permit expulsion of these aliens for their past actions or present expressions unaccompanied by conduct-- and I do not think it does[1]--then they are illegally detained and should be set free, making the issue of bail meaningless.

1 See my dissents in Dennis v. United States, 341 U.S. 494, 584-589, 71 S.Ct. 857, 904-907, 95 L.Ed. 1137; Harisiades v. Shaughnessy, 342 U.S. 580, 598, 72 S.Ct. 512, 523.

Mr. Justice BURTON, dissenting.

I join the dissenting opinion of Mr. Justice FRANKFURTER and add the suggestion that the Eighth Amendment lends support to the statutory interpretation he advocates. That Amendment clearly prohibits federal bail that is excessive in amount when seen in the light of all traditionally relevant circumstances. Likewise, it must prohibit unreasonable denial of bail. The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing. The same thing. The same circumstances are relevant to both procedures. It is difficult to believe that Congress now has attempted to give the Attorney General authority to disregard those considerations in the denial of bail.

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IN RE Kenneth HUMPHREY, on Habeas Corpus.

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Opinion

Kline, P.J.

***1** Nearly forty years ago, during an earlier incarnation, the present Governor of this state declared in his State of the State Address that it was necessary for the Legislature to reform the bail system, which he said constituted an unfair "tax on poor people in California. Thousands and thousands of people languish in the jails of this state even though they have been convicted of no crime. Their only crime is that they cannot make the bail that our present law requires." Proposing that California move closer to the federal system, the Governor urged that we find "a way that more people who have not been found guilty and who can meet the proper standards can be put on a bail system that is as just and as fair as we can make it." (Governor Edmund G. Brown Jr., State of the State Address, Jan. 16, 1979.) The Legislature did not respond.

Undaunted, our Chief Justice, in her 2016 State of the Judiciary Address, told the Legislature it cannot continue to ignore "the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor." Questioning whether money bail genuinely ensures public safety or assures arrestees appear in court, the Chief Justice suggested that better risk assessment programs would achieve the purposes of bail more fairly and effectively. (Chief Justice Tani Cantil-Sakauye, State of the Judiciary Address, Mar. 8, 2016.) The Chief Justice followed up her address to the Legislature by establishing the Pretrial Detention Reform Workgroup in October 2016 to study the current system and develop recommendations for reform.[1]

[1] The Workgroup's report concluded that "California's current pretrial release and detention system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias." The substance of the report consists of 10 recommendations designed to establish and facilitate implementation of "a risk-based pretrial assessment and supervision system that (1) gathers individualized information so that courts can make release determinations based on whether a defendant poses a threat to public safety and is likely to return to court—without regard for the defendant's financial situation; and (2) provides judges with release options that are effective, varied, and fair alternatives to money bail." (Pretrial Detention Reform, Recommendations to the Chief Justice, Pretrial Detention Reform Workgroup (2017) p. 2.)

This time the Legislature initiated action. Senate Bill No. 10, the California Money Bail Reform Act of 2017, was introduced at the commencement of the current state legislative session. The measure, still before the Legislature, opens with the declaration that "modernization of the pretrial system is urgently needed in California, where thousands of individuals held in county jails across the state have not been convicted of a crime and are awaiting trial simply because they cannot afford to post money bail or pay a commercial bail bond company." We hope sensible reform is enacted, but if so it will not be in time to help resolve this case.

***2** Meanwhile, as this case demonstrates, there now exists a significant disconnect between the stringent legal protections state and federal appellate courts have required for proceedings that may result in a deprivation of liberty and what actually happens in bail proceedings in our criminal courts. As we will explain, although the prosecutor presented no evidence that non-monetary conditions of release could not sufficiently protect victim or public safety, and the trial court found petitioner suitable for release on bail, the court's order, by setting bail in an

amount it was impossible for petitioner to pay, effectively constituted a *sub rosa* detention order lacking the due process protections constitutionally required to attend such an order. Petitioner is entitled to a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines petitioner is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention

THE PARTIES' POSITION

Petitioner Kenneth Humphrey was detained prior to trial due to his financial inability to post bail. Claiming bail was set by the court without inquiry or findings concerning either his financial resources or the availability of a less restrictive nonmonetary alternative condition or combination of conditions of release, petitioner maintains he was denied rights guaranteed by the Fourteenth Amendment.

Acknowledging that a bail scheme that "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid" (*United States v. Salerno* (1987) 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697) (*Salerno*), petitioner does not claim California's money bail system is facially unconstitutional. However, he maintains that requiring money bail as a condition of pretrial release at an amount it is impossible for the defendant to pay is the functional equivalent of a pretrial detention order. (*United States v. Leathers* (D.C. Cir. 1969) 412 F.2d 169, 171, ["the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all"]; *In re Christie* (2001) 92 Cal.App.4th 1105, 1109, 112 Cal.Rptr.2d 495 ["the court may neither deny bail nor set it in a sum that is the functional equivalent of no bail"].) Because the liberty interest of an arrestee is a fundamental constitutional right entitled to heightened judicial protection (*id*. at p. 1109, 112 Cal.Rptr.2d 495), such an order can be constitutionally justified, petitioner says, only if the state "first establish [es] that it has a *compelling* interest which justifies the [order] and then demonstrate[s] that the [order is] *necessary* to further that purpose."[2] (*People v. Olivas* (1976) 17 Cal.3d 236, 251, 131 Cal.Rptr. 55, 551 P.2d 375, citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 597, 96 Cal.Rptr. 601, 487 P.2d 1241; *In re Antazo* (1970) 3 Cal.3d 100, 110-111, 89 Cal.Rptr. 255, 473 P.2d 999; *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785, 87 Cal.Rptr. 839, 471 P.2d 487.) Petitioner argues that in order to do this, the state must show and the court must find that no condition or combination of conditions of release could satisfy the purposes of bail, which are to assure defendants' appearance at trial and protect victim and public safety.

2 Whether a bail determination violates the due process and equal protection requirements at issue in this case is distinct from the question whether an unattainably high money bail is also "excessive" under the state and federal Constitutions, as some courts have suggested. (See, e.g., *Pugh v. Rainwater* (5th Cir. 1978) 572 F.2d 1053, 1057 [" '[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment' "].) Petitioner has not advanced this claim, however, and we therefore do not address it.

As no such showing or finding was made, petitioner asks us to issue a writ of habeas corpus and either order his immediate release on his own recognizance or remand the matter to the superior court for an expedited hearing, with instructions to (1) conduct a detention hearing consistent with article I, section 12, of the California Constitution and the procedural safeguards discussed in *Salerno*, and; (2) set whatever least restrictive, non-monetary conditions of release will protect public safety; or (3) if necessary to assure his appearance at trial or future hearings, impose a financial condition of release after making inquiry into and findings concerning petitioner's ability to pay.

***3** In his informal opposition to the petition the Attorney General asked us to deny the petition. Relying upon the "Public Safety Bail" provisions of section 28, subd. (f)(3), of the California Constitution—which states that "[i]n setting, reducing or denying bail.... [p]ublic safety shall be the primary consideration"—the Attorney General distinguished the federal cases petitioner relies upon and argued that the magistrate did not violate petitioner's rights to due process or equal protection by deciding not to further reduce bail or release petitioner on his own recognizance.

However, after we issued an order to show cause, the Attorney General filed a return withdrawing his earlier assertion that the magistrate was not obligated to make any additional inquiry into petitioner's ability to pay under the circumstances of this case. The Attorney General now agrees with petitioner that a writ of habeas corpus should issue for the purpose of providing petitioner with a new bail hearing. As stated in the return: "The Department of Justice has determined that it will not defend any application of the bail law that does not take into consideration a person's ability to pay, or alternative methods of ensuring a person's appearance at trial. Given this determination, after further deliberations, we withdraw our earlier assertion that the magistrate was not obligated to make any additional

inquiry into petitioner's ability to pay under the circumstances of this case."

We shall explain why we agree with the parties that the trial court erred in failing to inquire into petitioner's financial circumstances and less restrictive alternatives to money bail, and that a writ of habeas corpus should therefore issue for the purpose of providing petitioner a new bail hearing.

FACTS AND PROCEEDINGS BELOW

The Underlying Offenses

Petitioner, a retired shipyard laborer, is 63 years of age and a lifelong resident of San Francisco. On May 23, 2017 (all dates are in that year), at approximately 5:43 p.m., San Francisco police officers responded to 1239 Turk Street regarding a robbery. The complaining witness, Elmer J., who was 79 years of age and used a walker, told the officers he was returning to his fourth floor apartment when a man, later identified as petitioner, followed him into his apartment and asked him about money. At one point petitioner told Elmer to get on the bed and threatened to put a pillow case over his head. When Elmer said he had no money, petitioner took Elmer's cell phone and threw it onto the floor. After Elmer gave him $2, petitioner stole $5 and a bottle of cologne and left. Elmer did not know or recognize petitioner. While reviewing the surveillance video with front desk clerks, the officers were informed that the African-American person in the video was petitioner, who lived in an apartment on the third floor of the building. The officers went to petitioner's apartment and arrested him without incident. Petitioner was subsequently charged with first degree robbery (Pen. Code, § 211),[3] first degree residential burglary (§ 459), inflicting injury (but not great bodily injury) on an elder and dependent adult (§ 368, subd. (c)), and theft from an elder or dependent adult, charged as a misdemeanor. (§ 368, subd. (d).)

[3] All subsequent statutory references are to the Penal Code unless otherwise indicated. As will be noted, references to "section 12" and "section 28" are to sections 12 and 28 of article 1 of the California Constitution.

The Initial Setting of Bail

At his arraignment on May 31, petitioner sought release on his own recognizance without financial conditions based on his advanced age, his community ties as a lifelong resident of San Francisco and his unemployment and financial condition, as well as the minimal property loss he was charged with having caused, the age of the three alleged priors (the most recent of which was in 1992), the absence of a criminal record of any sort for more than 14 years, and his never previously having failed to appear at a court ordered proceeding. Petitioner also invited the court to impose an appropriate stay-away order regarding the victim who, as noted, lived on a different floor of the same "senior home" in which appellant resided.

***4** The prosecutor did not affirmatively argue for pretrial detention pursuant to article 1, section 12, of the California Constitution, but simply asked the court to "follow the PSA [Public Safety Assessment] recommendation, which is that release is not recommended," and requested bail in the amount of $600,000, as prescribed by the bail schedule, and a criminal protective order directing petitioner to stay away from the victim.

After indicating it had read the Public Safety Assessment Report on petitioner, the trial court stated as follows: "I appreciate the fact that Mr. Humphrey has had a lengthy history of contact here in the City and County of San Francisco. I also note counsel's argument that many of his convictions are older in nature; however, given the seriousness of this crime, the vulnerability of the victim, as well as the recommendation from pretrial services, I'm not going to grant him OR [release on his own recognizance] or any kind of supervised release at this time. I will set bail in the amount of $600,000 and sign the criminal protective orders to [stay] away from [the victim]."[4]

[4] At the request of defense counsel, the court modified the protective order by deleting the requirement that petitioner stay away from 1239 Turk Street, where petitioner and the victim both lived, and limiting the premises petitioner must stay away from to the fourth floor of the Turk Street address, where the victim lived.

Petitioner's Motion for a Bail Hearing

On July 10, petitioner filed a motion for a formal bail hearing pursuant to section 1270.2[5] and an order releasing him on his own recognizance or bail reduction, claiming that "bail, as presently set, is unreasonable and beyond the defendant's means" and "violates the Eighth Amendment's proscription against excessive bail."

[5] Section 1270.2 provides, as material, that "[w]hen a person is detained in custody on a criminal charge prior to conviction for want of bail, that person is entitled to

> an automatic review of the order fixing the amount of bail by the judge or magistrate having jurisdiction of the offense. That review shall be held not later than five days from the time of the original order fixing the amount of bail on the original accusatory pleading."

Relying on *In re Christie, supra,* 92 Cal.App.4th at page 1109, 112 Cal.Rptr.2d 495, which prohibits the setting of bail in an amount "that is the functional equivalent of no bail," and *Lopez-Valenzuela v. Arpaio* (9th Cir. 2014) 770 F.3d 772, 780-781, which discusses authority for the proposition that criteria warranting pretrial detention "satisfy substantive due process only if they are 'narrowly tailored to serve a compelling state interest,' " petitioner's bail motion argued that the substantive due process guarantee of the Fourteenth Amendment entitled him to an individualized determination of his right to be released prior to trial on his own recognizance or bail after he was afforded an opportunity to present evidence relating to any factors that might affect the court's decision whether to release him pending trial, and that his guilt may not be presumed during the bail-setting process.

The motion cited extensive statistical studies and other data showing racial disparities in bail determinations in adult criminal and juvenile delinquency proceedings in state and federal courts in all regions of the country, none of which were challenged by the district attorney. A 2013 study of San Francisco's criminal justice system attached as an exhibit to petitioner's bail motion found, among other things, that although booked Black adults appear to be "more likely than booked White adults to meet the criteria for pretrial release," "Black adults in San Francisco are 11 times as likely as White adults to be booked into County Jail" prior to trial. (W. Hayward Burns Inst., *San Francisco Justice Reinvestment Initiative: Racial and Ethnic Disparities Analysis for the Reentry Council, Summary of Key Findings* (2013) p. 2.) The motion argued that "[t]he court should keep these stark facts in mind in setting bail so as not [to] exacerbate any unconscious, implicit or institutional bias that might exist."

***5** The motion for a bail hearing also provided considerable information about petitioner's family and personal history, particularly the relationship between the murder of his father, with whom he was close, when petitioner was 16 years old, petitioner's turn to drugs and subsequent addiction, and his fitful but "life-long" efforts to deal with that problem. While in custody at the San Francisco County Jail from 2005 to 2008, petitioner successfully completed the Roads to Recovery drug rehabilitation program and earned a high school diploma. After he was released from jail petitioner enrolled for nearly two years in San Francisco City College as a participant in the Fresh Start program, and during that period served as mentor for young adults in the community. After serving in that role for seven months, petitioner suffered a relapse that ended his mentoring activities. Near the end of 2015, he voluntarily entered a program called 890 Men's Residential, which is administered by the HealthRIGHT 360 family of programs, a "behavioral health services agency that offers a streamlined continuum of comprehensive substance abuse and mental health services." Petitioner's bail motion included a copy of a letter from the HealthRIGHT program verifying that he had "successfully completed treatment on 5/19/2016."

Petitioner's motion also represented that after he committed the charged offenses he was accepted into the Golden Gate for Seniors program, which was administered by Community Awareness & Treatment Services, Inc. (CATS), "a non-profit organization serving chronically homeless men and women in San Francisco with multiple problems including substance abuse and mental problems." Golden Gate for Seniors, CATS's oldest program, has 18 beds "that serve homeless men and women who abuse alcohol and drugs in the context of a six-month residential substance abuse treatment program [in which] clients participate in group recovery sessions, individual counseling and case management that link them with benefits, housing and other needed services." CATS accepted petitioner into the Golden Gate for Seniors program with a designated "intake date" of July 13, the day after the date set for the bail hearing. The motion argued that placing petitioner in this residential program instead of jail would ensure supervision and community safety, whereas placement in jail would deny him the opportunity to deal effectively with his substance abuse problem, which is the root of his past criminal conduct and the charged offenses.

The Hearing on the Bail Motion

The hearing on petitioner's bail motion took place on July 12, five days before the date set for the preliminary hearing. At the start of the proceeding defense counsel provided the court a letter from the Golden Gate for Seniors program stating that it had accepted petitioner for a residential placement commencing on July 13, the next day. After defense counsel said he had "laid out all my points in the bail motion" in detail, he emphasized that petitioner had not engaged in criminal conduct for many years, was 63 years of age, had been battling with addiction since he was a teenager, but had recently "made some significant strides," and that he took only five dollars and a bottle of cologne from his victim, who was not physically injured. Finally, counsel reiterated that though this was a "three-

strikes" case, petitioner's prior convictions were very old, the most recent having occurred a quarter of a century ago, in 1992. For the foregoing reasons, defense counsel asked the court to release petitioner on his own recognizance, and failing that to be "OR'd to Golden Gate for Seniors."

The prosecutor pointed out that one of petitioner's priors was a felony for which he served a prison sentence, and that under section 1275, the court had to find unusual circumstances in order to deviate from the bail schedule. Asserting that there were no such circumstances, and the $600,000 previously imposed by the court was the scheduled amount of bail, the prosecutor urged the court not to reduce that amount. Arguing that petitioner's present and past criminal offenses were all committed due to the need to "feed his habit," the prosecutor maintained that his addiction and inability to address it constituted "a continued public safety risk." The prosecutor added that petitioner should be considered "a great public safety risk" because he "followed a disabled senior into his home. He stole from him. He did so in a building that he had access to, [t]hat he resided in." Finally, the prosecutor argued that petitioner was a flight risk because he was exposed to a lengthy prison sentence.

***6** The one-page form risk assessment report submitted to the court by the pretrial services agency, which does not indicate a representative of the agency ever met with petitioner, provides no individualized explanation of its opaque risk assessment of petitioner and no information regarding the availability and potential for use of an unsecured bond, which imposes no costs on the defendant who appears in court, or supervised release programs involving features like required daily or periodic check-ins with the pretrial services agency, drug testing, home detention, electronic monitoring,[6] or other less restrictive release options. Nor, so far as the record shows, did the court ask the pretrial services agency to provide any such information.

6 The number of accused and convicted criminals in the United States who are monitored with ankle bracelets and other electronic tracking devices, such as GPS and radio-frequency units, rose nearly 140 percent over 10 years, according to a survey conducted in 2015 by The Pew Charitable Trusts. More than 125,000 people were supervised with the devices in 2015, up from 53,000 in 2005. (Use of Electronic Offender-Tracking Devices Expands Sharply, Brief from the Pew Charitable Trusts (Sept. 2016). Available at < http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expands-sharply> [as of Jan. 25, 2018]; Eisenberg, *Mass Monitoring* (2017) 90 So. Cal. L.Rev. 123; Wiseman, *Pretrial Detention and the Right to be Monitored* (2014) 123 Yale L.J. 1344; Causey, *Reviving the Carefully Limited Exception: From Jail to GPS Bail* (2013) 5 Faulkner L.Rev. 59.)

In explaining its decision, the trial court stated that it had public safety concerns because "this was a serious crime and serious conduct involved and pretty extreme tactics employed by Mr. Humphrey, if I accept what is in the police report,"[7] noting also that his offenses were similar to those he had committed in the past, "so that continuity is troubling to the court." The court acknowledged that "maybe little was taken," but said "that's because the person whose home was invaded was poor [and] I'm not [going to] provide less protection to the poor than to the rich." The court also felt petitioner's criminal history and the circumstances of the offenses, which the court described as "basically a home invasion," "are captured in the scheduled bail of $600,000. And as [the district attorney] argued, I have to find unusual circumstances to deviate. However, the court was impressed with petitioner's "willingness to participate in treatment, and I do commend that. I cannot see my way to an OR release on that basis, but I do think that is an unusual circumstance that would justify some deviation from the bail schedule." The court also attached significance to petitioner's strong ties to the community, and found that factor also qualified as an unusual circumstance justifying deviation from the bail schedule. Nonetheless, the court believed a high bail was still warranted "because of public safety and flight risk concerns," "and so I'm [going to] modify bail to be $350,000." At no point during the hearing did the court note that, as indicated in the risk assessment report and emphasized by counsel, petitioner had never previously failed to appear at a court ordered hearing.

7 The police report was not made a part of the appellate record and the trial court did not at the arraignment or subsequent bail hearing identify the statements in the report it apparently relied upon.

When the court added an additional condition—that upon release on bail petitioner participate in the Golden Gate for Seniors residential drug treatment program—the public defender observed that petitioner was too poor "to make even $350,000 bail" and would therefore have to remain in custody pending trial and be unable to participate in a residential drug treatment program. The court did not comment on the anomalousness of imposing a condition of release that it made impossible for petitioner to satisfy by setting bail at an unattainable figure.

***7** The petition for writ of habeas corpus was filed in this

court on August 4, at which time petitioner was in custody. We issued an order to show cause on September 1.

DISCUSSION

"Habeas corpus is an appropriate vehicle by which to raise questions concerning the legality of bail grants or deprivations. [Citations.] In evaluating petitioner's contentions, this court may grant relief without an evidentiary hearing if the return admits allegations in the petition that, if true, justify relief. [Citations.] On the other hand, we may deny the petition, without an evidentiary hearing, if we are persuaded the contentions in the petition are without merit. [Citations.]" (*In re McSherry* (2003) 112 Cal.App.4th 856, 859-860, 5 Cal.Rptr.3d 497.)

Where, as here, the material facts of the case are undisputed and " 'the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo.' " (*In re Taylor* (2015) 60 Cal.4th 1019, 1035, 184 Cal.Rptr.3d 682, 343 P.3d 867, quoting *In re Collins* (2001) 86 Cal.App.4th 1176, 1181, 104 Cal.Rptr.2d 108.)

Petitioner's claims that he was denied due process of law and deprived of his personal liberty on the basis of poverty arise under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and article 1, section 7 of the California Constitution.

I.

The California Bail Process

As noted, the California Constitution contains two sections pertaining to bail: sections 12 and 28 of article I (hereafter section 12 and section 28).

Section 12, like the preceding bail provisions of the California Constitution,[8] "was intended to abrogate the common law rule that bail was a matter of judicial discretion by conferring an absolute right to bail except in a narrow class of cases." (*In re Law* (1973) 10 Cal.3d 21, 25, 109 Cal.Rptr. 573, 513 P.2d 621, citing *In re Underwood* (1973) 9 Cal.3d 345, 107 Cal.Rptr. 401, 508 P.2d 721 and *Ex parte Voll, supra,* 41 Cal. at p. 32.) The provision "establishes a person's right to obtain release on bail from pretrial custody, identifies certain categories of crime in which such bail is unavailable, prohibits the imposition of excessive bail as to other crimes, sets forth the factors a court shall take into consideration in fixing the amount of the required bail, and recognizes that a person 'may be released on his or her own recognizance in the court's discretion.' " (*In re York* (1995) 9 Cal.4th 1133, 1139-1140, 40 Cal.Rptr.2d 308, 892 P.2d 804, fn. omitted)[9]

[8] The prior bail provision, which immediately prior to 1974 was article I, section 6, stated that: "All persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great." This identical provision was previously contained in article I, section 7, of the California Constitution. (*Ex parte Voll* (1871) 41 Cal. 29, 31; see also *Ex Parte Duncan* (1879) 54 Cal. 75.)

[9] Section 12 provides in full:

> "A person shall be released on bail by sufficient sureties, except for:
> (a) Capital crimes when the facts are evident or the presumption great;
> (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or
> (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.
> Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.
> A person may be released on his or her own recognizance in the court's discretion."

***8** Subsections (b) and (c) of section 12 provide that a court cannot deny admission to bail to a defendant charged with violent acts or who threatened another with great bodily harm, except on the basis of "clear and convincing evidence" that there is "a substantial likelihood the defendant's release would result in great bodily harm to others." The factors the court must consider in setting the amount of bail are "the seriousness of the offense charged, the previous criminal record of the defendant, and the

probability of his or her appearing at the trial or hearing of the case." (§ 12.)

Section 28 establishes and ensures enforcement of 17 rights for victims of criminal acts (art. I, § 28, subds. (f)(1)-(13)), one of which is the right "[t]o have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." (Art. I, § 28, subd. (b)(3).) With respect to that victim's right, subdivision (f)(3) of section 28, entitled "Public Safety Bail," provides that "[i]n setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary consideration."

The statutes implementing the constitutional right to bail are set forth in title 10, chapter 1 of the Penal Code. (§§ 1268–1276.5.) Under the statutory scheme, a defendant charged with an offense not punishable with death "may be admitted to bail before conviction, as a matter of right," and "[t]he finding of an indictment does not add to the strength of the proof or the presumptions to be drawn therefrom." (§§ 1270.5, 1271.) However, before any person arrested for any specified serious offense may be released on bail in an amount that is either more or less than the amount contained in the schedule of bail for that offense, or may be released on his or her own recognizance, a hearing must be held at which "the court shall consider evidence of past court appearances of the detained person, the maximum potential sentence that could be imposed, and the danger that may be posed to other persons if the detained person is released." (§ 1270.1, subds. (a) & (c).) In determining whether to release the detained person on his or her own recognizance, "the court shall consider the potential danger to other persons, including threats that have been made by the detained person and any past acts of violence. The court shall also consider any evidence offered by the detained person regarding his or her ties to the community and his or her ability to post bond." (§ 1270.1, subd. (c).) Where bond is set in a different amount from that specified in the bail schedule, "the judge or magistrate shall state the reasons for that decision and shall address the issue of threats made against the victim or witness, if they were made, in the record." (§ 1270.1, subd. (d).)

A person detained in custody prior to conviction for want of bail is entitled, no later than five days from the time of the original order fixing bail, to an automatic review of the order fixing the amount of bail on the original accusatory pleading. (§ 1270.2)

Section 1275, which describes the factors judicial officers are obliged to consider in making bail determinations, tracks the exact language of subdivision (f)(3) of section 28 in declaring that "[i]n setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration." (§ 1275, subd. (a)(1).) Section 1275 additionally states that "[i]n considering the seriousness of the offense charged, a judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm ... or possession of controlled substances by the defendant." (§ 1275, subd. (a)(2).) Before a court reduces bail to below the amount established by the applicable bail schedule for specified serious offenses "the court shall make a finding of unusual circumstances and shall set forth those facts in the record." (§ 1275, subd. (c).)

***9** The only requirement in the bail statutes that a court considering imposition of money bail take into account the defendant's financial circumstances is that the court consider "any evidence offered by the detained person" regarding ability to post bond. (§ 1270.1, subd. (c).) Nothing in the statutes requires the court to consider less restrictive conditions as alternatives to money bail.

In the present case, the parties agree that the district attorney did not produce "clear and convincing evidence" that there is "a substantial likelihood" petitioner's release "would result in great bodily injury to others" or that petitioner "threatened another with great bodily harm" and "there is a substantial likelihood" he "would carry out the threat if released," as required for detention under section 12, and the court did not make such findings. The parties further agree that, as we next explain, the due process and equal protection clauses of the Fourteenth Amendment require the court to make two additional inquiries and findings before ordering release conditioned on the posting of money bail—whether the defendant has the financial ability to pay the amount of bail ordered and, if not, whether less restrictive conditions of bail are adequate to serve the government's interests—and the trial court failed to make either of these inquiries or findings.

II.

The Court Erred in Failing to Inquire Into and Make Findings Regarding Petitioner's Financial Ability to Pay Bail and Less Restrictive Alternatives to Money Bail

Petitioner's claim that the due process and equal protection clauses of the Fourteenth Amendment required the trial court to determine the availability of less restrictive non-monetary conditions of release that would achieve the purposes of bail is based on two related lines of cases.

The first, exemplified by *Bearden v. Georgia* (1983) 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (*Bearden*), does not relate to bail directly but more generally to the treatment of indigency in cases in which a defendant is exposed to confinement as a result of his or her financial inability to pay a fine or restitution. These cases establish that a defendant may not be imprisoned solely because he or she is unable to make a payment that would allow a wealthier defendant to avoid imprisonment. In the second line are bail cases, primarily *Salerno, supra,* 481 U.S. 739, 107 S.Ct. 2095, establishing that, because the liberty interest of a presumptively innocent arrestee rises to the level of a fundamental constitutional right, the right to bail cannot be abridged except through a judicial process that safeguards the due process rights of the defendant and results in a finding that no less restrictive condition or combination of conditions can adequately assure the arrestee's appearance in court and/or protect public safety, thereby demonstrating a compelling state interest warranting abridgment of an arrestee's liberty prior to trial.

As we shall describe, the principles underlying these cases dictate that a court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and community.

A.

***10** The question in *Bearden, supra,* 461 U.S. 660, 103 S.Ct. 2064, was whether the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failure to pay a fine and restitution. The court held that the trial court erred in automatically revoking probation on the basis that the petitioner could not pay the fine imposed without determining that he had not made sufficient bona fide efforts to pay or that adequate alternate forms of punishment did not exist. In reaching this result, Justice O'Connor noted that "[d]ue process and equal protection principles converge" in the Supreme Court's analysis in cases involving the treatment of indigents in the criminal justice system, but the court "generally analyze[d] the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." (*Id*. at p. 665, 103 S.Ct. 2064, citing *Ross v. Moffitt* (1974) 417 U.S. 600, 608-609, 94 S.Ct. 2437, 41 L.Ed.2d 341.)

Justice O'Connor pointed out, however, that in order to determine whether the differential treatment violates the equal protection clause, "one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether 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 ....' " (*Ross v. Moffitt*, *supra*, 417 U.S. at pp. 666-667, 94 S.Ct. 2437, fns. omitted.)[10]

[10] In a footnote, Justice O'Connor pointed out that "[a] due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a relative term rather than a classification, fitting 'the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.' [Citation.] The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process." (*Bearden, supra*, 461 U.S. at p. 666, fn. 8, 103 S.Ct. 2064.) That statement is as applicable to a bail determination as to the sentencing issue in *Bearden*.

In imposing a judicial responsibility to inquire into the financial circumstances of an allegedly indigent defendant, the *Bearden* court relied heavily on the reasoning of its

earlier opinions in *Williams v. Illinois* (1970) 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (*Williams*) and *Tate v. Short* (1971) 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (*Tate*), both of which advanced the process of mitigating the disparate treatment of indigents in the criminal justice system initially set in motion by *Griffin v. Illinois* (1956) 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 and *Douglas v. California* (1963) 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811.

In *Williams* the indigent defendant was convicted of petty theft and given the maximum possible sentence of one year imprisonment and a $500 fine. As permitted under an Illinois statute, the judgment directed that in the event of nonpayment of the fine, the defendant was to remain in jail to pay off the obligation at the rate of five dollars per day. The Supreme Court struck the statute as applied to the defendant, holding that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." (*Williams, supra*, 399 U.S. at pp. 241-242, 90 S.Ct. 2018.) *Tate* was a similar case except that the statutory penalty permitted only a fine.

***11** As stated in *Williams*, "On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment." (*Williams, supra*, 399 U.S. at pp. 241-242, 90 S.Ct. 2018, fns. omitted, accord, *Tate, supra,* 401 U.S. at pp. 398-399, 91 S.Ct. 668.)

The rule the *Bearden* court distilled from *Williams* and *Tate* is that the state "cannot ' "[impose] a fine as a sentence and then automatically [convert] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." ' [(*Tate, supra,* 401 U.S. at p. 398, 91 S.Ct. 668.)] In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine." (*Bearden*, *supra*, 461 U.S. at pp. 667-668, 103 S.Ct. 2064.)

As *Bearden* explained, the Fourteenth Amendment ameliorates, even if it does not cure, the differential treatment it protects against by mandating careful and consequential judicial inquiry into the circumstances. A probationer who willfully refuses to pay a fine or restitution despite having the means to do so, or one who fails to "make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution," may be imprisoned as a "sanction to enforce collection" or "appropriate penalty for the offense." (*Bearden, supra,* 461 U.S. at p. 668, 103 S.Ct. 2064.) "But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." (*Id.* at pp. 668-669, 103 S.Ct. 2064.)

Bearden, of course, was dealing with the issue of inability to pay in the context of individuals already convicted and sentenced. Because it was concerned with fines and restitution, the *Bearden* court discussed the measures necessary to satisfy the State's interests in punishment and deterrence. The issues are different in the pretrial bail context. Here the relevant governmental interests are ensuring a defendant's presence at future court proceedings and protecting the safety of victims and the community. The liberty interest of the defendant, who is presumed innocent, is even greater; consequently, as will be further explained, it is particularly important that his or her liberty be abridged only to the degree necessary to serve a compelling governmental interest. (See *Lopez-Valenzuela v. Arpaio, supra,* 770 F.3d at p. 779; *Salerno, supra,* 481 U.S. at pp. 749-750, 755, 107 S.Ct. 2095.) When money bail is imposed to prevent flight, the connection between the condition attached to the defendant's release and the governmental interest at stake is obvious: If the defendant fails to appear, the bail is forfeited. (§§ 1269b, subd. (h); 1305, subd. (a).) A defendant who is unable to pay the amount of bail ordered—assuming appropriate inquiry and findings as to the amount necessary to protect against flight—is detained because there is no less restrictive alternative to satisfy the governmental interest in ensuring the defendant's presence. (See *United States v. Mantecon-Zayas* (1st Cir. 1991) 949 F.2d 548, 550; *Brangan v. Commonwealth* (2017) 477 Mass. 691,80 N.E.3d 949, 960, 963.)[11] Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. Money bail will protect

the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed. Accordingly, when the court's concern is protection of the public rather than flight, imposition of money bail in an amount exceeding the defendant's ability to pay unjustifiably relieves the court of the obligation to inquire whether less restrictive alternatives to detention could adequately protect public or victim safety and, if necessary, explain the reasons detention is required.

[11] *United States v. Mantecon-Zayas, supra,* 949 F.2d at p. 550, held that a court may impose a financial condition the defendant cannot meet *if* the court finds such condition bail is reasonably necessary to ensure the defendant's presence at trial. But "once a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order; in particular, the requirement in 18 U.S.C. § 3142(i) that the court 'include written findings of fact and a written statement of the reasons for the detention.' " (*Ibid.*) To the same effect, *Brangan v. Commonwealth, supra,* 80 N.E.3d at page 963, held that although a defendant does not have a right to "affordable bail," "where a judge sets bail in an amount so far beyond a defendant's ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty."

***12** *Bearden* and its progeny " 'stand for the general proposition that when a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating what the person must pay to satisfy a particular state interest.' Otherwise, the government has no way of knowing if the detention that results from failing to post a bond in the required amount is reasonably related to achieving that interest." (*Hernandez v. Sessions* (9th Cir. 2017) 872 F.3d 976, 992-993.)

The principles enunciated in *Bearden*, *Williams,* and *Tate* have been rigorously enforced by the courts of this state.

In *In re Antazo, supra,* 3 Cal.3d 100, 89 Cal.Rptr. 255, 473 P.2d 999, the two defendants were convicted of arson, and the trial court suspended imposition of sentence upon the condition, among others, that each pay a fine of $2,500 plus a penalty assessment of $625 or, in lieu of payment, serve one day in jail for each $10 unpaid. One defendant paid the fine and assessment and was released. The other defendant, Antazo, was indigent and unable to pay, and was therefore incarcerated. Discharging Antazo from custody, the Supreme Court stated as follows: "[A] sentence to pay a fine, together with a direction that a defendant be imprisoned until the fine is satisfied, gives an advantage to the rich defendant which is in reality denied to the poor one. 'The "choice" of paying $100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor ....' To put it in another way and in the context of the present case, when a fine in the same amount is imposed upon codefendants deemed equally culpable with the added provision for their imprisonment in the event of its nonpayment, an option is given to the rich defendant but denied to the poor one." (*Id.* at p. 108, 89 Cal.Rptr. 255, 473 P.2d 999; accord, *Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 750, 187 Cal.Rptr. 144, 653 P.2d 648.)

The court of appeal adopted the same reasoning in *In re Young* (1973) 32 Cal.App.3d 68, 107 Cal.Rptr. 915, in which the petitioner challenged the denial of prison credit for presentence detention that resulted solely from his indigency. The court held that as applied to an indigent defendant who could not afford bail, a statute providing that a prison term commences on delivery of the defendant to prison "operates to create an unconstitutional discrimination and results in overall confinement of persons who are convicted of the same crime who are able to afford bail and so secure liberty and those who cannot do so and are confined. Although the presentence jail time may not be 'punishment' as defined by the Penal Code, it is a deprivation of liberty. The additional deprivation suffered only by the indigent does not meet federal standards of equal protection ...." (*Id.* at p. 75, 107 Cal.Rptr. 915; accord, *People v. Kay* (1973) 36 Cal.App.3d 759, 763, 111 Cal.Rptr. 894 [holding that "[a]n indigent defendant cannot be imprisoned because of his inability to pay a fine, even though the fine be imposed as a condition of probation" and instructing the trial court on remand to take into consideration the "present resources of appellants and ... their prospects" when determining their restitution payments].)

Turning to the present case, petitioner asserts and it is undisputed that he was detained prior to trial due to his financial inability to post bail in the amount of $350,000, an amount that was fixed by the court without consideration of either his financial circumstances or less restrictive alternative conditions of release. The court's error in failing to consider those factors eliminated the

requisite connection between the amount of bail fixed and the dual purposes of bail, assuring petitioner's appearance and protecting public safety. (*Pugh v. Rainwater, supra*, 572 F.2d at p. 1057 [" 'Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.' "].) Due to its failure to make these inquiries, the trial court did not know whether the $350,000 obligation it imposed would serve the legitimate purposes of bail or impermissibly punish petitioner for his poverty. "[W]hen the government detains someone based on his or her failure to satisfy a financial obligation, the government cannot reasonably determine if the detention is advancing its purported governmental purpose unless it first considers the individual's financial circumstances and alternative ways of accomplishing its purpose." (*Hernandez v. Sessions, supra*, 872 F.3d at p. 991.)

B.

***13** *Salerno, supra*, 481 U.S. 739, 107 S.Ct. 2095, which petitioner relies heavily upon, upheld the constitutionality of the federal Bail Reform Act of 1984 (18 U.S.C. § 3141 et seq.) (the Bail Reform Act). That Act provides that "[a] judicial officer ... before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings" (18 U.S. C. § 3141(a)) and that 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 specified conditions, "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." (18 U.S.C. § 3142(b).) Thus, if the offense is not made statutorily unbailable, the presumption is release pending trial.[12]

12 The Bail Reform Act, and the District of Columbia bail statutes (Dist. of Col. Code, §§ 23-1301-1309), "are based on 'bail/no bail' or 'release/no release' schemes, which, in turn, are based on legal and evidence-based pretrial practices such as those found in the American Bar Association's Criminal Justice Standards on Pretrial Release. Indeed, each statute contains general legislative titles describing the process as either 'release' or 'detention' during the pretrial phase, and each starts the bail process by providing judges with four options: (1) release on personal recognizance or with unsecured appearance bond; (2) release on a condition or combination of conditions; (3) temporary detention; or (4) full detention. Each statute then has a provisions describing how each release or detention option should function. [¶] Because they successfully separate bailable from unbailable defendants, thus allowing the system to lawfully and transparently detain unbailable defendants with essentially none of the conditions associated with release (including secured financial conditions), both statutes are also able to include sections forbidding financial conditions that result in the preventive detention of the defendant—an abuse seen frequently in states that have not fully incorporated notions of a release/no release system." (Schnacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform, National Inst. of Corrections (Sept. 2014) p. 29.)

The United States Supreme Court has long recognized the gravity of the interests abridged by pretrial detention. As the court explained in *Stack v. Boyle* (1951) 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (*Stack*), "federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail" because "[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citation.] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (*Id*. at p. 4, 72 S.Ct. 1, fns. omitted.) In his oft-cited concurring opinion, Justice Jackson amplified this point: "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.[13] To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death [citation], providing: 'a person arrested for an offense not punishable by death shall be admitted to bail ...' before conviction." (*Id*. at pp. 7-8, 72 S.Ct. 1 (conc. opn. of Jackson, J.); see also *Gerstein v. Pugh* (1975) 420 U.S. 103, 114, 123, 95 S.Ct. 854, 43 L.Ed.2d 54 [recognizing that "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, ... impair his family relationships" and undermine his "ability to assist in preparation of his defense"].)

13 These are by no means the only adverse collateral consequences of pretrial detention. As has been noted,

> "[t]he stress of incarceration—or even just the threat of jail time—frequently prompts defendants to plead guilty and give up their right to trial .... [I]t 'is a self-fulfilling system; defendants have to plea, and end up with a record,' which permanently labels them as criminal, which in turn further influences judges when setting bail in future cases. Virtually all individuals charged with low-level offenses who face an unaffordable bail amount end up accepting a plea, thereby absolving the state of its burden to prove the case beyond a reasonable doubt .... 'Individuals who insist on their innocence and refuse to plead guilty get held ....' And while the plea might prevent detention altogether or at least allow a return to productivity outside the jail cell, it may also come with a criminal record.' " (Goff, *Pricing Justice: The Wasteful Enterprise of America's Bail System* (2017) 82 Bklyn. L.Rev. 881, 882, fns. omitted.) This article also describes a recent study showing that approximately two-thirds of the households with a family member in jail or prison struggle to meet their most essential needs, "nearly 50% are unable to purchase enough food or pay for housing. For one-third of families who were living above the poverty line before making contact with the criminal justice system, the expenses associated with incarceration or jail time—such as phone, commissary, and travel costs—pushed them into debt." (*Id*. at p. 899, fns. omitted.)

***14** The Bail Reform Act amended federal law by authorizing courts to make release decisions that not only consider the likelihood an arrestee might flee, as under prior law, but also "give appropriate recognition to the danger a person may pose to others if released." (*Salerno, supra,* 481 U.S. at p. 742, 107 S.Ct. 2095.)[14] Although the federal bail system is not based on secured money bail, petitioner relies upon *Salerno* because of the heavy emphasis the opinion places on the extensive safeguards mandated by the Bail Reform Act to assure the accuracy of a judicial assessment that the release of a particular arrestee would endanger public safety. These safeguards, which the court relied upon in upholding the statute, are relevant to our consideration of the inquiries and findings necessary before a presumptively innocent arrestee may be detained prior to trial.

[14] The 1966 Act (Pub. L. No. 89-465, 80 Stat. 214) provided that non-capital defendants were to be released pending trial unless the court determined that such release did not adequately ensure a defendant's appearance. It also required the court to choose the least restrictive alternatives from a list of conditions designed to secure a defendant's appearance. The bail of defendants charged with a capital offense was determined on the basis of different criteria which took public safety into account.

The defendants in *Salerno* were charged with 35 acts of racketeering activity, including fraud, extortion, gambling and conspiracy to commit murder. At their arraignment, the government moved to have them detained prior to trial on the ground that "no condition of release would assure the safety of the community or any person," and made a detailed proffer of evidence that, among other things, respondents had engaged in wide-ranging conspiracies to aid their illegal enterprises through violent means, and Salerno had personally participated in two murder conspiracies. (*Salerno, supra,* 481 U.S. at p. 743, 107 S.Ct. 2095.)

The trial court granted the government's detention motion after concluding that the government had established 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 determinations necessary to order an arrestee's detention under the Bail Reform Act. (*Salerno*, *supra*, 481 U.S. at pp. 743-744, 107 S.Ct. 2095.) The Court of Appeals reversed, finding the Bail Reform Act's " 'authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes.' [Citation.] The [Court of Appeals] concluded that the Government could not, consistent with due process, detain persons who had not been accused of any crime merely because they were thought to present a danger to the community." (*Salerno*, at p. 744, 107 S.Ct. 2095.)

Rejecting that conclusion, the Supreme Court reasoned that the pretrial detention authorized by the Bail Reform Act is not impermissible punishment but a regulatory measure designed to protect community safety that is constitutionally justified by the "legitimate and compelling" government interest in preventing crime committed by arrestees. (*Salerno, supra,* 481 U.S. at p. 749, 107 S.Ct. 2095.) In appropriate circumstances, the court declared, such detention can outweigh an arrestee's liberty interest. (*Id*. at pp. 747-752, 107 S.Ct. 2095.)

Salerno described the protections included in the Bail Reform Act as follows: "The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. [Citation]." (*Salerno, supra,* 481 U.S. at p. 750,

107 S.Ct. 2095.) "Detainees have a right to counsel at the detention hearing. [Citation.] They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. [Citation.] The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. [Citation.] The Government must prove its case by clear and convincing evidence. [Citation.] Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. [Citation.] The Act's review provisions, [citation], provide for immediate appellate review of the detention decision." (*Id*. at pp. 751-752, 107 S.Ct. 2095.)

***15** As an en banc panel of the Ninth Circuit has observed, *Salerno* "concluded that the Bail Reform Act satisfied heightened scrutiny because it both served a 'compelling' and 'overwhelming' governmental interest 'in preventing crime by arrestees' and was 'carefully limited' to achieve that purpose," and "sufficiently tailored because it 'careful[ly] delineat[ed] ... the circumstances under which detention will be permitted.' " (*Lopez-Valenzuela v. Arpaio, supra,* 770 F.3d at p. 779.)

The Ninth Circuit went on to note that "[i]f there was any doubt about the level of scrutiny applied in *Salerno*, it has been resolved in subsequent Supreme Court decisions, which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny. See [*Reno v.*] *Flores* [(1993)] 507 U.S. [292,] 301-02 [113 S.Ct. 1439, 123 L.Ed.2d 1] ... (O'Connor, J. concurring); *Foucha v. Louisiana* [(1992)] 504 U.S. 71, 80-83 [112 S.Ct. 1780, 118 L.Ed.2d 437] (Kennedy, J. dissenting). *Salerno* and the cases that have followed it have recognized that '[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.' *Foucha*, 504 U.S. at 80 [112 S.Ct. 1780]. Thus, '[t]he institutionalization of an adult by the government triggers heightened substantive due process scrutiny.' *Flores*, 507 U.S. at 316 [113 S.Ct. 1439] (O'Connor, J., concurring). As the Court explained in *Salerno,* [*supra,*] 481 U.S. at 755 [107 S.Ct. 2095], 'liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.' See also *Zadvydas v. Davis* [(2001)] 533 U.S. 678, 690 [121 S.Ct. 2491, 150 L.Ed.2d 653] ('Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.'); *Foucha*, 504 U.S. at 90 [112 S.Ct. 1780] (Kennedy, J. dissenting.) ('As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.') Thus, [the Arizona constitutional provision prohibiting state courts from setting bail for detainees illegally in the country] will satisfy substantive due process only if they are 'narrowly tailored to serve a compelling state interest.' *Flores*, 507 U.S. at 302 [113 S.Ct. 1439] (citing *Salerno*, 481 U.S. at 746 [107 S.Ct. 2095].)" (*Lopez-Valenzuela v. Arpaio, supra*, 770 F.3d 772 at pp. 780-781.)

Because the federal bail scheme at issue in *Salerno* is not a money-bail system, the court had no need to address the issues presented by such a system when the applicant for bail is indigent or impecunious. *Turner v. Rogers* (2011) 564 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 452 (*Turner*) is instructive in this regard. *Turner* addressed the question whether a father facing the possibility of incarceration for civil contempt due to his inability to pay a child support order had a right to court-appointed counsel. Noting that the proceeding was civil and therefore required "fewer procedural protections than in a criminal case" (*id*. at p. 442, 131 S.Ct. 2507), the court "determine[d] the 'specific dictates of due process' by examining the 'distinct factors' that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair," namely, "(1) the nature of 'the private interest that will be affected,' (2) the comparative 'risk' of an 'erroneous deprivation of that interest with and without 'additional or substitute procedural safeguards,' and (3) the nature and magnitude of any countervailing interest in not providing 'additional or substitute procedural requirement[s].' " (*Id*. at pp. 444-445, 131 S.Ct. 2507, citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18.)

***16** *Turner* recognized that the gravity of "the private interest that will be affected" argued strongly for the right to counsel. An indigent defendant's loss of personal liberty through imprisonment demands due process protection, the court declared, because "[t]he interest in securing that freedom, the freedom 'from bodily restraint,' lies at the core of the liberty protected by the Due Process Clause." (*Turner, supra,* 564 U.S. at p. 445, 131 S.Ct. 2507, quoting *Foucha v. Louisiana, supra,* 504 U.S. at p. 80, 112 S.Ct. 1780.) The court ultimately found this interest outweighed by a combination of three considerations that militated against an automatic right to state-provided counsel in civil proceedings that might result in imprisonment. One of those considerations is particularly significant for our purposes: the availability of "a set of 'substitute procedural

safeguards' *Mathews*, [*supra*,] 424 U.S. at 335 [96 S.Ct. 893] ..., which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty ... without incurring some of the drawbacks inherent in recognizing an automatic right to counsel." (*Turner, supra*, 564 U.S. at p. 447, 131 S.Ct. 2507.)[15] Those safeguards included "(1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay." (*Id*. at pp. 447-448, 131 S.Ct. 2507.) The court made it clear that the "alternative procedural safeguards" it described were examples, not a complete list of what was required by due process, and that the state could provide procedures "equivalent" to those identified by the court. (*Id*. at p. 448, 131 S.Ct. 2507.)

15 The other two factors were (1) that a defendant's ability to pay is closely tied to indigence, which is in many cases "sufficiently straightforward" to be determined prior to providing a defendant with counsel; and (2) sometimes the person opposing the defendant is not the government represented by counsel but the custodial parent who is unrepresented by counsel, so that providing the defendant counsel "could create an asymmetry of representation" that would distort the nature of the proceeding. (*Turner, supra,* 564 U.S. at pp. 446-447, 131 S.Ct. 2507.)

A determination of ability to pay is critical in the bail context to guard against improper detention based only on financial resources. Unlike the federal Bail Reform Act,[16] however, our present bail statutes only require a court to consider a defendant's ability to pay if the defendant raises the issue. (§ 1270.1, subd. (c).) This leaves in the hands of the defendant a matter that is the trial court's responsibility to ensure—that a defendant not be held in custody solely because he or she lacks financial resources. (See *De Luna v. Hidalgo County* (S.D. Tex. 2012) 853 F.Supp.2d 623, 648 ["the absence of any inquiry into a defendant's indigency unless the defendant 'raises' it of his or her own accord does not provide the process due" and "risks that defendants who do not think to 'speak up' during arraignment about their inability to pay fines may be jailed solely by reason of their indigency, which the Constitution clearly prohibits"].) Furthermore, section 1270.1, subdivision (c), applies only where a person arrested for specified offenses (expressly excluding first degree residential burglary, petitioner's offense) is to be released on his or her own recognizance or bail in an amount that is more or less than that specified for the offense on the bail schedule. (§ 1270.1, subd. (a).) While section 1275 identifies factors to be considered by the court in setting, reducing or denying bail, including factors pertaining to whether release of the arrestee would endanger public safety, it does not include consideration of the defendant's ability to fulfill a financial condition of release. Nor does section 1269c, which authorizes the setting of bail in amounts greater or lower than that specified in the bail schedule, require any judicial consideration of the arrestee's financial circumstances.

16 The Bail Reform Act expressly provides that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person." (18 U.S.C. § 3142(c)(2).) Among the factors required to be considered "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," are "the history and characteristics of the person, including ... [¶] ... financial resources ...." (18 U.S.C. § 3142(g)(3).)

***17** The *Bearden* line of cases, together with *Salerno* and *Turner*, compel the conclusion that a court which has not followed the procedures and made the findings required for an order of detention must, in setting money bail, consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention.

If the court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose. We believe the clear and convincing standard of proof is the appropriate standard because an arrestee's pretrial liberty interest, protected under the due process clause, is "a fundamental interest second only to life itself in terms of constitutional importance." (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 435, 166 Cal.Rptr. 149, 613 P.2d 210; see *Santosky v. Kramer* (1982) 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599. 756 ["This court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money' "]; *Addington v. Texas* (1979) 441 U.S. 418, 427, 99 S.Ct. 1804, 60 L.Ed.2d 323 ["the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence"]; § 12 [clear and convincing evidence required to establish facts necessary for exception to constitutional

right to pretrial release in non-capital cases].)

Another protection that *Salerno* identified in the federal Bail Reform Act and *Turner* discussed, express findings and statements of decision (*Salerno, supra,* 481 U.S. at p. 752, 107 S.Ct. 2095; *Turner, supra*, 564 U.S. at p. 447, 131 S.Ct. 2507), is also of particular importance in ensuring that orders for release on bail do not become de facto detention orders. Although our bail statutes require statements of reasons to only a limited degree,[17] section 28, subdivision (f)(3), requires that when a judicial officer grants or denies bail or release on a person's own recognizance, "the reasons for that decision shall be stated in the record and included in the court's minutes." The significance of a statement of reasons is discussed in *In re Podesto* (1976) 15 Cal.3d 921, 937-938, 127 Cal.Rptr. 97, 544 P.2d 1297 (*Podesta*) and *In re Pipinos* (1982) 33 Cal.3d 189, 187 Cal.Rptr. 730, 654 P.2d 1257 (*Pipinos*). These cases addressed the adequacy of judicial explanations of the reasons for denying release pending appeal, but their guidelines are also useful in the context of pretrial detention. Because the liberty interest of a convicted person awaiting appeal is less than that of an accused person awaiting trial—there is no absolute right to bail on appeal, and the grant of such bail is totally within the trial court's discretion (§ 1272)—"[t]he rules governing the setting of bail pending trial must be at least as rigorous as those governing the setting of bail on appeal." (*In re Christie, supra*, 92 Cal.App.4th at p. 1109, 112 Cal.Rptr.2d 495.)

17 The bail statutes only require a court to state reasons on the record if it departs from the amount specified on the bail schedule in cases involving enumerated offenses (§ 1270.1, subd. (d)), and to find "unusual circumstances" and "set forth those facts on the record" if it reduces bail below the amount on the bail schedule for a person charged with a serious or violent felony (§ 1275, subd. (c)).

***18** *Podesto* upheld section 1272, which governs release after conviction pending probation or appeal, and held that trial courts "should render a brief statement of reasons in support of an order denying a motion for bail on appeal." (*Podesto, supra*, 15 Cal.3d at p. 938, 127 Cal.Rptr. 97, 544 P.2d 1297.) Explicit judicial findings "serve several worthy purposes: They help to assure a realistic review by providing a method of evaluating a judge's decision or order; they guard against careless decision making by encouraging the trial judge to express the grounds for his decision; and they preserve public confidence in the fairness of the judicial process." (*In re John H*. (1978) 21 Cal.3d 18, 23, 145 Cal.Rptr. 357, 577 P.2d 177, citing *Podesto,* at p. 937, 127 Cal.Rptr. 97, 544 P.2d 1297.)

Pipinos, supra, 33 Cal.3d 189, 187 Cal.Rptr. 730, 654 P.2d 1257, found insufficient a trial court's statement that the defendant's bail application was denied because he posed a " 'substantial flight risk,' " represented " 'some risk to society,' " and did not have a " 'substantial likelihood of success on appeal.' " The Supreme Court found these comments did not promote the "goal of ensuring that judges engage in careful and reasoned decisionmaking. Once defendant came forward with evidence in support of his application for release ... the court was duty-bound to articulate its evaluative process and show how it weighed the evidence presented in light of the applicable standards." (*Id*. at p. 198, 187 Cal.Rptr. 730, 654 P.2d 1257, citing *Podesto, supra*, 15 Cal.3d at p. 938, 127 Cal.Rptr. 97, 544 P.2d 1297.) The trial court's statement was inadequate because "it does not identify the specific facts which persuaded the court that bail would be inappropriate in this case. The court simply based its denial of bail on the bare conclusions that there was a likelihood the defendant would flee and would continue his criminal activities as a dealer of controlled substances, and that his appeal was meritless." (*Pipinos*, at pp. 198-199, 187 Cal.Rptr. 730, 654 P.2d 1257.)

With respect to the likelihood of flight, the *Pipinos* court considered the factors noted in *Podesto*: "Because the primary purpose of bail is assurance of continued attendance at future court proceedings [citation], a defendant to qualify for release on appeal must satisfactorily demonstrate that the likelihood of his flight is minimal in light of the following three criteria: '(1) the defendant's ties to the community, including his employment, the duration of his residence, his family attachments and his property holdings; (2) the defendant's record of appearance at past court hearings or of flight to avoid prosecution; and (3) the severity of the sentence defendant faces.' " (*Pipinos, supra*, 33 Cal.3d at p. 199, 187 Cal.Rptr. 730, 654 P.2d 1257, quoting *Podesto, supra*, 15 Cal.3d at pp. 934-935, 127 Cal.Rptr. 97, 544 P.2d 1297.) Pipinos satisfied the first two criteria, but the trial court was " 'persuaded that he wouldn't give much pause to flee,' " solely on the ground that he faced a four-year prison term. This was improper, the Supreme Court stated, because *Podesto* requires that one factor be weighed against the others, "and the court's failure to mention the other factors ... does not permit us to review in what manner, if at all, it balanced defendant's community ties and record of court appearances against the incentive to flight suggested by the prison term.' " (*Pipinos,* at p. 199, 187 Cal.Rptr. 730, 654 P.2d 1257.) This balancing is required because "otherwise denial of bail would be proper in any case in which a prison term is imposed, regardless of offsetting factors presented by defendant." (*Id*. at p. 200, 187 Cal.Rptr. 730, 654 P.2d

1257.) Additionally, the absence of balancing "fails to promote the policy purpose underlying our requirement of a statement of reasons—guarding against careless decisionmaking. Although the court may very well have engaged in careful analysis of the facts and law, its failure to articulate its reasons for finding defendant a flight risk leaves us without the benefit of its analysis." (*Ibid*.)

***19** *Pipinos* also concluded the trial court's finding that the defendant was a " 'danger to society' " was "deficient with respect to providing a basis for meaningful review and guarding against careless decisionmaking." (*Pipinos, supra,* 33 Cal.3d at p. 200, 187 Cal.Rptr. 730, 654 P.2d 1257.) The trial court did "not expressly state that there is a probability that defendant will continue to engage in criminal conduct. Instead, the court obliquely refers to defendant's 'basic character flaws,' and bases its conclusion of danger to society on the fact that there is no evidence of a 'metamorphosis.' We may conceivably infer that the court found, based on its assessment of defendant's character, that it was unlikely that defendant would forego his profitable trafficking in controlled substances. However, a primary purpose of the *Podesto* requirement of a statement is precisely to prevent this type of speculative judicial second-guessing, especially when, as here, we are asked to draw inferences as to inferences the trial court might have drawn." (*Ibid*.) "Because of the court's failure to articulate its reasons for finding defendant a danger to the community, we cannot ascertain the manner in which the court exercised its discretion. We do not know if the denial of bail was based upon the circumstances and propensities of the individual defendant, or whether it was based upon precisely the generalizations of future criminality *Podesto* ' s standards were meant to prevent. *Podesto* urges caution in denying bail based on the propensities of the defendant and warns courts 'not [to] adopt an ironclad, mechanical policy of denying bail to all who commit a particular crime.' [Citations.]" (*Id*. at p. 201, 187 Cal.Rptr. 730, 654 P.2d 1257.)

The trial court in the present case explained its reasons to the extent required by the bail statutes, which was only to explain that it found petitioner's community ties and willingness to engage in treatment constituted "unusual circumstances" justifying deviation from the bail schedule. (§§ 1275, subd. (c), 1270.1, subd. (d).) Of greatest significance, it did not explain why, despite commending petitioner for his willingness to participate in supervised residential drug treatment and ordering participation in such treatment as a condition of release, it simultaneously precluded release by setting an amount of money bail it was told petitioner could not pay.[18] The court's failure to explain the reasoning behind this incongruous order makes it impossible for us to know whether the trial court's determinations that petitioner was dangerous and presented a flight risk were based upon an individualized evaluation of his circumstances and propensities or solely upon "the generalizations of future criminality *Podesto* 's standards were meant to prevent," (*Pipinos, supra*, 33 Cal.3d at p. 201, 187 Cal.Rptr. 730, 654 P.2d 1257), or even whether the court fully recognized the incongruity of its decision.

18 The stay-away order also suggests internal inconsistency in the court's order, in that it would only be necessary if petitioner was not detained, but this aspect of the order is more readily explained as a safeguard included even in orders for detention, as a protection for the victim in case a defendant is later able to obtain release.

III.

Bail Determinations Must be Based upon Consideration of Individualized Criteria

Failure to consider a defendant's ability to pay before setting money bail is one aspect of the fundamental requirement that decisions that may result in pretrial detention must be based on factors related to the individual defendant's circumstances. This requirement is implicit in the principles we have discussed—that a defendant may not be imprisoned solely due to poverty and that rigorous procedural safeguards are necessary to assure the accuracy of determinations that an arrestee is dangerous and that detention is required due to the absence of less restrictive alternatives sufficient to protect the public.

Stack, supra, 342 U.S. 1, 72 S.Ct. 1, illustrates the significance of individualized bail determinations (a point subsequently reiterated in *Salerno, supra,* 481 U.S. at p. 750, 107 S.Ct. 2095). The 12 petitioners in *Stack* were charged with conspiring to violate the Smith Act, which made it a criminal offense to advocate the violent overthrow of the government or to organize or be a member of any group devoted to such advocacy. (*Stack,* at p. 3, 72 S.Ct. 1.) After bail was fixed in the uniform amount of $50,000 for each petitioner, they moved to reduce the amount as excessive, submitting statements regarding their individual circumstances and financial resources, none of which was controverted by the government. (*Ibid.*)

The only evidence presented by the government was a showing that four persons previously convicted under the Smith Act in a federal court in another state had forfeited

bail. Noting that petitioners were exposed to imprisonment for no more than five years and a fine of not more than $10,000, and that the government did not deny bail had been fixed in a sum much higher than that usually imposed for offenses with like penalties, the court questioned the government's failure to make any factual showing justifying the unusually high amount of bail uniformly fixed for each of the four petitioners. "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon the standards relevant to the purpose of assuring the presence of *that defendant*...." (*Stack, supra,* 342 U.S. at p. 5, 72 S.Ct. 1, italics added.) As Justice Jackson observed, "[e]ach defendant stands before the bar of justice as an individual. Even on a conspiracy charge[,] defendants do not lose their separateness or identity. ... The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance." (*Id.* at p. 9, 72 S.Ct. 1, conc. opn. of Jackson, J.)

***20** The $600,000 bail initially ordered in this case was prescribed by the county bail schedule, which was also the anchor for the $350,000 reduced bail order.[19] Bail schedules provide standardized money bail amounts based on the offense charged and prior offenses, regardless of other characteristics of an individual defendant that bear on the risk he or she currently presents.[20] These schedules, therefore, represent the antithesis of the individualized inquiry required before a court can order pretrial detention. Bail schedules have been criticized as undermining the judicial discretion necessary for individualized bail determinations, as based on inaccurate assumptions that defendants charged with more serious offenses are more likely to flee and reoffend,[21] and as enabling the detention of poor defendants and release of wealthier ones who may pose greater risks.[22]

19 In response to the court's request that he inform the "Clerk of this Court" in writing how the bail schedule amount of $600,000 was calculated, petitioner's counsel stated that he "is unable to explain with any degree of certainty how money bail was calculated" and "because the San Francisco bail schedule incorporates no instructions for how to administer its list of offenses and dollar amounts, different sheriff's employees and different magistrates apply different principles." After consultation with the Attorney General, however, petitioner believes the most likely scenario is as follows: "To avoid 'stacking' bail amounts for different charges arising out of the same incident (a common practice throughout the state and in many cases in San Francisco) the Assistant District Attorney in this case only applied the money bail amount for one of the charges, in this case the residential burglary, because that is the charge with the highest scheduled bail. There were two enhancements applied to that charge (an elderly victim and the presence of a person during the burglary), and these amounts ($100,000 each) were added to the total, even though these enhancements arguably constitute 'stacking' since the presence of the victim is counted twice. There were also allegations of four serious priors, each of which would add $100,000 to the total bail amount. However, because two of the priors are from the same date and county, those were counted as one offense for purposes of applying the bail schedule. Therefore, money bail enhancements were added for three serious priors. In sum, the likely breakdown of the $600,000 money bail amount was: [scheduled bail for residential burglary in the amount of $100,000 and $100,000 for each of five enhancement allegations (a person was present in the residence; crime against an elderly victim; and three prior convictions in 1980, 1986 and 1992).]" Petitioner's counsel also noted that "nothing on the face of the bail schedule required this computation of money bail. The bail schedule contains no instruction on how financial conditions of release should be calculated, including whether money bail should be 'stacked' or whether prior convictions from the same date should be counted separately or together for the purpose of adding bail enhancements. The schedule offers no instructions for what to do when the presence of a victim would form the basis for several enhancements, one due to the victim's presence and another due to the victim's age."

20 Superior court judges in each county are required to "prepare, adopt, and annually revise a uniform countywide schedule of bail" for all bailable felony and for all misdemeanor and infraction offenses except Vehicle Code infractions. (§ 1269b, subd. (c).) In adopting the schedule of bail for all bailable felony offenses, "the judges shall consider the seriousness of the offense charged. In considering the seriousness of the offense charged the judges shall assign an additional amount of required bail for each aggravating or enhancing factor chargeable in the complaint, including, but not limited to, additional bail for charges alleging facts that would bring a person within [specified statutes defining certain violent and serious felony offenses]. [¶] In considering offenses in which a violation of [specified provisions of the Health and Safety Codes] is alleged, the judge shall assign an additional amount of required bail for offenses involving large quantities of controlled substances." (§ 1269b, subd. (e).)

21 Bail schedules are based on the theory that more serious crimes are punished by higher penalties and it is therefore more likely that the defendant will flee and prove dangerous and re-offend if released. However, as a thoughtful San Francisco Superior Court judge who has studied the subject points out, "the evidence does not

support the proposition that the severity of the crime has any relationship either to the tendency to flee or the likelihood of re-offending." (Karnow, *Setting Bail for Public Safety* (2008) 13 Berkeley J. of Crim. L. 1, 14.) According to Judge Karnow, "the most exhaustive empirical studies of bail practices in the United States" which he discusses at length, suggest instead "that the severity of the crime cannot be used as a proxy for the danger posed by the defendant if he were released on bail. Accordingly, the current practice by which judges simply follow the bail schedules is, to put it delicately, of uncertain utility." (*Id*. at pp. 15, 16, fn.omitted; see also, Arkfeld, *The Federal Bail Reform Act of 1984: Effect of the Dangerousness Determination on Pretrial Detention* (1988) 19 Pac. L.J. 1435, 1444-1445 [referring to studies by the National Bureau of Standards and Harvard University].)

22 The Standards for Criminal Justice promulgated by the American Bar Association "flatly rejects the practice of setting bail amounts according to a fixed bail schedule based on charge," because such schedules "are arbitrary and inflexible: they exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates. The practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount of bail required by the bail schedule. They also enable the unsupervised release of more affluent defendants who may present real risks of flight or dangerousness, who may be able to post the required amount easily and for whom the posting of bail may be simply a cost of doing 'business as usual.' " (ABA Standards for Crim. Justice, Pretrial Release (3d ed. 2007) com. to std. 10-5.3 (e).) The Fifth Circuit has agreed, stating in *Pugh v. Rainwater, supra,* 572 F.2d 1053 that "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty meeting its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." (*Id*. at p. 1057, citing Wisotsky, *Use of a Master Bond Schedule: Equal Justice Under Law?* (1970) 24 Univ. of Miami L.Rev. 808; *The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City* (1972) 8 Crim. Law Bulletin 459; Note, *Bail and its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform* (1974) 9 Valparaiso Univ. L.Rev. 167.) (See also *Pierce v. City of Velda City* (E.D. Mo. June 3, 2015) No. 4:15-CV-00570, 2015 WL 10013006 [2015 U.S. Dist. Lexis 176261] [enjoining the defendant city's "use of a secured bail schedule to set the conditions for release of a person in custody after arrest for an offense that may be prosecuted by [the city]"].)

***21** Petitioner does not facially challenge the use of the San Francisco bail schedule. Nor do we condemn the trial court's consultation of the schedule: Such consultation is statutorily required, because for serious or violent felonies the court cannot depart from the amount prescribed by the schedule without finding unusual circumstances. (§ 1275, subd. (c).) The nature of the present charges against petitioner and his prior offenses are relevant to assessment of his dangerousness, and the schedule provides a useful measure of the relative seriousness of listed offenses. The bail schedule also serves useful functions in providing a means for individuals arrested without a warrant to obtain immediate release without waiting to appear before a judge (§ 1269b),[23] as well as a starting point for the setting of bail by a judge issuing an arrest warrant or for a court setting bail provisionally in order to allow time for assessment of a defendant's financial resources and less restrictive alternative conditions by the pretrial services agency, or if a defendant does not oppose pretrial detention.[24] As this case demonstrates, however, unquestioning reliance upon the bail schedule without consideration of a defendant's ability to pay, as well as other individualized factors bearing upon his or her dangerousness and/or risk of flight, runs afoul of the requirements of due process for a decision that may result in pretrial detention. Once the trial court determines public and victim safety do not require pretrial detention and a defendant should be admitted to bail, the important financial inquiry is not the amount prescribed by the bail schedule but the amount necessary to secure the defendant's appearance at trial or a court-ordered hearing.

23 Under section 1269b, subdivisions (a) and (b), if the defendant has not appeared before a judge on the charge contained in the complaint, indictment, or information, "the bail shall be in the amount fixed in the warrant of arrest or, if no warrant for arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear. ..." (§ 1269b, subd. (b).)

24 While the bail schedules may be particularly useful to overburdened courts in low risk misdemeanor and traffic offenses, allowing arrestees an opportunity to obtain immediate release (especially on weekends and evenings when courts are not in session) and avoiding the need for unnecessary bail hearings, it has been pointed out that the low bail amounts for such offenses "simply serve as an arrest fine or tax on those defendants who can make bail, while detaining those who can't," and swift release could be less onerously facilitated by release on personal recognizance or unsecured bonds. (Carlson, *Bail Schedules, A Violation of Judicial Discretion?* Crim. Justice (Spring 2011) p. 14.)

Despite the widespread criticism of bail schedules, setting bail in the amount prescribed by the bail schedule remains the default position in this state,[25] and the practice may well be encouraged by the fact that by declining to depart from the bail schedule a court relieves itself of the statutory duty to state reasons. (See § 1270.1, subd. (d).) For poor persons arrested for felonies, reliance on bail schedules amounts to a virtual presumption of incarceration. According to a San Francisco study, last year 85 percent of the inmates of the county jail were awaiting trial and "[o]f these, 40-50% could be released if they could afford to pay their bail." (The Financial Justice Project, Office of the Treasurer & Tax Collector of the City and County of San Francisco, Do the Math: Money Bail Doesn't Add up for San Francisco (June 2017) p. 4.) While these statistics, corroborated by other recent studies,[26] do not indicate the corresponding percentage of arrestees who were released pending trial, for the population unable to afford money bail they make a mockery of the Supreme Court's observation in *Salerno* that prior to trial "liberty is the norm." (*Salerno, supra*, 481 U.S. at p. 755, 107 S.Ct. 2095.)

25 See footnote 23, *ante*.

26 For example, an analysis of county jail populations in California during 2014-2015 shows that 5,584 persons were booked into the San Francisco County Jail for the mean number of five days although charges were never made against them or were dismissed, and the cost to the county of those detentions, which numbered 28,671 days, was $3,264,766.77. (Human Rights Watch. "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People (Apr. 2017) p. 43.) The statewide statistics are not materially different. A 2015 study by the California Department of Justice shows that roughly one-third of the 1,451,441 individuals arrested for felonies in this state between 2011 and 2015, 459,9847 were never found guilty of any crime, charges were not even filed against 273,899 of them, and all but a small fraction were detained due to the inability to post the amount of bail set. (Criminal Justice Statistics Center, Cal. Dept. of Justice, Crime in California (2015) p. 49.)
An analysis of 2000-2009 data from the US Department of Justice reveals that California's large urban counties "relied more heavily on pretrial detention of felony defendants (59% detained), compared with other large urban counties in the United States (32% detained), even after accounting for differences in the composition of defendants. But the state still had higher rates of failure to appear in court and higher levels of felony rearrests during the pretrial period." (Tafoya et al., Pretrial Release in California (May 2017) Public Policy Institute of California, p. 5.)

***22** In the present case, as we have said, the prosecution did not present *any* evidence, let alone clear and convincing evidence, to establish that "no condition or combination of conditions of release would ensure the safety of the community or any person" (*Salerno, supra*, 481 U.S. at pp. 743-744, 107 S.Ct. 2095), thereby justifying abridgment of petitioner's liberty interest while awaiting trial. To the contrary, the prosecution did not dispute that any risk petitioner posed to victim and public safety could be sufficiently mitigated with the conditions of release the court imposed, and the court, by ordering petitioner's release on money bail with these conditions, implicitly so found. The conditions requiring petitioner to participate in the supervised residential drug treatment program and to stay away from the victim, addressed the particular circumstances of petitioner and the offense, but the bail amount was based solely on the bail schedule rather than any individualized inquiry into the amount necessary to satisfy the purposes of money bail in this case. And while the court attempted to acknowledge petitioner's circumstances by lowering the initially set amount of bail, the reduction from $600,000 to $350,000 was ineffectual. The reduction could be meaningful only if the court had reason to believe it possible for petitioner to post bail in the lower amount; but the court did not find or explain such a possibility, and the record suggests that, as defense counsel stated, petitioner was no more able to post bail in the amount of $350,000 than he was to post bail in the amount of $600,000. Nothing in the record suggests petitioner's claim of indigency was not bona fide, and neither the district attorney nor the court questioned the veracity of the claim. The court thus reached the anomalous result of finding petitioner suitable for release on bail but, in effect, ordering him detained (and therefore rendering him unable to participate in the treatment program the court had made a condition of release).

IV.

The Relief to Which Petitioner is Entitled

As we have said, two provisions of the California Constitution bear on the issue of pretrial release on bail: Section 12, establishing the right to pretrial release on bail except in enumerated circumstances, and section 28, making victim and public safety the primary consideration in bail decisions. Section 12, which addresses only the subject of bail, limits the cases in which a defendant is *not*

entitled to release to those involving capital crimes or involving certain other felonies if it is established by clear and convincing evidence that release would result in a substantial likelihood of great bodily harm to others. Section 28 establishes a number of rights for crime victims, one of which is the right to have the victim's safety considered in "fixing the amount of bail and release conditions for the defendant" (§ 28, subd. (b)(3)), and several rights shared by victims and the public, including that victim and public safety be the "primary considerations" in "setting, reducing or denying bail." (§ 28, subd. (f)(3).)

The Attorney General, in his return to the order to show cause, argued that these provisions should be "reconcile[d]" by interpreting section 28 as requiring courts to make public safety and safety of the victim the primary considerations in decisions to deny bail, set the amount of bail or release a defendant on his own recognizance, but "not to the extent of completely displacing section 12's bail provisions." The Attorney General maintained that section 28's emphasis on safety considerations applied to setting both the amount of money bail and nonmonetary conditions of release, rejecting petitioner's view that the only relevant consideration in setting money bail (as opposed to nonmonetary conditions of release) is risk of flight.[27] Petitioner urged that there is no need for us to reconcile the two constitutional provisions because neither is inconsistent with the requirements that a court considering bail must inquire into the defendant's ability to pay and, if the order would result in pretrial detention, afford the procedural protections required by due process and determine by clear and convincing evidence that no less restrictive alternative would satisfy the government's interests. Petitioner argued that safety considerations bear on nonmonetary conditions of release but not on the amount of money bail, which (as earlier explained) is relevant only to protect against flight risk.

27 The Attorney General's return expressed concern that the right to bail established by section 12 could be seen as conflicting with subdivision (b)(3) of section 28. The latter states as follows: "(b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights [¶] ... [¶] (3) To have the safety of the victim and the victim's family considered in fixing *the amount of bail* and release conditions." (Italics added.) Responding to petitioner's argument that the court could not consider public safety in deciding the amount of a monetary condition of pretrial release, the Attorney General's return focused on the italicized phrase and noted that, "[b]ecause monetary bail, unlike nonmonetary conditions, is an 'amount' that can be fixed, it makes little sense to view this clause as applying only to nonmonetary conditions. Moreover, the reference to 'release conditions' in that clause would be surplusage if 'bail' and 'release conditions' meant the same thing."

***23** For the first time at oral argument, in his second change of position in this case, the Attorney General advanced the view that section 28 authorizes a court to impose a higher amount of money bail on a defendant found to present a risk to public or victim safety than on one who presented no such risk. Stating that his position had "come into greater clarity" over the course of other litigation in the time since the return in this case was filed, the Attorney General further maintained that defendants who would be entitled to bail under section 12 because they are not charged with capital crimes or, under subdivisions (b) or (c) of that section, found by clear and convincing evidence to have a substantial likelihood of inflicting great bodily harm on others, may be found to present a risk to victim or public safety by a preponderance of the evidence and detained prior to trial if they are unable to afford bail and no less restrictive condition of release is adequate to protect public safety. The Attorney General also maintained that a defendant may be detained under section 28 solely to protect against flight. The Attorney General acknowledged that this view of section 28 would effectively eviscerate section 12.

The suggestion that section 28, in effect, impliedly repealed section 12, as we have said, is a significant departure from the positions the Attorney General took in briefing this case. We decline to resolve the issue, raised as it was so late in these proceedings. (*People v. Crow* (1993) 6 Cal.4th 952, 960, fn. 7, 26 Cal.Rptr.2d 1, 864 P.2d 80 [declining to address argument raised for first time at oral argument]; *People v. Barragan* (2004) 32 Cal.4th 236, 254, fn. 5, 9 Cal.Rptr.3d 76, 83 P.3d 480 [declining to address argument first raised in appellant's reply brief]; *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11, 142 Cal.Rptr. 429, 572 P.2d 43 ["Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant"].)[28]

28 As the Attorney General explained in his return to the order to show cause, the provenance of section 28 gives no indication it was meant to render section 12 ineffective. The right to bail has been part of the California Constitution since its adoption in 1849. (*People v. Turner* (1974) 39 Cal.App.3d 682, 684, 114 Cal.Rptr. 372.) Until 1982, the exception stated in section 12 and its predecessors was for capital offenses. (See fn. 8, *ante*.) In 1982, the voters enacted Proposition 4, which amended section 12 by adding as exceptions to the right of bail most of the cases now identified in

subdivisions (b) and (c) of section 12. (Ballot Pamp., Primary Elec. (June 8, 1982) text of Prop. 4, p. 17.) A competing initiative in 1982, Proposition 8 (the "Victims' Bill of Rights"), would have repealed section 12, made release on bail permissive rather than mandatory and enacted the language that is presently found in section 28, including making public safety "the primary consideration" in "setting, reducing or denying bail." (Ballot Pamp., Primary Elec. (June 8, 1982) text of Prop. 8, §§ 2, 3, p. 33.) After both initiatives passed, the Supreme Court concluded that the provisions of proposed section 28 were preempted by the proposed amendments to section 12, because Proposition 4 received more votes than Proposition 8. (*In re York, supra*, 9 Cal.4th at p. 1140, fn. 4, 40 Cal.Rptr.2d 308, 892 P.2d 804; see also, *People v. Standish* (2006) 38 Cal.4th 858, 875-878, 43 Cal.Rptr.3d 785, 135 P.3d 32.) Subsequently, section 28 was enacted in 2008 as Proposition 9 (the "The Victims' Bill of Rights Act of 2008"). Subdivision (f)(3) of section 28 ("Public Safety Bail") contains precisely the same text as the identically titled subdivision (e) of section 28 in 1982, except that it added "safety of the victim" to public safety as the "primary considerations" in "setting, reducing or denying bail." (Voter Information Guide, General Elec. (Nov. 4, 2008) text of Prop. 9, § 4.1, p. 130; Voter Information Guide (June 8, 1982) text of Prop. 8, § 3, p. 33.) But, unlike the 1982 Victims' Bill of Rights, Proposition 9 did *not* repeal section 12.
The Attorney General agreed in his return to the order to show cause that because Proposition 9 did not eliminate the longstanding right to bail under section 12, its passage in 2008 did not impliedly repeal the right to bail under section 12. (*In re Lance W.* (1985) 37 Cal.3d 873, 886, 210 Cal.Rptr. 631, 694 P.2d 744 [presumption against repeal obliges courts to reconcile conflicts between constitutional provisions to avoid implying that later enacted provision repeals another existing provision]). The Attorney General pointed out that the proposed repeal of section 12 in Proposition 8 was the reason Propositions 4 and 8 were found contradictory when enacted in 1982. As explained in *People v. Standish, supra*, 38 Cal.4th at pages 876-878, 43 Cal.Rptr.3d 785, 135 P.3d 32, Proposition 9 did not mention section 12, and the ballot pamphlet that year did not suggest that the public safety bail provision proposed by Proposition 9 was incompatible in any way with the right to bail provided by section 12.

***24** For the reasons we have discussed, the trial court erred in setting bail at $350,000 without inquiring into and making findings regarding petitioner's ability to pay and alternatives to money bail and, if petitioner's financial resources would be insufficient and the order would result in his pretrial detention, making the findings necessary for a valid order of detention. Petitioner is entitled to a new bail hearing at which he is afforded the opportunity to provide evidence and argument, and the court considers his financial resources and other relevant circumstances, as well as alternatives to money bail. If the court determines that petitioner is unable to afford the amount of money bail it finds necessary to ensure petitioner's future court appearances, it may set bail at that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose. The court's findings and reasons must be stated on the record or otherwise preserved.

V.

Closing Observations

We are not blind to the practical problems our ruling may present. The timeliness within which bail determinations must be made are short, and judicial officers and pretrial service agencies are already burdened by limited resources.

But the problem this case presents does not result from the sudden application of a new and unexpected judicial duty; it stems instead from the enduring unwillingness of our society, including the courts (see, e.g., Foote, *The Coming Constitutional Crisis in Bail: I* (1965) 113 U. Pa. L.Rev. 959-960, 998), to correct a deformity in our criminal justice system that close observers have long considered a blight on the system.[29]

[29] Alexis De Tocqueville, a keen early observer of our criminal procedures, observed in 1835 that our bail system "is hostile to the poor, and favorable only to the rich. The poor man has not always a security to produce ...; and if he is obliged to wait for justice in prison, he is speedily reduced to distress. A wealthy person, on the contrary, always escapes imprisonment. ... Nothing can be more aristocratic than this system of legislation. (De Tocqueville, Democracy in America (Dover Thrift ed. 2017) p. 56.) Tocqueville attributed this anomaly to English law which he thought Americans retained despite the fact that it was "repugnant to the general tenor of their legislation and the mass of their ideas." (*Ibid*.)

The problem, as our Chief Justice has shown, requires the judiciary, not just the Legislature, to change the way we think about bail and the significance we attach to the bail process. Though legislation is desperately needed, administration of the bail system is committed to the courts. It will be hard, perhaps impossible, for judicial officers to fully rectify the bail process without greater

resources than our trial courts now possess. Nevertheless, the highest judicial responsibility is and must remain the enforcement of constitutional rights, a responsibility that cannot be avoided on the ground its discharge requires greater judicial resources than the other two branches of government may see fit to provide. Judges may, in the end, be compelled to reduce the services courts provide, but in our constitutional democracy the reductions cannot be at the expense of presumptively innocent persons threatened with divestment of their fundamental constitutional right to pretrial liberty.

DISPOSITION

The bail determination is reversed, and the matter is remanded for further proceedings consistent with this opinion.

We concur:

Stewart, J.

Miller, J.

All Citations

--- Cal.Rptr.3d ----, 2018 WL 550512

107 S.Ct. 2095
Supreme Court of the United States

UNITED STATES, Petitioner
v.
Anthony SALERNO and Vincent Cafaro.

No. 86–87.
|
Argued Jan. 21, 1987.
|
Decided May 26, 1987.

Defendants were committed for pretrial detention pursuant to the Bail Reform Act by the United States District Court for the Southern District of New York, 631 F.Supp. 1364, John Walker, Jr., and Mary Johnson Lowe, JJ., and defendants appealed. The Court of Appeals, 794 F.2d 64, vacated and remanded. On writ of certiorari, the Supreme Court, Chief Justice Rehnquist, held that: (1) Bail Reform Act authorization of pretrial detention on basis of future dangerousness constituted permissible regulation that did not violate substantive due process, and was not impermissible punishment before trial; (2) due process clause did not categorically prohibit pretrial detention imposed as regulatory measure on ground of community danger, without regard to duration of detention; and (3) Bail Reform Act authorization of pretrial detention on ground of future dangerousness was not facially unconstitutional as violative of Eighth Amendment.

Judgment of the Court of Appeals reversed.

Justice Marshall filed a dissenting opinion in which Justice Brennan joined.

Justice Stevens filed a dissenting opinion.

Opinion on remand, 829 F.2d 345.

****2097** *Syllabus*[*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***739** The Bail Reform Act of 1984 (Act) requires courts to detain prior to trial arrestees charged with certain serious felonies if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure ... the safety of any other person and the community." 18 U.S.C. § 3142(e) (1982 ed., Supp. III). The Act provides arrestees with a number of procedural rights at the detention hearing, including the right to request counsel, to testify, to present witnesses, to proffer evidence, and to cross-examine other witnesses. The Act also specifies the factors to be considered in making the detention decision, including the nature and seriousness of the charges, the substantiality of the Government's evidence, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by his release. Under the Act, a decision to detain must be supported by written findings of fact and a statement of reasons, and is immediately reviewable. After a hearing under the Act, the District Court ordered the detention of respondents, who had been charged with 35 acts of racketeering activity. The Court of Appeals reversed, holding that § 3142(e)'s authorization of pretrial detention on the ground of future dangerousness is facially unconstitutional as violative of the Fifth Amendment's substantive due process guarantee.

Held:

1. Given the Act's legitimate and compelling regulatory purpose and the procedural protections it offers, § 3142(e) is not facially invalid under the Due Process Clause. Pp. 2101–2104.

(a) The argument that the Act violates substantive due process because the detention it authorizes constitutes impermissible punishment before trial is unpersuasive. The Act's legislative history clearly indicates that Congress formulated the detention provisions not as punishment for dangerous individuals, but as a potential solution to the pressing societal problem of crimes committed by persons on release. Preventing danger to the community is a legitimate regulatory goal. Moreover, the incidents of detention under the Act are not excessive in relation to that goal, since the Act carefully limits the circumstances under which detention may be sought to the most serious of crimes, the arrestee is entitled to a prompt hearing, the maximum length of detention ***740** is limited by the Speedy Trial Act, and detainees must be housed apart from convicts. Thus, the Act constitutes permissible regulation rather than impermissible punishment. Pp. 2101–2102.

(b) The Court of Appeals erred in ruling that the Due Process Clause categorically prohibits pretrial detention that is imposed as a regulatory measure on the **2098 ground of community danger. The Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. Such circumstances exist here. The Act narrowly focuses on a particularly acute problem—crime by arrestees—in which the Government's interests are overwhelming. Moreover, the Act operates only on individuals who have been arrested for particular extremely serious offenses, and carefully delineates the circumstances under which detention will be permitted. Pp. 2102–2103.

(c) The Act's extensive procedural safeguards are specifically designed to further the accuracy of the likelihood-of-future-dangerousness determination, and are sufficient to withstand respondents' facial challenge, since they are more than "adequate to authorize the pretrial detention of at least some [persons] charged with crimes." *Schall v. Martin,* 467 U.S. 253, 264, 104 S.Ct. 2403, 2409, 81 L.Ed.2d 207. Pp. 2103–2104.

2. Section 3142(e) is not facially unconstitutional as violative of the Excessive Bail Clause of the Eighth Amendment. The contention that the Act violates the Clause because it allows courts essentially to set bail at an infinite amount for reasons not related to the risk of flight is not persuasive. Nothing in the Clause's text limits the Government's interest in the setting of bail solely to the prevention of flight. Where Congress has mandated detention on the basis of some other compelling interest—here, the public safety—the Eighth Amendment does not require release on bail. Pp. 2104–2105.

794 F.2d 64 (CA 2 1986), reversed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. ——. STEVENS, J., filed a dissenting opinion, *post,* p. ——.

Attorneys and Law Firms

Solicitor General Fried argued the cause for the United States. With him on the briefs were *Assistant Attorney General Weld, Deputy Solicitor General Bryson, Jeffrey P. Minear, Samuel Rosenthal,* and *Maury S. Epner.*

***741** *Anthony M. Cardinale* argued the cause for respondents. With him on the brief was *Kimberly Homan.**

* Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *Jon May* and *Mark King Leban;* and for the Public Defender Service by *Cheryl M. Long, James Klein,* and *David A. Reiser.*

Briefs of *amici curiae* were filed for the American Bar Association by *Eugene C. Thomas, Charles G. Cole,* and *David A. Schlueter;* for the American Civil Liberties Union et al. by *William J. Genego, Dennis E. Curtis, Mark Rosenbaum, Paul Hoffman, Richard Emery, Martin Guggenheim, Alvin Bronstein,* and *David Goldstein;* and for Howard Perry by *Allen N. Brunwasser.*

Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

The Bail Reform Act of 1984 (Act) allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure ... the safety of any other person and the community." The United States Court of Appeals for the Second Circuit struck down this provision of the Act as facially unconstitutional, because, in that court's words, this type of pretrial detention violates "substantive due process." We granted certiorari because of a conflict among the Courts of Appeals regarding the validity of the Act.[1] 479 U.S. 929, 107 S.Ct. 397, 93 L.Ed.2d 351 (1986). We hold that, as against the facial attack mounted by these respondents, the Act fully comports with constitutional requirements. We therefore reverse.

[1] Every other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional challenge. *United States v. Walker,* 805 F.2d 1042 (CA11 1986); *United States v. Rodriguez,* 803 F.2d 1102 (CA11 1986); *United States v. Simpkins,* 255 U.S.App.D.C. 306, 801 F.2d 520 (1986); *United States v. Zannino,* 798 F.2d 544 (CA1 1986); *United States v. Perry,* 788 F.2d 100 (CA3), cert. denied, 479 U .S. 864, 107 S.Ct. 218, 93 L.Ed.2d 146 (1986); *United States v. Portes,* 786 F.2d 758 (CA7 1985).

***742** I

Responding to "the alarming problem of crimes committed by persons on release," S.Rep. No. 98–225, p. 3 (1983), U.S. Code Cong. & Admin. News 1984, pp. 3182, 3185

Congress formulated the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq*. (1982 ed., Supp. III), as the solution to a bail crisis in the federal courts. The Act represents the National Legislature's considered response to numerous perceived deficiencies in the ****2099** federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S.Rep. No. 98–225, at 3, U.S.Code Cong. & Admin.News 1984, p. 3185.

To this end, § 3141(a) of the Act requires a judicial officer to determine whether an arrestee shall be detained. Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds 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, he shall order the detention of the person prior to trial." Section 3142(f) provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, § 3142(i), and support his conclusion with "clear and convincing evidence," § 3142(f).

The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the ***743** arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. § 3142(g). Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order. §§ 3145(b), (c).

Respondents Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, after being charged in a 29–count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations. The RICO counts alleged 35 acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder. At respondents' arraignment, the Government moved to have Salerno and Cafaro detained pursuant to § 3142(e), on the ground that no condition of release would assure the safety of the community or any person. The District Court held a hearing at which the Government made a detailed proffer of evidence. The Government's case showed that Salerno was the "boss" of the Genovese crime family of La Cosa Nostra and that Cafaro was a "captain" in the Genovese family. According to the Government's proffer, based in large part on conversations intercepted by a court-ordered wiretap, the two respondents had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. The Government also offered the testimony of two of its trial witnesses, who would assert that Salerno personally participated in two murder conspiracies. Salerno opposed the motion for detention, challenging the credibility of the Government's witnesses. He offered the testimony of several character witnesses as well as a letter from his doctor stating that he was suffering from a serious medical condition. Cafaro presented no evidence at the hearing, but instead characterized the wiretap conversations as merely "tough talk."

[1] The District Court granted the Government's detention motion, concluding that the Government had established by ***744** clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person:

> "The activities of a criminal organization such as the Genovese Family do not ****2100** cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident." 631 F.Supp. 1364, 1375 (S.D.N.Y.1986).[2]

[2] Salerno was subsequently sentenced in unrelated proceedings before a different judge. To this date, however, Salerno has not been confined pursuant to that sentence. The authority for Salerno's present incarceration remains the District Court's pretrial detention order. The case is therefore very much alive and is properly presented for our resolution.

Respondents appealed, contending that to the extent that the Bail Reform Act permits pretrial detention on the ground that the arrestee is likely to commit future crimes, it is unconstitutional on its face. Over a dissent, the United States Court of Appeals for the Second Circuit agreed. 794 F.2d 64 (1986). Although the court agreed that pretrial

detention could be imposed if the defendants were likely to intimidate witnesses or otherwise jeopardize the trial process, it found "§ 3142(e)'s authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *Id.,* at 71–72. The court concluded that the Government could not, consistent with due process, detain persons who had not been accused of any crime merely because they were thought to present a danger to the community. *Id.,* at 72, quoting ***745** *United States v. Melendez-Carrion,* 790 F.2d 984, 1000–1001 (CA2 1986) (opinion of Newman, J.). It reasoned that our criminal law system holds persons accountable for past actions, not anticipated future actions. Although a court could detain an arrestee who threatened to flee before trial, such detention would be permissible because it would serve the basic objective of a criminal system—bringing the accused to trial. The court distinguished our decision in *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), in which we upheld police detention pursuant to arrest. The court construed *Gerstein* as limiting such detention to the " 'administrative steps incident to arrest.' " 794 F.2d, at 74, quoting *Gerstein, supra,* 420 U.S., at 114, 95 S.Ct., at 863. The Court of Appeals also found our decision in *Schall v. Martin,* 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984), upholding postarrest, pretrial detention of juveniles, inapposite because juveniles have a lesser interest in liberty than do adults. The dissenting judge concluded that on its face, the Bail Reform Act adequately balanced the Federal Government's compelling interests in public safety against the detainee's liberty interests.

II

[2] A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. *Schall v. Martin, supra,* at 269, n. 18, 104 S.Ct., at 2412, n. 18. We think respondents have failed to shoulder their heavy burden to demonstrate that the Act is "facially" unconstitutional.[3]

[3] We intimate no view on the validity of any aspects of the Act that are not relevant to respondents' case. Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case.

***746** ****2101** Respondents present two grounds for invalidating the Bail Reform Act's provisions permitting pretrial detention on the basis of future dangerousness. First, they rely upon the Court of Appeals' conclusion that the Act exceeds the limitations placed upon the Federal Government by the Due Process Clause of the Fifth Amendment. Second, they contend that the Act contravenes the Eighth Amendment's proscription against excessive bail. We treat these contentions in turn.

A

The Due Process Clause of the Fifth Amendment provides that "No person shall ... be deprived of life, liberty, or property, without due process of law...." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325–326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). This requirement has traditionally been referred to as "procedural" due process.

Respondents first argue that the Act violates substantive due process because the pretrial detention it authorizes constitutes impermissible punishment before trial. See *Bell v. Wolfish,* 441 U.S. 520, 535, and n. 16, 99 S.Ct. 1861, 1872, and n. 16, 60 L.Ed.2d 447 (1979). The Government, however, has never argued that pretrial detention could be upheld if it were "punishment." The Court of Appeals assumed that pretrial detention under the Bail Reform Act is regulatory, not penal, and we agree that it is.

[3] As an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. ***747** *Bell v. Wolfish, supra,* at 537, 99 S.Ct., at 1873. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to

legislative intent. *Schall v. Martin,* 467 U.S., at 269, 104 S.Ct., at 2412. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on " 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " *Ibid.,* quoting *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168–169, 83 S.Ct. 554, 567–568, 9 L.Ed.2d 644 (1963).

[4] We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. See S.Rep. No. 98–225, at 8. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. *Id.,* at 4–7. There is no doubt that preventing danger to the community is a legitimate regulatory goal. *Schall v. Martin, supra.*

Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. See 18 U.S.C. § 3142(f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). The arrestee is entitled to a prompt detention hearing, *ibid.,* and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial ****2102** Act.[4] See 18 U.S.C. § 3161 *et seq.* (1982 ed. and Supp. III). Moreover, as in *Schall v. Martin,* the conditions of confinement envisioned by the Act "appear to reflect the regulatory purposes relied upon by the" Government. ***748** 467 U.S., at 270, 104 S.Ct., at 2413. As in *Schall,* the statute at issue here requires that detainees be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U.S.C. § 3142(i)(2). We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.

4 We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal.

[5] The Court of Appeals nevertheless concluded that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." 794 F.2d, at 71. Respondents characterize the Due Process Clause as erecting an impenetrable "wall" in this area that "no governmental interest—rational, important, compelling or otherwise—may surmount." Brief for Respondents 16.

We do not think the Clause lays down any such categorical imperative. We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous. See *Ludecke v. Watkins,* 335 U.S. 160, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948) (approving unreviewable executive power to detain enemy aliens in time of war); *Moyer v. Peabody,* 212 U.S. 78, 84–85, 29 S.Ct. 235, 236–237, 53 L.Ed. 410 (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection). Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. *Carlson v. Landon,* 342 U.S. 524, 537–542, 72 S.Ct. 525, 532–535, 96 L.Ed. 547 (1952); *Wong Wing v. United States,* 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896). We have also held that the government may detain mentally unstable individuals who present a danger ***749** to the public, *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), and dangerous defendants who become incompetent to stand trial, *Jackson v. Indiana,* 406 U.S. 715, 731–739, 92 S.Ct. 1845, 1854–1858, 32 L.Ed.2d 435 (1972); *Greenwood v. United States,* 350 U.S. 366, 76 S.Ct. 410, 100 L.Ed. 412 (1956). We have approved of postarrest regulatory detention of juveniles when they present a continuing danger to the community. *Schall v. Martin, supra.* Even competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Finally, respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, see *Bell v. Wolfish,* 441 U.S., at 534, 99 S.Ct., at 1871, or a danger to witnesses.

Respondents characterize all of these cases as exceptions to the "general rule" of substantive due process that the government may not detain a person prior to a judgment of

guilt in a criminal trial. Such a "general rule" may freely be conceded, but we think that these cases show a sufficient number of exceptions to the rule that the congressional action challenged here ****2103** can hardly be characterized as totally novel. Given the well-established authority of the government, in special circumstances, to restrain individuals' liberty prior to or even without criminal trial and conviction, we think that the present statute providing for pretrial detention on the basis of dangerousness must be evaluated in precisely the same manner that we evaluated the laws in the cases discussed above.

The government's interest in preventing crime by arrestees is both legitimate and compelling. *De Veau v. Braisted,* 363 U.S. 144, 155, 80 S.Ct. 1146, 1152, 4 L.Ed.2d 1109 (1960). In *Schall, supra,* we recognized the strength of the State's interest in preventing juvenile crime. This general concern with crime prevention is no less compelling when the suspects are adults. Indeed, "[t]he ***750** harm suffered by the victim of a crime is not dependent upon the age of the perpetrator." *Schall v. Martin, supra,* 467 U.S., at 264–265, 104 S.Ct., at 2410. The Bail Reform Act of 1984 responds to an even more particularized governmental interest than the interest we sustained in *Schall.* The statute we upheld in *Schall* permitted pretrial detention of any juvenile arrested on any charge after a showing that the individual might commit some undefined further crimes. The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f). Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. See S.Rep. No. 98–225, at 6–7. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U.S.C. § 3142(f). While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

[6] [7] On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated ***751** to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934).

[8] Finally, we may dispose briefly of respondents' facial challenge to the procedures of the Bail Reform Act. To sustain them against such a challenge, we need only find them "adequate to authorize the pretrial detention of at least some [persons] charged with crimes," *Schall, supra,* 467 U.S., at 264, 104 S.Ct., at 2409, whether or not they might be insufficient in some particular circumstances. We think they pass that test. As we stated in *Schall,* "there is ****2104** nothing inherently unattainable about a prediction of future criminal conduct." 467 U.S., at 278, 104 S.Ct., at 2417; see *Jurek v. Texas,* 428 U.S. 262, 274, 96 S.Ct. 2950, 2957, 49 L.Ed.2d 929 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.); *id.,* at 279, 96 S.Ct., at 2959–2960 (WHITE, J., concurring in judgment).

Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. 18 U.S.C. § 3142(f). They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. *Ibid.* The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, ***752** and the danger to the community. § 3142(g). The Government must prove its case by clear and convincing evidence. § 3142(f). Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. § 3142(i). The Act's review provisions, § 3145(c), provide for immediate appellate review of the detention decision.

We think these extensive safeguards suffice to repel a facial challenge. The protections are more exacting than those we found sufficient in the juvenile context, see *Schall, supra,* 467 U.S., at 275–281, 104 S.Ct., at 2415–2418, and they far exceed what we found necessary to effect limited postarrest detention in *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.

B

Respondents also contend that the Bail Reform Act violates the Excessive Bail Clause of the Eighth Amendment. The Court of Appeals did not address this issue because it found that the Act violates the Due Process Clause. We think that the Act survives a challenge founded upon the Eighth Amendment.

The Eighth Amendment addresses pretrial release by providing merely that "[e]xcessive bail shall not be required." This Clause, of course, says nothing about whether bail shall be available at all. Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on *Stack v. Boyle,* 342 U.S. 1, 5, 72 S.Ct. 1, 3, 96 L.Ed. 3 (1951), in which the Court stated that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." In respondents' view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it ***753** violates the Excessive Bail Clause. Respondents concede that the right to bail they have discovered in the Eighth Amendment is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses. Brief for Respondents 21–22. Respondents characterize these exceptions as consistent with what they claim to be the sole purpose of bail—to ensure the integrity of the judicial process.

[9] While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release. The above- ****2105** quoted *dictum* in *Stack v. Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial.

The holding of *Stack* is illuminated by the Court's holding just four months later in *Carlson v. Landon,* 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952). In that case, remarkably similar to the present action, the detainees had been arrested and held without bail pending a determination of deportability. The Attorney General refused to release the individuals, "on the ground that there was reasonable cause to believe that [their] release would be prejudicial to the public interest and *would endanger the welfare and safety of the United States.*" *Id.,* at 529, 72 S.Ct., at 528–529 (emphasis added). The detainees brought the same challenge that respondents bring to us today: the Eighth Amendment ***754** required them to be admitted to bail. The Court squarely rejected this proposition:

> "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." *Id.,* at 545–546, 72 S.Ct., at 536–537 (footnotes omitted).

[10] [11] *Carlson v. Landon* was a civil case, and we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail. For even if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid. Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the

interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack v. Boyle, supra.* We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention ***755** of flight, as it has here, the Eighth Amendment does not require release on bail.

III

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern ****2106** for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

The judgment of the Court of Appeals is therefore

Reversed.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice ***756** established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

I

A few preliminary words are necessary with respect to the majority's treatment of the facts in this case. The two paragraphs which the majority devotes to the procedural posture are essentially correct, but they omit certain matters which are of substantial legal relevance.

The Solicitor General's petition for certiorari was filed on July 21, 1986. On October 9, 1986, respondent Salerno filed a response to the petition. No response or appearance of counsel was filed on behalf of respondent Cafaro. The petition for certiorari was granted on November 3, 1986.

On November 19, 1986, respondent Salerno was convicted after a jury trial on charges unrelated to those alleged in the indictment in this case. On January 13, 1987, Salerno was sentenced on those charges to 100 years' imprisonment. As of that date, the Government no longer required a pretrial detention order for the purpose of keeping Salerno incarcerated; it could simply take him into custody on the judgment and commitment order. The present case thus became moot as to respondent Salerno.[1]

1 Had this judgment and commitment order been executed immediately, as is the ordinary course, the present case would certainly have been moot with respect to Salerno. On January 16, 1987, however, the District Judge who had sentenced Salerno in the unrelated proceedings issued the following order, apparently with the Government's consent:

> "Inasmuch as defendant Anthony Salerno was not ordered detained in this case, but is presently being detained pretrial in the case of *United States v. Anthony Salerno et al.,* SS 86 Cr. 245 (MJL),
>
> "IT IS HEREBY ORDERED that the bail status of defendant Anthony Salerno in the above-captioned case shall remain the same as it was prior to the January 13, 1987 sentencing, pending further order of the Court." Order in SS 85 Cr. 139 (RO) (S.D.N.Y.) (Owen, J.).

This order is curious. To release on bail pending appeal "a person who has been found guilty of an offense and sentenced to a term of imprisonment," the District Judge was required to find "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released...." 18 U.S.C. § 3143(b)(1) (1982 ed., Supp. III). In short, the District Court which had sentenced Salerno to 100 years' imprisonment then found, with the Government's consent, that he was not dangerous, in a vain attempt to keep alive the controversy as to Salerno's

dangerousness before this Court.

***757** The situation with respect to respondent Cafaro is still more disturbing. In early October 1986, before the Solicitor General's petition for certiorari was granted, respondent Cafaro became a cooperating witness, assisting the Government's investigation "by working in a covert capacity."[2] The information that Cafaro was ****2107** cooperating with the Government was not revealed to his codefendants, including respondent Salerno. On October 9, 1986, respondent Cafaro was released, ostensibly "temporarily for medical care and treatment," with the Government's consent. Docket, SSS 86 Cr. 245–2, p. 6 (MJL) (S.D.N.Y.) (Lowe, J.).[3] This release was conditioned upon execution of a personal recognizance bond in the sum of $1 million, under the general pretrial ***758** release provisions of 18 U.S.C. § 3141 (1982 ed., Supp.III). In short, respondent Cafaro became an informant and the Government agreed to his release on bail in order that he might better serve the Government's purposes. As to Cafaro, this case was no longer justiciable even before certiorari was granted, but the information bearing upon the essential issue of the Court's jurisdiction was not made available to us.

2 This characterization of Cafaro's activities, along with an account of the process by which Cafaro became a Government agent, appears in an affidavit executed by a former Assistant United States Attorney and filed in the District Court during proceedings in the instant case which occurred after the case was submitted to this Court. Affidavit of Warren Neil Eggleston, dated March 18, 1987, SS 86 Cr. 245, p. 4 (MJL) (S.D.N.Y.).

3 Further particulars of the Government's agreement with Cafaro, including the precise terms of the agreement to release him on bail, are not included in the record, and the Court has declined to order that the relevant documents be placed before us.

In his reply brief in this Court, the Solicitor General stated: "On October 8, 1986, Cafaro was temporarily released for medical treatment. Because he is still subject to the pretrial detention order, Cafaro's case also continues to present a live controversy." Reply Brief for United States 1–2, n. 1. The Solicitor General did not inform the Court that this release involved the execution of a personal recognizance bond, nor did he reveal that Cafaro had become a cooperating witness. I do not understand how the Solicitor General's representation that Cafaro was "still subject to the pretrial detention order" can be reconciled with the fact of his release on a $1 million personal recognizance bond.

The Government thus invites the Court to address the facial constitutionality of the pretrial detention statute in a case involving two respondents, one of whom has been sentenced to a century of jail time in another case and released pending appeal with the Government's consent, while the other was released on bail *in this case,* with the Government's consent, because he had become an informant. These facts raise, at the very least, a substantial question as to the Court's jurisdiction, for it is far from clear that there is now an actual controversy between these parties. As we have recently said, "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Burke v. Barnes,* 479 U.S. 361, 363, 107 S.Ct. 734, 736, 93 L.Ed.2d 732 (1987); see *Sosna v. Iowa,* 419 U.S. 393, 402, 95 S.Ct. 553, 558–559, 42 L.Ed.2d 532 (1975); *Golden v. Zwickler,* 394 U.S. 103, 108, 89 S.Ct. 956, 959–960, 22 L.Ed.2d 113 (1969). Only by flatly ignoring these matters is the majority able to maintain the pretense that it has jurisdiction to decide the question which it is in such a hurry to reach.

II

The majority approaches respondents' challenge to the Act by dividing the discussion into two sections, one concerned with the substantive guarantees implicit in the Due Process Clause, and the other concerned with the protection afforded by the Excessive Bail Clause of the Eighth Amendment. This is a sterile formalism, which divides a unitary argument ***759** into two independent parts and then professes to demonstrate that the parts are individually inadequate.

On the due process side of this false dichotomy appears an argument concerning the distinction between regulatory and punitive legislation. The majority concludes that the Act is a regulatory rather than a punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement. The major premise is that "[u]nless Congress expressly ****2108** intended to impose punitive restrictions, the punitive/regulatory distinction turns on ' "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." ' "

Ante, at 2101 (citations omitted). The majority finds that "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals," but instead was pursuing the "legitimate regulatory goal" of "preventing danger to the community." *Ibid.*[4] Concluding that pretrial detention is not an excessive solution to the problem of preventing danger to the community, the majority thus finds that no substantive element of the guarantee of due process invalidates the statute.

[4] Preventing danger to the community through the enactment and enforcement of criminal laws is indeed a legitimate goal, but in our system the achievement of that goal is left primarily to the States. The Constitution does not contain an explicit delegation to the Federal Government of the power to define and administer the general criminal law. The Bail Reform Act does not limit its definition of dangerousness to the likelihood that the defendant poses a danger to others through the commission of *federal* crimes. Federal preventive detention may thus be ordered under the Act when the danger asserted by the Government is the danger that the defendant will violate state law. The majority nowhere identifies the constitutional source of congressional power to authorize the federal detention of persons whose predicted future conduct would not violate any federal statute and could not be punished by a federal court. I can only conclude that the Court's frequently expressed concern with the principles of federalism vanishes when it threatens to interfere with the Court's attainment of the desired result.

***760** This argument does not demonstrate the conclusion it purports to justify. Let us apply the majority's reasoning to a similar, hypothetical case. After investigation, Congress determines (not unrealistically) that a large proportion of violent crime is perpetrated by persons who are unemployed. It also determines, equally reasonably, that much violent crime is committed at night. From amongst the panoply of "potential solutions," Congress chooses a statute which permits, after judicial proceedings, the imposition of a dusk-to-dawn curfew on anyone who is unemployed. Since this is not a measure enacted for the purpose of punishing the unemployed, and since the majority finds that preventing danger to the community is a legitimate regulatory goal, the curfew statute would, according to the majority's analysis, be a mere "regulatory" detention statute, entirely compatible with the substantive components of the Due Process Clause.

The absurdity of this conclusion arises, of course, from the majority's cramped concept of substantive due process. The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as "regulation," and, magically, the Constitution no longer prohibits its imposition. Because, as I discuss in Part III, *infra,* the Due Process Clause protects other substantive rights which are infringed by this legislation, the majority's argument is merely an exercise in obfuscation.

The logic of the majority's Eighth Amendment analysis is equally unsatisfactory. The Eighth Amendment, as the majority notes, states that "[e]xcessive bail shall not be required." The majority then declares, as if it were undeniable, that: "[t]his Clause, of course, says nothing about whether bail shall be available at all." *Ante,* at 2104. If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether. Whether the ***761** magistrate sets bail at $1 million or refuses to set bail at all, the consequences are indistinguishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter. Indeed, such a result would lead to the conclusion that there was no need for ****2109** Congress to pass a preventive detention measure of any kind; every federal magistrate and district judge could simply refuse, despite the absence of any evidence of risk of flight or danger to the community, to set bail. This would be entirely constitutional, since, according to the majority, the Eighth Amendment "says nothing about whether bail shall be available at all."

But perhaps, the majority says, this manifest absurdity can be avoided. Perhaps the Bail Clause is addressed only to the Judiciary. "[W]e need not decide today," the majority says, "whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." *Ante,* at 2105. The majority is correct that this question need not be decided today; it was decided long ago. Federal and state statutes which purport to accomplish what the Eighth Amendment forbids, such as imposing cruel and unusual punishments, may not stand. See, *e.g., Trop v. Dulles,* 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The text of the Amendment, which provides simply that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," provides absolutely no support for the majority's speculation that both courts and Congress are forbidden to inflict cruel and unusual punishments, while only the courts are forbidden to require excessive bail.[5]

[5] The majority refers to the statement in *Carlson v. Landon,* 342 U.S. 524, 545, 72 S.Ct. 525, 536–537, 96 L.Ed. 547 (1952), that the Bail Clause was adopted by

> Congress from the English Bill of Rights Act of 1689, 1 Wm. & Mary, Sess. 2, ch. II, § I(10), and that "[i]n England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." A sufficient answer to this meager argument was made at the time by Justice Black: "The Eighth Amendment is in the American Bill of Rights of 1789, not the English Bill of Rights of 1689." *Carlson v. Landon, supra,* at 557, 72 S.Ct., at 542 (dissenting opinion). Our Bill of Rights is contained in a written Constitution, one of whose purposes is to protect the rights of the people against infringement by the Legislature, and its provisions, whatever their origins, are interpreted in relation to those purposes.

***762** The majority's attempts to deny the relevance of the Bail Clause to this case are unavailing, but the majority is nonetheless correct that the prohibition of excessive bail means that in order "to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response." *Ante,* at 2105. The majority concedes, as it must, that "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." *Ibid.* But, the majority says, "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail." *Ante,* at 2105. This conclusion follows only if the "compelling" interest upon which Congress acted is an interest which the Constitution permits Congress to further through the denial of bail. The majority does not ask, as a result of its disingenuous division of the analysis, if there are any substantive limits contained in both the Eighth Amendment and the Due Process Clause which render this system of preventive detention unconstitutional. The majority does not ask because the answer is apparent and, to the majority, inconvenient.

III

The essence of this case may be found, ironically enough, in a provision of the Act to which the majority does not refer. Title 18 U.S.C. § 3142(j) (1982 ed., Supp. III) provides that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." But the very pith ***763** and purpose of this statute is an abhorrent limitation of the presumption ****2110** of innocence. The majority's untenable conclusion that the present Act is constitutional arises from a specious denial of the role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1895). Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), and is established beyond legislative contravention in the Due Process Clause. See *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 1692–1693, 48 L.Ed.2d 126 (1976); *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072–1073, 25 L.Ed.2d 368 (1970). See also *Taylor v. Kentucky,* 436 U.S. 478, 483, 98 S.Ct. 1930, 1933–1934, 56 L.Ed.2d 468 (1978); *Kentucky v. Whorton,* 441 U.S. 786, 790, 99 S.Ct. 2088, 2090, 60 L.Ed.2d 640 (1979) (Stewart, J., dissenting).

The statute now before us declares that persons who have been indicted may be detained if a judicial officer finds clear and convincing evidence that they pose a danger to individuals or to the community. The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary. But let us suppose that a defendant is indicted and the Government shows by clear and convincing evidence that he is dangerous and should be detained pending a trial, at which trial the defendant is acquitted. May the Government continue to hold the defendant in detention based upon its showing that he is dangerous? The answer cannot be yes, for that would allow the Government to imprison someone for uncommitted crimes based upon "proof" not beyond a reasonable doubt. The result must therefore be that once the indictment has failed, detention ***764** cannot continue. But our fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal. Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. " 'If it suffices to accuse, what will become of the innocent?' " *Coffin v. United States, supra,* 156 U.S., at 455, 15 S.Ct., at 403 (quoting Ammianus Marcellinus, Rerum Gestarum Libri Qui Supersunt, L. XVIII, c. 1, A.D. 359).

To be sure, an indictment is not without legal consequences. It establishes that there is probable cause to believe that an offense was committed, and that the defendant committed it. Upon probable cause a warrant for the defendant's arrest may issue; a period of administrative detention may occur before the evidence of probable cause is presented to a neutral magistrate. See *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Once a defendant has been committed for trial he may be detained in custody if the magistrate finds that no conditions of release will prevent him from becoming a fugitive. But in this connection the charging instrument is evidence of nothing more than the fact that there will be a trial, and

> "release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a ****2111** sum of money subject to forfeiture serves as additional assurance of the ***765** presence of an accused." *Stack v. Boyle,* 342 U.S. 1, 4–5, 72 S.Ct. 1, 3, 96 L.Ed. 3 (1951) (citation omitted).[6]

[6] The majority states that denial of bail in capital cases has traditionally been the rule rather than the exception. And this of course is so, for it has been the considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee. If in any particular case the presumed likelihood of flight should be made irrebuttable, it would in all probability violate the Due Process Clause. Thus what the majority perceives as an exception is nothing more than an example of the traditional operation of our system of bail.

The finding of probable cause conveys power to try, and the power to try imports of necessity the power to assure that the processes of justice will not be evaded or obstructed.[7] "Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested." 794 F.2d 64, 73 (CA2 1986) (quoting *United States v. Melendez-Carrion,* 790 F.2d 984, 1002 (CA2 1986) (opinion of Newman, J.)). The detention purportedly authorized by this statute bears no relation to the Government's power to try charges supported by a finding of probable cause, and thus the interests it serves are outside the scope of interests which may be considered in weighing the excessiveness of bail under the Eighth Amendment.

[7] It is also true, as the majority observes, that the Government is entitled to assurance, by incarceration if necessary, that a defendant will not obstruct justice through destruction of evidence, procuring the absence or intimidation of witnesses, or subornation of perjury. But in such cases the Government benefits from no presumption that any particular defendant is likely to engage in activities inimical to the administration of justice, and the majority offers no authority for the proposition that bail has traditionally been denied *prospectively,* upon speculation that witnesses would be tampered with. Cf. *Carbo v. United States,* 82 S.Ct. 662, 7 L.Ed.2d 769 (1962) (Douglas, J., in chambers) (bail pending appeal denied when more than 200 intimidating phone calls made to witness, who was also severely beaten).

***766** It is not a novel proposition that the Bail Clause plays a vital role in protecting the presumption of innocence. Reviewing the application for bail pending appeal by members of the American Communist Party convicted under the Smith Act, 18 U.S.C. § 2385, Justice Jackson wrote:

> "Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is ... unprecedented in this country and ... fraught with danger of excesses and injustice...." *Williamson v. United States,* 95 L.Ed. 1379, 1382 (1950) (opinion in chambers) (footnote omitted).

As Chief Justice Vinson wrote for the Court in *Stack v. Boyle, supra:* "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S., at 4, 72 S.Ct., at 3.

IV

There is a connection between the peculiar facts of this case and the evident constitutional defects in the statute which the Court upholds today. Respondent Cafaro was originally incarcerated for an indeterminate period at the request of the Government, which believed (or professed to believe) that his release imminently threatened the

safety of the community. That threat apparently vanished, from the Government's point of view, when Cafaro agreed to act as a covert agent of the Government. There could be no more eloquent demonstration of the coercive power of authority to imprison upon prediction, or **2112 of the dangers which the almost *767 inevitable abuses pose to the cherished liberties of a free society.

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz,* 339 U.S. 56, 69, 70 S.Ct. 430, 436, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting). Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.

I dissent.

Justice STEVENS, dissenting.

There may be times when the Government's interest in protecting the safety of the community will justify the brief detention of a person who has not committed any crime, see *ante,* at 2102, see also *United States v. Greene,* 497 F.2d 1068, 1088–1089 (CA7 1974) (Stevens, J., dissenting).[1] To *768 use Judge Feinberg's example, it is indeed difficult to accept the proposition that the Government is without power to detain a person when it is a virtual certainty that he or she would otherwise kill a group of innocent people in the immediate future. *United States v. Salerno,* 794 F.2d 64, 77 (CA2 1986) (dissenting opinion). Similarly, I am unwilling to decide today that the police may never impose a limited curfew during a time of crisis. These questions are obviously not presented in this case, but they lurk in the background and preclude me from answering the question that is presented in as broad a manner as Justice MARSHALL has. Nonetheless, I firmly agree with Justice MARSHALL that the provision of the Bail Reform Act allowing pretrial detention on the basis of future dangerousness is unconstitutional. Whatever the answers are to the questions I have mentioned, it is clear to me that a pending indictment may not be given any weight in evaluating an individual's risk to the community or the need for immediate detention.

1 "If the evidence overwhelmingly establishes that a skyjacker, for example, was insane at the time of his act, and that he is virtually certain to resume his violent behavior as soon as he is set free, must we then conclude that the only way to protect society from such predictable harm is to find an innocent man guilty of a crime he did not have the capacity to commit?" *United States v. Greene,* 497 F.2d, at 1088.

If the evidence of imminent danger is strong enough to warrant emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense. In this case, for example, it is unrealistic to assume that the danger to the community that was present when respondents were at large did not justify their detention before they were indicted, but did require that measure the moment that the grand jury found probable cause to believe they had committed crimes in the past.[2] It is equally unrealistic to **2113 assume that the danger will vanish if a jury happens to acquit them. *769 Justice MARSHALL has demonstrated that the fact of indictment cannot, consistent with the presumption of innocence and the Eighth Amendment's Excessive Bail Clause, be used to create a special class, the members of which are, alone, eligible for detention because of future dangerousness.

2 The Government's proof of future dangerousness was not dependent on any prediction that, as a result of the indictment, respondents posed a threat to potential witnesses or to the judicial system.

Several factors combine to give me an uneasy feeling about the case the Court decides today. The facts set forth in Part I of Justice MARSHALL's opinion strongly support the possibility that the Government is much more interested in litigating a "test case" than in resolving an actual controversy concerning respondents' threat to the safety of the community. Since Salerno has been convicted and sentenced on other crimes, there is no need to employ novel pretrial detention procedures against him. Cafaro's case is even more curious because he is apparently at large

and was content to have his case argued by Salerno's lawyer even though his interests would appear to conflict with Salerno's. But if the merits must be reached, there is no answer to the arguments made in Parts II and III of Justice MARSHALL's dissent. His conclusion, and not the Court's, is faithful to the "fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v. New York,* 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). Accordingly, I respectfully dissent.

All Citations

481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697, 55 USLW 4663

72 S.Ct. 1
Supreme Court of the United States

STACK et al.
v.
BOYLE, U.S. Marshal.

No. 400.
|
Argued on Motions for Bail and for Writs of Habeas Corpus Prior to Docketing of Petition for Certiorari Oct. 18, 1951.
|
Decided Nov. 5, 1951.

Proceedings in the matter of the applications of Loretta S. Stack, and others for writs of habeas corpus directed to James J. Boyle, United States Marshal. The United States District Court for the Southern District of California denied the applications, and the applicants appealed. The Court of Appeals for the Ninth Circuit, 192 F.2d 56, affirmed the District Court's decision, and the applicants sought certiorari. The United States Supreme Court, Mr. Chief Justice Vinson, granted certiorari and held that the applicants' pretrial bail in the case against them for conspiring to violate the Smith Act had not been fixed by proper methods.

Judgment of Court of Appeals vacated and case remanded to District Court with directions.

Attorneys and Law Firms

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Mr. Philip B. Perlman, Sol. Gen., Washington, D.C., for Boyle, Marshal.

Opinion

*3 Mr. Chief Justice VINSON delivered the opinion of the Court.

Indictments have been returned in the Southern District of California charging the twelve petitioners with conspiring to violate the Smith Act, 18 U.S.C. (Supp. IV) ss 371, 2385, 18 U.S.C.A. ss 371, 2385. Upon their arrest, bail was fixed for each petitioner in the widely varying amounts of $2,500, $7,500, $75,000 and $100,000. On motion of petitioner Schneiderman following arrest in the Southern District of New York, his bail was reduced to $50,000 before his removal to California. On motion **3 of the Government to increase bail in the case of other petitioners, and after several intermediate procedural steps not material to the issues presented here, bail was fixed in the District Court for the Southern District of California in the uniform amount of $50,000 for each petitioner.

Petitioners moved to reduce bail on the ground that bail as fixed was excessive under the Eighth Amendment.[1] In support of their motion, petitioners submitted statements as to their financial resources, family relationships, health, prior criminal records, and other information. The only evidence offered by the Government was a certified record showing that four persons previously convicted under the Smith Act in the Southern District of New York had forfeited bail. No evidence was produced relating those four persons to the petitioners in this case. At a hearing on the motion, petitioners were examined by the District Judge and cross-examined by an attorney for the Government. Petitioners' factual statements stand uncontroverted.

1 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' U.S.Const. Amend. VIII.

After their motion to reduce bail was denied, petitioners filed applications for habeas corpus in the same *4 District Court. Upon consideration of the record on the motion to reduce bail, the writs were denied. The Court of Appeals for the Ninth Circuit affirmed. 192 F.2d 56. Prior to filing their petition for certiorari in this Court, petitioners filed with Mr. Justice DOUGLAS an application for bail and an alternative application for habeas corpus seeking interim relief. Both applications were referred to the Court and the matter was set down for argument on specific questions covering the issues raised by this case.

[1] Relief in this type of case must be speedy if it is to be effective. The petition for certiorari and the full record are now before the Court and, since the questions presented by the petition have been fully briefed and argued, we consider it appropriate to dispose of the petition for certiorari at this time. Accordingly, the petition for certiorari is granted for review of questions important to the administration of criminal justice.[2]

2 In view of our action in granting and making final disposition of the petition for certiorari, we have no occasion to determine the power of a single Justice or Circuit Justice to fix bail pending disposition of a petition for certiorari in a case of this kind.

[2] First. From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 1895, 156 U.S. 277, 285, 15 S.Ct. 450, 453, 39 L.Ed. 424. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

[3] [4] The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. ***5** Ex parte Milburn, 1835, 9 Pet. 704, 710, 9 L.Ed. 280. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment. See United States v. Motlow, 10 F.2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh circuit).

****4** [5] [6] [7] [8] Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure[3] are to be applied in each case to each defendant. In this case petitioners are charged with offenses under the Smith Act and, if found guilty, their convictions are subject to review with the scrupulous care demanded by our Constitution. Dennis v. United States, 1951, 341 U.S. 494, 516, 71 S.Ct. 857, 870, 95 L.Ed. 1137. Upon final judgment of conviction, petitioners face imprisonment of not more than five years and a fine of not more than $10,000. It is not denied that bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case. The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in ***6** a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners have been indicted.

3 Rule 46(c). 'AMOUNT. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.'

If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved. In the absence of such a showing, we are of the opinion that the fixing of bail before trial in these cases cannot be squared with the statutory and constitutional standards for admission to bail.

[9] [10] [11] [12] Second. The proper procedure for challenging bail as unlawfully fixed is by motion for reduction of bail and appeal to the Court of Appeals from an order denying such motion. Petitioners' motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a zone of reasonableness, but challenged the bail as violating statutory and constitutional standards. As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a 'final decision' of the District Court under 28 U.S.C. (Supp. IV) s 1291, 28 U.S.C.A. s 1291. Cohen v. Beneficial Industrial Loan Corp., 1949, 337 U.S. 541, 545—547, 69 S.Ct. 1221, 1225—1226, 93 L.Ed. 1528. In this case, however, petitioners did not take an appeal from the order of the District Court denying their motion for reduction of bail. Instead, they presented their claims under the Eighth Amendment in applications for writs of habeas corpus. While habeas corpus is an appropriate remedy for one held in custody in violation of the Constitution, 28 U.S.C. (Supp. IV) s 2241(c)(3), 28 U.S.C.A. s 2241(c)(3), the District Court should withhold relief in this collateral ***7** habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted. Ex parte Royall, 1886, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868; Johnson v. Hoy, 1913, 227 U.S. 245, 33 S.Ct. 240, 57 L.Ed. 497.

The Court concludes that bail has not been fixed by proper

methods in this case and that petitioners' remedy is by motion to reduce bail, with right of appeal to the Court of Appeals. Accordingly, the judgment of the Court of Appeals is vacated **5 and the case is remanded to the District Court with directions to vacate its order denying petitioners' applications for writs of habeas corpus and to dismiss the applications without prejudice. Petitioners may move for reduction of bail in the criminal proceeding so that a hearing may be held for the purpose of fixing reasonable bail for each petitioner.

It is so ordered.

Judgment of Court of Appeals vacated and case remanded to District Court with directions.

Mr. Justice MINTON took no part in the consideration or decision of this case.

By Mr. Justice JACKSON, whom Mr. Justice FRANKFURTER joins.

I think the principles governing allowance of bail have been misunderstood or too casually applied in these cases and that they should be returned to the Circuit Justice or the District Courts for reconsideration in the light of standards which it is our function to determine. We have heard the parties on only four specific questions relating to bail before conviction—two involving considerations of law and of fact which should determine the amount of bail, and two relating to the procedure for correcting any departure therefrom. I consider first the principles which govern release of accused persons upon bail pending their trial.

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons *8 in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death, Fed.Rules Crim.Proc. 46(a)(1) providing: 'A person arrested for an offense not punishable by death shall be admitted to bail * * *' before conviction.

Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them. Fed.Rules Crim.Proc. 46(f).

In allowance of bail, the duty of the judge is to reduce the risk by fixing an amount reasonably calculated to hold the accused available for trial and its consequence. Fed.Rules Crim.Proc. 46(c). But the judge is not free to make the sky the limit, because the Eighth Amendment to the Constitution says: 'Excessive bail shall not be required * * *.'

Congress has reduced this generality in providing more precise standards, stating that '* * * the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.' Fed.Rules Crim.Proc. 46(c).

*9 These statutory standards are not challenged as unconstitutional, rather the amounts of bail established for these petitioners are alleged to exceed these standards. We submitted no constitutional questions to argument by the parties, and it is our duty to avoid constitutional issues if possible. For me, the record is inadequate to say what amounts would be reasonable in any particular one of these cases and I regard it as not the function of this Court to do so. Furthermore, the whole Court agrees that the remedy pursued in the circumstances of this case is inappropriate to **6 test the question and bring it here. But I do think there is a fair showing that these congressionally enacted standards have not been correctly applied.

It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46(c). Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants do not lose their separateness or identity. While it might be possible that these defendants are identical in financial ability, character and relation to the charge—elements Congress has directed to be regarded in fixing bail—I think it violates the law of probabilities. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.

Complaint further is made that the courts below have been unduly influenced by recommendations of very high bail made by the grand jury. It is not the function of the grand jury to fix bail, and its volunteered advice is not ***10** governing. Since the grand jury is a secret body, ordinarily hearing no evidence but the prosecution's, attended by no counsel except the prosecuting attorneys, it is obvious that it is not in a position to make an impartial recommendation. Its suggestion may indicate that those who have heard the evidence for the prosecution regard it as strongly indicative that the accused may be guilty of the crime charged. It could not mean more than that without hearing the defense, and it adds nothing to the inference from the fact of indictment. Such recommendations are better left unmade, and if made should be given no weight.

But the protest charges, and the defect in the proceedings below appears to be, that, provoked by the flight of certain Communists after conviction, the Government demands and public opinion supports a use of the bail power to keep Communist defendants in jail before conviction. Thus, the amount is said to have been fixed not as a reasonable assurance of their presence at the trial, but also as an assurance they would remain in jail. There seems reason to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail. This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount. I think the whole matter should be reconsidered by the appropriate judges in the traditional spirit of bail procedure.

The other questions we have heard argued relate to the remedy appropriate when the standards for amount of bail are misapplied. Of course, procedural rights so vital cannot be without means of vindication. In view of the nature of the writ of habeas corpus, we should be reluctant to say that under no circumstances would it be appropriate. But that writ will best serve its purpose and be best protected from discrediting abuse if it ***11** is reserved for cases in which no other procedure will present the issues to the courts. Its use as a substitute for appeals or as an optional alternative to other remedies is not to be encouraged. Habeas corpus is not, in the absence of extraordinary circumstances, the procedure to test reasonableness of bail.

We think that, properly limited and administered, the motion to reduce bail will afford a practical, simple, adequate and expeditious procedure. In view of prevailing confusions and conflicts in practice, this Court should define and limit the procedure with considerable precision, in the absence of which we may flood the courts with motions and appeals in bail cases.

The first fixing of bail, whether by a commissioner under Rule 5(b), or upon removal under Rule 40(a), Fed.Rules Crim.Proc., ****7** or by the court upon arraignment after indictment, 18 U.S.C. s 3141, 18 U.S.C.A. s 3141, is a serious exercise of judicial discretion. But often it must be done in haste—the defendant may be taken by surprise, counsel has just been engaged, or for other reasons the bail is fixed without that full inquiry and consideration which the matter deserves. Some procedure for reconsideration is a practical necessity, and the court's power over revocation or reduction is a continuing power which either party may invoke as changing circumstances may require. It is highly important that such preliminary matters as bail be disposed of with as much finality as possible in the District Court where the case is to be tried. It is close to the scene of the offense, most accessible to defendant, has opportunity to see and hear the defendant and the witnesses personally, and is likely to be best informed for sound exercise of discretion. Rarely will the original determination be disturbed, if carefully made, but if the accused moves to reduce or the Government to revoke bail, a more careful deliberation may then be made on the relevant evidence presented by the parties, ***12** and if the defendant or the Government is aggrieved by a denial of the motion an appeal may be taken on the record as it then stands.

It is my conclusion that an order denying reduction of bail is to be regarded as a final decision which may be appealed to the Court of Appeals. But this is not because every claim of excessive bail raises a constitutional question. It is because we may properly hold appeal to be a statutory right. While only a sentence constitutes a final judgment in a criminal case, Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 165, 82 L.Ed. 204, it is a final decision that Congress has made reviewable. 28 U.S.C. s 1291, 28 U.S.C.A. s 1291. While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment. The purpose of the finality requirement is to avoid piecemeal disposition of the basic controversy in a single case 'where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation * * *'' Cobbledick v. United States, 309 U.S. 323, 326, 60 S.Ct. 540, 542, 84 L.Ed. 783. But an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all. The relation of an order fixing bail to final judgment in a criminal case is analogous to an order determining the right to security in a civil proceeding, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, or other interlocutory orders reviewable under 28 U.S.C. s 1292, 28 U.S.C.A. s 1292. I would hold, therefore, that such orders are appealable.

I cannot agree, however, that an order determining what amount of bail is reasonable under the standards prescribed does not call for an exercise of discretion. The Court of Appeals is not required to reexamine every order complained of. They represent exercises of discretion, upon questions, usually, of fact. Trivial differences or ***13** frivolous objections should be dismissed. The Appellate Court should only reverse for clear abuse of discretion or other mistake of law. And it ought to be noted that this Court will not exercise its certiorari power in individual cases except where they are typical of a problem so important and general as to deserve the attention of the supervisory power.

If we would follow this course of reasoning, I think in actual experience it would protect every right of the accused expeditiously and cheaply. At the same time, it would not open the floodgates to a multitude of trivial disputes abusive of the motion procedure.

Having found that the habeas corpus proceeding was properly dismissed by the District Court, in which its judgment was ****8** affirmed by the Court of Appeals, we should to that extent affirm. Having thus decided that the procedure taken in this case is not the proper one to bring the question of excessiveness of bail before the courts, there is a measure of inconsistency and departure from usual practice in our discussion of matters not before us. Certainly it would be inappropriate to say now that any particular amount as to any particular defendant is either reasonable or excessive. That concrete amount, in the light of each defendant's testimony and that of the Government, should be fixed by the appropriate judge or Justice upon evidence relevant to the standards prescribed. It is not appropriate for the Court as a whole to fix bail where the power has been given to individual judges and Justices to do so. But there is little in our books to help guide federal judges in bail practice, and the extraordinary and recurring nature of this particular problem seems to warrant a discussion of the merits in which we would not ordinarily engage.

It remains to answer our own question as to whether the power to grant bail is in the Court or in the Circuit ***14** Justice. There is considerable confusion as to the source and extent of that power.

Fed.Rules Crim.Proc. 46(a)(1), with respect to noncapital cases does not state who has power to grant bail before conviction—it simply directs that in such case bail 'shall' be granted. For an answer to the 'who' question it is necessary to turn to the Criminal Code.

18 U.S.C.A. s 3141, entitled 'Power of courts and magistrates', provides: 'Bail may be taken by any court, judge or magistrate authorized to arrest and commit offenders, but in capital cases bail may be taken only by a court of the United States having original or appellate jurisdiction in criminal cases or by a justice or judge thereof.'

The power to arrest and commit offenders is contained in 18 U.S.C.A. s 3041, which states that: 'For any offense against the United States, the offender may, by any justice or judge of the United States, * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.' (Italics added.) The fact that this section specifically grants the power of arrest to 'any justice * * * of the United States' supports the conclusion that Justices of this Court have the power of arrest, and, having that power under this section, they therefore also have power to grant bail under s 3141.

The Reviser's Notes to s 3141 disclose that it is the product of Rev.Stat. ss 1015 and 1016, which were embodied verbatim in 18 U.S.C. (1940 ed.) ss 596 and 597. The Reviser also states that, 'Sections 596 and 597 of Title 18, U.S.C., 1940 ed., except as superseded by rule 46(a)(1) of the Federal Rules of Criminal Procedure are consolidated and rewritten in this section without ***15** change of meaning. 80th Congress House Report No. 304.' (Italics added.) Since no change of meaning was intended, the context of the old sections becomes pertinent.

Rev.Stat. s 1015 reads: 'Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders.' 'The preceding section,' s 1014, is the predecessor of 18 U.S.C.A. s 3041, and reads the same as that section, namely: 'For any crime or offense against the United States, the offender may, by any justice or judge of the United States, * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * *'. (Italicized words are those omitted in 18 U.S.C.A. s 3041.)

Going on in the Revised Statutes, s 1016 states that: 'Bail may be admitted upon all ****9** arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court or a circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law.'

The evident tenor of ss 1015 and 1016, taken together with s 1014, is that a Justice of this Court is one of many who

can grant bail in a noncapital case but is one of a restricted class who can grant bail in a capital case. ***16** Section 1016 appears to narrow the class included in s 1015.

To correlate the Revised Statutes with the present statutory scheme:

1. Rule 46(a)(1), reading as follows, is taken from Rev.Stat. ss 1015 and 1016 insofar as the latter govern who shall be admitted to bail and the considerations to be given the admission to bail of a capital case defendant.

Rule 46(a)(1), 'Bail before conviction':

'A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.'

2. 18 U.S.C.A. s 3041, governing power of arrest, is taken directly from Rev.Stat. s 1014.

3. 18 U.S.C.A. s 3141, setting out who may grant bail, is taken from Rev.Stat. ss 1015 and 1016 insofar as the latter are apropos of that subject.

It thus appears that the scheme of the Revised Statutes has been taken over bodily into the present Code and Rules. The only change I perceive is that, under the Revised Statutes, there was no clear statutory authority for a court to grant bail in a noncapital case. Rev.Stat. s 1015 (and s 1014) applicable to such case speak only of individuals. 18 U.S.C.A. s 3141 confers the power on 'any court, judge or magistrate authorized to arrest and commit offenders.' The only reasonable construction of the latter is the obvious literal one, that is, that courts as well as the individuals empowered to arrest and commit ***17** offenders by 18 U.S.C. s 3041, 18 U.S.C.A. s 3041 are authorized to grant bail. This is substantiated by the language of Fed.Rules Crim.Proc. 46(c), 'Amount (of bail)': 'If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant * * *.' (Italics added.)

That is the one difference between the Revised Statutes' scheme and the present—the power to grant bail in noncapital cases now clearly is vested in the courts as well as in individual judges and justices.

With the premise provided by the Revisor that the power to grant bail before conviction is the same now as under the Revised Statutes, the one exception being the extension to the courts just noted, the conclusion follows that bail can be granted by any court of the United States, including this Court, or by any judge of the United States, including the Justices of this Court.

The next problem is how Rule 45 of the Rules of this Court, 28 U.S.C.A., is to be assimilated with the foregoing. Only the first and fourth subsections of the Rule have any present pertinence. They read as follows:

'1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

'4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this ****10** court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard.'

***18** The apparent conflict between the two subsections disappears when subsection 4 is viewed as a reservation of power in this Court only, not in an individual Justice of this Court, to issue an order in exceptional cases disturbing the custody of the prisoner. No other court and no individual judge or justice can disturb the custody of the prisoner. See Carlson v. Landon, 341 U.S. 918, 71 S.Ct. 744, 95 L.Ed. 1353.

The next problem is the bearing, if any, of Fed.Rules Crim.Proc. 46(a)(2), covering the right to bail 'Upon Review.' It reads: 'Bail may be allowed pending appeal or certiorari only if it appears that the case involves a stubstantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. * * *' Insofar as it might be applicable to petitioners' case, since they were seeking a review when they filed their petition for bail, it would not seem that it has any efficacy. They have not yet been tried for the offense for which they have been indicted, so that the much wider powers of bail conferred by the statutes governing bail before conviction are applicable. Rule 46(a)(2) is only intended to apply where a review of a conviction on the merits is sought.

Turning back to the case at hand, and treating the application to Mr. Justice DOUGLAS for bail as one for bail pending review of a denial of habeas corpus, I think it clear that he does not have power to grant bail, but the full Court does have that power. However, since the Court sustains the denial of habeas corpus, treating the application for bail strictly as one pending review of the denial of habeas corpus, the problems it raises are actually moot. If the application to Mr. Justice DOUGLAS be

treated as one made for fixing bail in the original case, it is my opinion that he has power to entertain it.

342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3

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Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement

By William F. Dressel President, The National Judicial College and
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Pretrial Justice in Criminal Cases:
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Pretrial Justice in Criminal Cases:
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Introduction

When a person is arrested or immediately after, significant issues must be addressed. For example:

- Should the person be detained?
- If detention is not required (e.g., mandatory because of the nature of the offense charged), what type or amount of bail or release conditions should be required?
- Should non-financial conditions of release (e.g., restricted residency, no contact provisions, limitations on activities, etc.) be imposed?
- If monitoring or supervision is necessary, how will it be provided?
- Should the court order screening, assessments or evaluations for possible drug abuse or mental health issues?
- Should the court order participation in specific programs?

These and other issues involve rapid decisions addressing two key types of risks potentially posed by the arrested person: (1) what is the risk of failure to appear, and (2) what is the risk to community safety or to the safety of specific individuals? From a systemic perspective, there are additional issues to consider:

- What are effective practices or protocols that allow decision makers to make evidence-based decisions that take these risks into account?
- To what extent is there room for improvement in the processes that judges and other justice system decision makers now follow about pretrial release and detention?
- What can be done to address problems or build upon strengths to improve the quality and effectiveness of pretrial decision-making?

These questions were at the core of a focus group discussion conducted with judges who participated in a program addressing "The Theory and Practice of Judicial Leadership and Project Management" held at The National Judicial College (the NJC) in the fall of 2012. The judges – a total of 36, from 22 states and the District of Columbia – constitute a cross-section of judges from both general and limited jurisdiction courts. They were identified as individuals appropriate to lead or represent the judiciary in justice system improvement projects.[1] This essay builds on the focus group discussions and includes five sections:

1. The core principles relevant to pretrial justice practices
2. A summary of the focus group discussion in which the participating judges identified ten challenges or obstacles to pretrial decision making
3. The judges' focus group's suggestions on ways to improve existing practices
4. The national picture and key trends in release or detention decision-making
5. The authors' views on the need for improvements in pretrial justice and practical steps that can be taken in the near future, consistent with the core principles relevant to pretrial justice practices.

[1] The NJC presented the grant funded program in two stages (one four-day stage in April 2012 and a second four-day stage in September 2012). The NJC designed the two stages to educate the judges in project management and leadership skills. Chief justices or state court administrators nominated the judges who attended; prior to the first program, the judges or their court systems identified local, circuit-wide, or state-wide justice system projects to address. The judges also agreed to act as a focus group on an issue of national importance that the NJC chose. Additionally, the judges participated in a brainstorming session in which they identified areas appropriate for future judicial focus groups which the NJC will explore in the future.

The NJC chose the focus group subject because of recent developments in pretrial justice. Most notably, a 2011 National Symposium on Pretrial Justice[2] highlighted and addressed potential improvements in criminal justice policies and practices in this area. Participants at the National Symposium developed a number of recommendations for improving pretrial practices, including recommending development of education and training programs that would engage judges at every level in addressing key issues.[3] The NJC focus group discussion hopefully will inform future judicial education programs, especially with regard to what judges perceive to be obstacles to improving pretrial practices and potential avenues for implementing positive changes in practices.

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[2] The U.S. Department of Justice, Office of Justice Programs, and the Pretrial Justice Institute convened the National Symposium on May 31-June 1, 2011 in Washington, D.C. For information about the symposium including the recommendations of participants, see *National Symposium on Pretrial Justice: Summary Report of Proceedings*, at http://www.pretrial.org/NSPJ%20Report%20211.pdf.

[3] *Id*. at p. 40.

I. Pretrial Justice: Core Principles

Pretrial decision-making processes vary widely across jurisdictions in the United States. Despite the differences in practices, the authors believe that it should be possible to find broad basic agreement about a few core principles relevant to pretrial justice practices:

- The practices should be fair and evidence based. Optimally, decisions about custody or release should not be determined by factors such as an individual's gender, race, ethnicity, or financial resources.
- The practices should address two key goals: (1) protecting against the risk that the individual will fail to appear for scheduled court dates; and (2) protecting against risks to the safety of the community or to specific persons.
- Unnecessary pretrial detention should be minimized. Detention is detrimental to the individual who is detained, costly to the jurisdiction, and can be counter-productive in terms of its impact on future criminal behavior.
- To make sound decisions about release or detention, judicial officers need to have (1) reliable information about the potential risks posed by release of the individual; and (2) confidence that resources are available in the community to address or minimize the risks of non-appearance or danger to the community if the decision is made to release the individual.[4]

[4] These principles were central to discussions at the National Symposium on Pretrial Justice and are at the core of the American Bar Association's *Standards for Pretrial Release. See* especially Standard 10-1.4.

II. Ten Obstacles or Challenges to Effective Pretrial Decision Making

Asked to consider the obstacles to system improvement, judges participating in the NJC's focus group discussion identified ten main challenges:

1. **Lack of information.** Many of the judges noted that no pretrial services programs exist in their jurisdictions to provide information about defendants – especially about potential risks that might be posed by release and ways to address such risks. Often the judges have only the charge, basic facts set out in a police report or probable cause affidavit, and perhaps a summary of the individual's prior record. The problem is especially acute at first appearances in limited jurisdiction courts, where sometimes no defense counsel or prosecutors are present to provide relevant information.

2. **Lack of objective criteria for setting release conditions.** Although many state statutes list broad criteria to be used in making release or detention decisions, the judges noted that generally little in the way of objective criteria exists to guide their exercise of discretion in setting bail amount or other bond conditions. Often, the only guide is a bail schedule that sets presumptive bond amounts based solely on the charge, without any regard to the individual circumstances of the case and the defendant.[5]

3. **Lack of an evidence-based risk assessment tool.** A few of the judges who participated in the focus group are from jurisdictions that make use of evidence-based risk assessment instruments that can provide judges with indications of the level of risk posed by individual defendants. Most, however, do not have access to such tools. Additionally, a few judges who are familiar with such tools expressed concern about the existing tools' inability to focus explicitly on a primary concern of judges: the risk that an individual will, if released, commit a violent offense. These judges are more concerned about the risk of violent behavior than about risks of possible nonappearance or the risk of additional minor, nonviolent criminal offenses.[6]

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[5] The Conference of State Court Administrators (COSCA) drafted a recent policy paper that is highly critical of the use of bail schedules, noting that they "seem to contradict the notion that pretrial release conditions should reflect an assessment of an individual defendant's risk of failure to appear and threat to public safety." *See* Conference of State Court Administrators, *2012-2013 Policy Paper: Evidence-Based Pretrial Release* 3.

[6] Current risk assessment instruments merge all of these risks into a single risk of "pretrial failure" or "pretrial misconduct." *See, e.g.,* Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia* 1, 5 (Richmond, VA: Virginia Department of Criminal Justice Services, 2003); Marie VanNostrand and Kenneth Rose, *Pretrial Risk Assessment in Virginia* 7 (Luminosity, Inc. for the Virginia Department of Criminal al Justice Services and the Virginia Community Criminal Justice Association, May 2009); Edward LaTessa *et al.*, *Validation of the Ohio Risk Assessment System: Final Report* (Cincinnati: University of Cincinnati Center for Criminal Justice Research, July 2009); Cynthia A. Mamalian, *State of the Science of Risk Assessment* 7-8 (Washington, D.C.: Pretrial Justice Institute, Mar. 2011).

4. **Lack of counsel at first appearance.** In some limited jurisdiction courts (as well as some general jurisdiction, single-tier court systems), it is common for first appearance proceedings to take place without a prosecutor or defense counsel being present. The judges participating in the focus group felt strongly that there is value in having counsel for both sides present, especially when there is no pretrial services program to provide basic information relevant to setting release conditions. A prosecutor can provide information not readily available from the documents before the judge about factors such as the circumstances of the offense, the victim's situation, the victim's views about release, and the prosecution's views about appropriate conditions of release. Similarly, defense counsel can provide information about the defendant's history, current employment, living situation, roots in the community, health issues, and ability to function under specific conditions of release.

5. **Lack of options for release under supervision in the community, especially for "frequent fliers."** Some jurisdictions have an array of community-based supervision options that judges can employ to help mitigate potential risks of nonappearance or pretrial criminal offenses committed by released defendants. However, many of the judges at the focus group session thought that such resources were not readily available in their jurisdictions. A number of the judges expressed particular frustration about the lack of options for dealing with the population of frequent arrestees. Many of these individuals have significant mental health or substance abuse problems and are repeatedly charged with relatively minor offenses such as petty theft, urinating in public, other public order offenses, or failure to pay a previously imposed fine. They typically fail to change their behaviors regardless of the sanction imposed, and judges often lack other dispositional options that could address underlying behavioral health issues. Sometimes, a short jail sentence becomes the default sanction simply because nothing else has worked, and the judges feel that the offender's conduct warrants some expression of justice system disapproval.

6. **Push-back from bail bond agencies and insurance companies.** In some jurisdictions, bail bond agencies and the insurance companies who underwrite them promote themselves as providing a service and being part of the "system." They are often active in local and statewide political issues and have a vested interest in maintaining a money bail system.

7. **Docket management pressures.** Many judges in high volume courts have scores of cases on their dockets each day. Reorganizing existing practices, to enable the judge and counsel to give more attention to information about the defendant and to consider specific risks of release and possible supervisory options, would likely slow down the process and lead to longer court days.

8. **A local legal culture that is comfortable with long-standing practices.** A number of the judges commented that existing courthouse cultures in their jurisdictions tend to reinforce perpetuation of the status quo – i.e., continuation of practices that rely on the use of money bail and the services of bail bond agencies. The judges often set bail amounts using a schedule that is based on the perceived seriousness of the charged offense(s). As the judges pointed out, a number of reasons explain why some practitioners are likely to resist changes in the existing system:

    - Jurisdictions commonly use bail schedules – lists showing the "standard" amount of money bail to post for specific offenses. The schedules provide a quick and easy default positions for judges to take in setting bond.
    - If the defendant is unable to post money bail, a "quick" disposition may occur, especially in a case involving a relatively minor offense because the defendant is eager to get out of jail.
    - Setting bail high enough to make it difficult or impossible for defendants to post bond is often viewed as providing judges and communities with assurance that defendants will not be a risk to public safety.
    - Setting a relatively high bail amount avoids the risk of public criticism of the judge and prosecutor that can result if a released defendant commits a serious offense.
    - Everyone in the courthouse knows the existing system. Changing to a system that involves consideration of more information about risks and possible release options would require learning new procedures and practices and is likely to provoke resistance from some practitioners.
    - People are comfortable with what they know, and often don't see clear advantages to changing to a different system. In particular, judges and other practitioners are not likely to be receptive to being told that what they have been doing for many years is wrong or inappropriate.
    - Philosophical and partisan differences among judges and others can impede adoption of a new system.

9. **Funding concerns.** Although a few of the jurisdictions represented at the focus group session have pretrial services programs that provide risk assessment information and some supervision services for defendants who are released conditionally, most do not. Given the economic recession that has been going on since 2008, judges expressed concerns that no funding is available to start such programs or sustain them over time.

10. **Lack of judicial or multi-disciplinary education on pretrial justice issues.** For most of the judges who participated in the NJC's course and the focus group session, this was the first experience they had had with any kind of education concerning the pretrial release and detention decision-making process in a long time. New judge programs or elective sessions at judicial conferences may address decision-making about pretrial release or detention, but this area has not been a high priority for education. The judges strongly agreed that they need to know more about feasible approaches to improving their existing systems. Law enforcement, prosecutors, defense counsel, pretrial professionals, among others, impact how this area of the criminal justice system works. As such, multidisciplinary educational programs that educate these professionals along with judges are critical for improving the pretrial justice system.

III. Focus Group Ideas on Ways to Improve Existing Practices

Of the 36 judges who participated in the September 2012 focus group discussion at the NJC, only a few had experiences with systems that provide viable alternatives to money bail. However, those judges without alternatives had considerable interest in learning about the experience of judges who preside in courts where judicial officers have access to objective risk assessment information at the time they initially set bail conditions (typically at defendants' first court appearances) or at later bail review hearings. Similarly, the judges expressed strong interest in finding out how other judges, who have some types of resources available to provide for conditional or supervised release, make use of such resources.

Following a plenary session discussion about perceived obstacles to improved pretrial justice decision-making and practices in jurisdictions that have and use pretrial services programs, the judges returned to small groups to consider possible approaches to improving existing practices. The groups developed six main ideas about ways to improve these practices:

1. **Learn who is in the local jail.** Several of the judges at the NJC course were able to solicit data about the population of their local jails before the course. Not surprisingly, they learned that the jails had a high proportion of pretrial defendants. When persons arrested for alleged probation violations were included with the pretrial defendants identified by these judges, the aggregated percentage was well over 60 percent of the inmates and in one case over 90 percent. Once justice system practitioners have a sense of who is in their jails (and why and for how long), they can begin to think of ways to reduce unnecessary use of expensive jail resources.

2. **Define the problem(s) – be clear about what practices need to be changed.** While the existing money bail system is open to criticism, it will be important for judges and other local-level practitioners to be clear about what changes are most needed including why they should be sought. Is the primary problem:

    - Overcrowding in the local jail?
    - Unnecessary detention of persons who pose no real risk to the safety of the community?
    - A lack of information that a judge needs to make informed decisions about detention or release at the outset of the case?
    - Actual or perceived discrimination against a particular group of persons?
    - A lack of available supervisory options that would enable safe release of some defendants?
    - All of the above or a combination of some of them?

Defining the problem(s) will help to clarify what approaches are likely to be most promising in improving existing practices.

3. **Develop a collaborative approach to system improvement.** Consistent with one of the key themes of the NJC program, several of the discussion groups emphasized the importance of judges working collaboratively with other stakeholders to examine their existing systems and seek improvements. A primary concern of the judges in multi-judge trial courts is gaining support for change (or at least receptivity to considering change) from their judicial colleagues as a foundation for working with a broader stakeholder group.

4. **Learn from practitioners in other jurisdictions – especially about pretrial justice system improvements that have worked well.** All of the small groups expressed interest in learning more about the risk assessment tools and supervisory options used in jurisdictions that have made progress in improving previously existing practices.

5. **Seek improvements incrementally.** Many judges saw merit in starting slowly. Initial steps would be to identify existing practices and learn about effective practices used in other jurisdictions. Once the current situation is understood and the range of potential options is identified, it is possible to design and implement changes that can be tailored to the circumstances of the local jurisdiction.

6. **Educate judges and other justice system stakeholders about the need and opportunity for significant improvements in pretrial justice policies and practices.** The judges who participated in the focus group session recognized that, ultimately, it is the judiciary that has responsibility to establish fair and effective pretrial practices. They emphasized the importance of education as an essential prerequisite for significant change in existing practices – education first and foremost for judges, but also for other system stakeholders including prosecutors, defense counsel, law enforcement, jail staff, and local county government officials such as county commissioners.

IV. The National Picture: Great Disparity in Practices but a Trend Toward Evidence-Based Decision-Making

Across the United States major differences exist in the ways that decisions about pretrial release or detention are made and in the outcomes of those decisions. The differences can be seen in the widely varying proportion of defendants who are released pending adjudication, in the range of different types of release mechanisms used, and in the varying effectiveness with which jurisdictions are able to achieve the key goals of pretrial decision-making. For example, the most recent available national data – drawn from records of cases involving defendants arrested on felony charges in 40 large urban counties in May 2006 and published by the federal Bureau of Justice Statistics (BJS) – shows that:

- The proportion of felony defendants released prior to trial varies from as low as 37 percent (Harris County, TX) to as high as 83 percent (Kings County, NY).
- The proportion released on non-financial conditions varies between zero (Harris County, TX) and 68 percent (Bronx County, NY)
- The proportion of released defendants who failed to return to court and remained fugitives after a year ranged from one percent (nine counties) to 14 percent (Middlesex County, NJ)
- The proportion of released defendants who were re-arrested on either misdemeanors or felony charges ranged between less than seven percent (five counties) to a high of 37 percent (Dallas, TX).[7]

The BJS data include only cases involving defendants charged with felonies, and no available national data exist on release rates, failure to appear (FTA) rates, or re-arrest rates for misdemeanor defendants. However, a few facts stand out from other available data

- Large numbers of people are affected by pretrial release or detention practices. As U.S. Attorney General Eric Holder noted in his remarks at the National Symposium on Pretrial Justice, during the course of a year approximately 10 million individuals will have been involved in nearly 13 million jail admissions.[8]

[7] *See* Thomas H. Cohen and Tracey Kyckelhahn, *Felony Defendants in Large Urban Courts, 2006* (Washington, D.C.: Bureau of Justice Statistics, May 2010, Revised July 2010) (tables 19 and 20 at pages 37-38 show release percentages, failure to appear (FTA) rates, and re-arrest rates for the 40 counties in the BJS study).

[8] See Remarks from the Honorable Eric H. Holder, Jr., in *National Symposium on Pretrial Justice: Summary Report of Proceedings*, supra note 1 at 30-31.

- On a single day in June 2011, there were about 735,000 persons in county and city jails in the U.S.[9] The number of jail inmates has more than doubled in a little over two decades, from about 343,000 in mid-1988 to more than 785,000 in mid-2008. Since 2008, there has been a slight decline to about 735,000 in June 2011.[10]

- About 60 percent of all of the inmates in American jails are defendants awaiting trial or other resolution of the charges against them.[11] A 2002 study of un-convicted inmates showed that a little less than 35 percent had been charged with violent offenses. The others were charged with property offenses (22%), drug offenses (23%) and public order offenses (20%).[12]

- A significant percentage of pretrial detainees has been in jail before, some of them many times.[13]

- Most of the pretrial defendants are poor. In many jurisdictions, they remain in custody because they cannot afford to post the financial bail set by a court.[14]

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[9] Todd D. Minton, *Jail Inmates at Midyear 2011 – Statistical Tables* 1(Bureau of Justice Statistics, Apr. 2011).

[10] *Ibid*. Data on jail populations going back to at least 1983 can be found in other publications in the BJS *Prison and Jail Inmates at Midyear Series.* For BJS data on jail populations between 1983 and 1994, *see* Craig A. Perkins, James J. Stephen, and Allen J. Beck, Bureau of Justice Statistics, *Jails and Jail Inmates at Midyear 1993-94* (Table 1 at 2).

[11] See Minton, *Jail Inmates at Midyear 2011 – Statistical Tables, supra* note 5 (Table 12).

[12] Doris J. James, *Profile of Jail Inmates*, 2002 at 3 (Bureau of Justice Statistics Special Report, July 2004) (Table 3).

[13] *See* Cherise Fanno Burdeen, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* 4 (Washington, D.C.: National Association of Counties, Sept. 2009). This guide notes that a 2007 study of the jail in Athens-Clarke County, Georgia, showed that most of the male inmates were on at least their tenth stay in jail and that one was on his 112th jail stay. The guide emphasizes that a majority of counties are spending significant jail resources on a small number of individuals who are repeatedly arrested.

[14] The effect of requiring financial bail on producing unnecessary pretrial incarceration of poor people was a central theme of speakers at the 2011 National Symposium on Pretrial Justice and has been a continuing criticism of the money bail system for close to a century. *See* the *Summary Report of Proceedings, supra* note 1; also Roscoe Pound and Felix Frankfurter, eds., *Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio* 290-292 (Cleveland: The Cleveland Foundation, 1922; reprinted, Montclair, NJ: Patterson Smith, 1968); Arthur L. Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U.Pa. Law Rev. 693 (1954); Daniel J. Freed and Patricia Wald, *Bail in the United States: 1964* (Washington, D.C.: U.S. Department of Justice and The Vera Foundation, Inc., 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (New York: John Wiley and Sons, 1968); Paul Wice, *Freedom for Sale: A National Study of Pretrial Release* (Lexington, MA: D.C. Heath and Co., 1974); John S. Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger, 1979); Spike Bradford, *For Better or for Profit: How the Bail Bonding Industry Stands in the Way of Effective Pretrial Justice* (Washington, D.C.: Justice Policy Institute, 2012).

The legal framework for addressing pretrial justice issues varies from state to state. Some states have statutes that provide presumptions in favor of release on recognizance or on unsecured bond unless a judicial officer determines that the defendant presents a risk that that calls for more restrictive conditions of release or for detention.[15] In other states, court rule has established such a presumption.[16] In many states, however, the legal framework is murky, and judges get little guidance from statutes or court rules. There is, however, an important United States Supreme Court opinion that is directly relevant to policy development at the local level. In *United States v. Salerno*, 481 U.S. 739 (1987), the Court upheld a federal law permitting pretrial detention of an arrested person in certain limited categories of serious criminal offenses, after a hearing at which the prosecutor is required to show significant risk of flight or danger to the community by clear and convincing evidence. In his opinion for the seven-justice majority, then Chief Justice Rehnquist observed that "in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[17]

Pretrial justice practices have been receiving increasing attention from influential national groups. Perhaps most notably, in January 2013, the U.S. Conference of Chief Justices (CCJ) addressed these issues in a resolution that formally endorsed a policy paper developed by the Conference of State Court Administrators (COSCA) on evidence-based pretrial release. The resolution explicitly calls on court leaders to:

> promote, collaborate, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crime.[18]

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[15] *See, e.g.,* Alaska Stat. § 12.30.020; Delaware Code Ann. Title 11 § 2105; Iowa Code § 811.2; Kentucky Rev. Stat. 431.520; Massachusetts Gen. Laws Ann. Ch. 276 § 58A; Maine Rev. Stat. Title 15 § 1026 (2-A); North Carolina Gen. Stat. Ch. 15A §§ 534 (a) and (b); South Carolina Code Ann. § 17-15-10; South Dakota Laws § 23A-43-2; Wisconsin Stat. 961.01.

[16] *See*, e.g., Minnesota R. Criminal P. 6.10; N.D. R. Criminal P. 46(a); Washington Criminal R. 3.2; Wyoming R. Criminal P. 8(c)(1).

[17] *United States v. Salerno*, 481 U.S. 739, 755 (1987). Notably, as highlighted in the COSCA policy paper, at least two state supreme courts have explicitly rejected the practice of using non-discretionary bail amounts based solely on the charge. See *COSCA Policy Paper on Evidence-Based Pretrial Release* 3 (*supra*, note 5); *Pelekai v. White*, 861 P.2d 1205 (Hawaii 1993); *Clark v. Hall*, 53 P.3d 416 (Okla. 2002).

[18] Resolution # 3 approved by the Conference of Chief Justices (CCJ) at the CCJ 2013 Midyear Meeting, Jan. 30, 2013.

The COSCA policy paper endorsed by the Chief Justices includes a review of the history of bail and the issues related to the use of financial conditions of release, discussion of the consequences of the existing bail system in terms of financial costs and unequal justice, and the advantages of making release or detention decisions on the basis of empirically-based assessments of a defendant's risk of flight and threat to public safety and the safety of crime victims.[19] At least one CCJ member – Chief Judge Jonathan Lippman of New York – has already acted on the CCJ resolution, calling for major bail reform in his 2013 State of the Judiciary Address.[20]

Change is in the wind. The endorsement of evidence-based pretrial release practices by the Conference of Chief Justices is an important step toward improving pretrial release practices, and is consistent with policy positions taken by other major national organizations and associations of justice system practitioners. In addition to the Conference of Chief Justices and the Conference of State Court Administrators, a number national organizations and associations of key stakeholder groups have strongly endorsed moving from the traditional money bail system to a risk-based system for making decisions about detention or release and for setting pretrial release conditions. These include the American Bar Association, the National Association of Counties, the American Jail Association, the International Association of Chiefs of Police, the American Council of Chief Defenders, the Association of Prosecuting Attorneys, and the American Probation and Parole Association.[21]

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[19] Conference of State Court Administrators (COSCA), *2012-2013 Policy Paper: Evidence-Based Pretrial Release, supra*, note 5. The COSCA policy paper explicitly rejects the use of bail schedules, noting that the use of such schedules contradicts the policy goal of setting release conditions that reflect an assessment of the individual defendant's risk of failure to appear and threat to public safety. *Id*. at 3. Notably, as highlighted in the COSCA policy paper, at least two state supreme courts have explicitly rejected the practice of using non-discretionary bail amounts based solely on the charge. *See Pelekai v. White*, 861 P.2d 1205 (Hawaii 1993); *Clark v. Hall*, 53 P.3d 416 (Okla. 2002).

[20] Jonathan Lippman, *The State of the Judiciary 2013: "Let Justice be Done"* (Albany, NY: Feb. 5, 2013)

[21] See the COSCA policy paper on *Evidence-Based Pretrial Release* 10, *supra*, note 5 and accompanying end notes citing relevant resolutions and publications of these major associations.

V. Authors' Observations and Conclusions

Despite a long history of informed criticism of the money bail system as unfair, discriminatory against the poor, a primary cause of unnecessary over-incarceration of individuals who do not pose significant risks of nonappearance or public safety, and costly to taxpayers, the system has endured for many decades in most places in the U.S. The obstacles identified by the judges who participated in the September 2012 NJC focus group discussion (see Part II above) pinpoint many of the reasons for the persistence of the system and can be viewed as targets for constructive change.

The ideas that emerged during the focus group discussion with judges who are pursuing justice improvement initiatives in their states should be encouraging for the prospects of achieving significant improvement in pretrial justice. During that discussion, judges from the 10th Judicial Circuit of Florida and the 19th Judicial District of Colorado spoke about stakeholder groups in their jurisdictions that had recently gotten together to review existing practices and consider possible changes. The stakeholder groups have developed systems that provide ways for judges in these jurisdictions to obtain essential information and utilize existing resources for supervision in the community, enabling release of more individuals than before. Generally, local government officials are receptive to ideas for system improvements that will result in lower costs for running the jail. They are also likely to very receptive to proposals that will avoid the need for construction of additional jail space.[22]

The judges' identification of obstacles to effective pretrial decision-making and their suggestions for ways to improve existing practices (Parts II and III above) provide the basis for developing a practical agenda for specific steps to implement needed change. We believe that once attention has been drawn to the issues, many judges at the trial court level are very interested in, and receptive to, improving pretrial decision-making practices. Of particular relevance, the judges at the focus group session were especially interested in learning about the practices in the District of Columbia, Kentucky, and the two local jurisdictions (in Florida and Colorado) where judges had taken leading roles in developing county-based pretrial services programs that make use of risk assessment instruments and resources for community supervision of released defendants.

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[22] *See, e.g.,* National Association of Counties, *Jail Population Management: Elected Officials' Guide to Pretrial Services,* supra note 13.

For purposes of engaging judges in leading and supporting the use of evidence-based practices that focus release/detention decision-making on the risks posed by an arrested person, three key areas of attention seem especially important:

1. **The existence and effective operation of other practices for making pretrial release or detention decisions.** Judges want to learn about decision-making practices that have worked elsewhere – why they were adopted, how they work operationally, whether the outcomes (in terms of factors such as pretrial crime and failure to appear [FTA] rates) are better than under traditional approaches, and how practitioners like them. At the focus group discussions, the judges expressed strong interest in the examples of alternative approaches that were briefly outlined by judges from the District of Columbia and Kentucky, and (at the local level) Florida and Colorado.

2. **Strategies for initiating and achieving system change.** Recognizing that jurisdictions differ widely on many dimensions, judges are nonetheless interested in what approaches to system change have actually worked. Who supported the change, and why? What were the obstacles? How were the obstacles overcome and the change put in place? What problems can be anticipated as implementation moves forward? What roles did judges play in initiating and implementing the change?

3. **Relative advantage—why will a new approach be better for the jurisdiction?** Efforts aimed at improving judges' practices in pretrial decision-making should focus on why the needed change will enable the judge to function more effectively as a judge, as well as on why the changes will better serve the jurisdiction's justice system and the larger community. This approach suggests an emphasis on four key outcomes to be expected from changing to an evidence-based system that addresses identified risks:

    - ***Effective judicial decision-making.*** When a judge has accurate and relevant information about risk factors and supervisory options, the judge is able to make a better and more informed decision about detention or conditions of release.

    - ***Fairness.*** Equal justice under law is a core value in the American legal system. Perpetuation of the existing money bail system undermines that value and results in discrimination against the poor.

    - ***Public safety.*** By providing the judge with sound risk assessment information at the time of the release or detention decision plus resources for community supervision when needed, an improved system will increase the likelihood of a decision that will protect the safety of victims, witnesses, and the community.

- ***Cost effectiveness.*** With risk assessment information provided to the judge on a timely basis and with supervisory options available in the community, substantial taxpayer costs can be saved by reducing unnecessary pretrial detention. Operating a jail is expensive, and community supervision is appreciably less expensive. It will be important to demonstrate actual savings likely to be achieved through system change.

Reviewing the ideas generated at the judges' focus group discussion in light of what we know about the picture of pretrial justice nationally, it seems to the authors of this essay that the time is ripe for courts and court systems to begin transitioning from a traditional money bail system to a modern evidence-based system. A modern system would enable judges to use evidence-based risk assessment instruments as the foundation for release or detention decision-making, bring greater fairness to the process, reduce unnecessary confinement in jails, save taxpayer dollars, and enhance public safety. Good working models of such systems exist, and we anticipate that more will emerge in the near future.

Recognizing that different paths will be taken in different states and localities, below are 10 suggestions for approaches and next steps that courts and judges can take:

1. **Avoid a one-size-fits-all approach.** No easy generalizations about pretrial decision-making practices exist across the United States or about feasible reform strategies that will be broadly applicable. The diversity of the jurisdictions represented at the focus group discussions reinforces the sense that it will be important to tailor pretrial justice improvement efforts to the circumstances and needs of individual local jurisdictions. The focus group included a few judges from jurisdictions that have very progressive modern pretrial decision-making practices, and many from jurisdictions where bail practices continue to use the traditional money bail system. The capacity to obtain essential information about defendants and to utilize a range of supervisory options varies widely across jurisdictions, and practical approaches will necessarily take a variety of forms.[23] That said, however, it nevertheless seems feasible to move toward use of evidence-based practices that focus pretrial decision-making on identified risks that may be posed by arrested persons.

[23] Because of sparse populations, long distances, and low case volume, developing effective pretrial programs in rural areas poses special challenges, but the challenges have been met successfully in some rural jurisdictions. For discussion of ways to develop or enhance an evidence-based approach to pretrial decision-making in rural areas, *see* Stephanie J. Vetter and John Clark, *The Delivery of Pretrial Justice in Rural Areas: A Guide for Rural County Officials* (Washington, D.C.: National Association of Counties, 2012).

2. **Support continued refinement of risk screening and assessment instruments that enable risk-focused decision-making.** Predicting the risk of future behavior is an enterprise fraught with problems, but much has been done to develop risk screening and assessment instruments that can help judicial officers make sound decisions.[24] These instruments provide a far better basis for making decisions about pretrial custody than simply using a bail schedule or setting a bond amount that makes release dependent upon an individual's financial resources and a bond agency's willingness to post the bail. However, there is surely room for further improvement in developing more effective tools for gauging risk and for identifying the nature and severity of the risks. As hypothesized by one leading researcher, judges considering release or detention issues may be less concerned with failure to appear and re-arrest for a minor offense than with a person's risk of dangerousness.[25] It seems desirable to support work on refining the risk screening and assessment instruments already in existence, to make them even more useful in providing judicial officers with reliable information about specific types of risks. Having such information will enable judges to tailor release or detention decisions (and orders regarding conditions of release) to the specific nature and severity of the risks posed by individuals who have been arrested.

3. **Support development of improved capability for risk management, including appropriate community-based resources for monitoring, supervision and treatment.** Having information derived from good risk screening and assessment instruments takes judges only part way toward effective pretrial decision-making. It is also important for judicial officers to have a range of viable options that can provide a basis for managing risks that are identified. In recent years, there has been considerable progress in the development of community-based resources that can be used to provide monitoring, supervision, and – when appropriate – attention to an individual's substance abuse and/or mental health problems that contribute to the risk of pretrial misbehavior. Judges need to know about the availability of such resources and ways in which they can be utilized. They can be effective leaders in identifying the need for specific types of community-based resources and catalyzing support for their development.

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[24] *See, e.g.,* the publications discussing risk assessment techniques cited in note 6, *supra*.

[25] Mamalian, *State of the Science of Risk Assessment* 33 n. 88*, supra* note 6.

4. **Ensure that counsel for the prosecution and defense are present and prepared in court when the court adjudicates release or detention issues.** Judges who participated in the focus group discussion noted the value of having counsel present at the initial stages of any criminal case. Optimally, counsel for both the prosecution and the defense will have essential information – including information about current charge (at a minimum the police report) and the defendant's prior criminal record, family and housing situation, employment status, physical and mental condition (including indications of abuse of drugs or alcohol), and prior record of compliance with conditions of release – before a first appearance proceeding. Defense counsel should have an opportunity to review the police report and any information about the arrested person prepared by a pretrial services program. Counsel should also have adequate opportunity to consult with the arrested person prior to the proceeding. The prosecutor should know the basic facts of the prosecution case – i.e., the facts that provided grounds for the arrest – and should also be familiar with information in a pretrial services report. Because of the generally short time period between an arrest and the arrested person's first court appearance, it is sometime not feasible to have all of the relevant information gathered in time for the first appearance proceeding. If not, and if there is doubt as to whether the individual should be released, a *short* continuance of the proceeding – generally not more than a day – may be needed to enable the information to be gathered, the risks of release assessed, and a decision made with input from counsel.[26] In our opinion, the informational reports provided to judicial officers by established pretrial services programs, though generally characterized as "risk assessments" are generally more in the nature of "risk screening" reports. They provide very useful information relevant to gauging risk and can provide a basis for rapid and well-grounded custody or release decisions to be made in a high proportion of cases. However, there will almost certainly be some cases in which more in-depth assessment is desirable.

[26] *See, e.g.,* Mamalian, *State of the Science of Risk Assessment* 31, *supra* note 6. Mamalian suggests experimenting with a "differentiated case management" approach in which a court would first identify low risk defendants who could be released quickly without bail. Then, additional time could be spent on more in-depth assessment of the risks posed by higher risk defendants and determination of what supervision options would be most useful to address identified risks.

5. **Conduct judicial education programs that support judicial leaders in moving toward improved practices.** As noted above in the discussion of the focus group's identification of obstacles to system improvement, effective pretrial decision-making has not been a priority area for judicial education. To implement real change, it will be important for judges to become well educated about pretrial justice principles and best practices. Some of the education can be done on a national basis at The National Judicial College using in-person programs, and some can be done though online programs. However, it will also be important to work at the state level with state judicial educators and others involved in planning judicial conferences and specialized training programs for judges. For example, curricula now being developed by the Pretrial Justice Institute and the National Judicial College can be used for in-state, regional, or national programs of varying length. The curriculum can be adapted for presentation – optimally by a mix of experts and sitting judges who have succeeded in achieving significant reforms – in one-hour to one-day segments at state judicial conferences. Such short programs could focus on key points about the current situation and viable approaches to implementing improved practices, with examples from peer jurisdictions.

6. **Develop and broadly disseminate a "how-to" guide.** To supplement and support judicial education programs, it will be helpful to have a range of written and visual resources that can help judges and other system leaders initiate and implement changes. For example, it would be useful to have a practitioner-oriented resource guide—similar to the "Ten Key Components" publication that was instrumental in fostering the development and implementation of many drug courts in the 1990s.[27] Such a guide could address key elements of an effective pretrial justice system; why change is needed; and how the changes can be accomplished in order to improve judicial decision-making, minimize unnecessary detention, save taxpayer dollars, and increase the fairness with which the system functions.[28]

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[27] National Association of Drug Court Professionals, Drug Court Standards Committee, *Defining Drug Courts: The Key Components* (Washington, D.C.: Office of Justice Programs Drug Courts Program Office, Jan. 1997).

[28] For a useful detailed guide to starting a pretrial services program, *see* Pretrial Justice Institute, *Pretrial Services Program Implementation: A Starter Kit* (Washington, D.C.: Pretrial Justice Institute, undated; probably 2010).

7. **Use learning sites and videos to demonstrate effective practices.** Four of the jurisdictions represented at the focus group – the District of Columbia, Kentucky, and the Florida and Colorado jurisdictions discussed in the preceding paragraph – are all potential "learning sites" for judges and other justice system stakeholders who are interested in improving current practices. It seems desirable to develop detailed descriptions of how these and other similar jurisdictions function, how well judges and other practitioners like the practices, and how the improved practices were developed and implemented. If possible, it would be desirable to find ways for judges and other practitioners to get a first-hand look at these systems in operation and opportunity to discuss the approaches with practitioners in these learning sites. Videos of practitioners and practices in these jurisdictions can also be valuable both as stand-alone educational tools and as supplements to in-person and online educational programs. A learning site could also (or additionally) conduct a series of webcasts as a way to foster peer-to-peer learning for judges and other practitioners interested in improving pretrial release or detention decision-making.

8. **Develop resources for information and technical assistance.** Judges and others at the focus group session were clearly interested in having a "go-to" place where they could get questions answered, obtain information, and perhaps get short-term assistance in assessing their local systems and developing improved practices. The Pretrial Justice Institute (PJI) has developed an extensive base of web-accessible publications and other resource materials that can be very useful in assessing current practices and implementing changes.

9. **Exercise judicial leadership.** To initiate and achieve meaningful change in existing practices will require judicial leadership – optimally at all levels of the judiciary. The Conference of Chief Justices' resolution endorsing evidence-based pretrial release is an important exercise of state-level judicial leadership. Chief Judge Lippman's call for change in New York laws and practices exemplifies one form of state-level judicial leadership in this area. Leadership at the trial court level, where decisions about release or detention are made every day, in a wide range of different environments, will be equally important. The judges who participated in the NJC's focus group session are all local-level trial court judges. They recognized the leadership opportunities that judges can exercise in improving the justice systems in their localities and in their states. Of particular relevance, they acknowledged that trial court judges – especially chief judges or their designees – can, as knowledgeable and respected neutrals, convene stakeholders and can lead or help catalyze significant justice system improvements at the local level. As work goes forward in improving pretrial justice, judges should have key leadership and supporting roles.

10. **Anticipate resistance to change and develop a strong coalition in support of needed reforms.** The broader the coalition that can be assembled in support of modernizing pretrial justice decision-making, the better. There will almost surely be "incidents" involving persons released from custody – sometimes cases in which a released defendant is charged with serious criminal conduct – that will occur in some jurisdictions and will raise concern about the appropriateness of any program. Therefore, it is important to develop broad support for the program and to acknowledge its limitations. Judges, program leaders, and other stakeholders need to be aware of what the assessments performed actually tell a decision maker about the risks of release and about ways to address the risks. This is why the multidisciplinary approach to education discussed on page 8 is so important. Additionally, the political influence of bail bond agencies and insurance companies needs to be taken into account in undertaking improvement initiatives. These entities have been active in many states in opposing the implementation of pretrial services programs that can provide the information and supervisory options that many judges would like to have to make informed decisions. The entities can adversely impact the future careers of judges in systems where judges are subject to retention or contested elections. The prospect of opposition from these interest groups suggests the importance of developing strong broad-based coalitions to support the development of alternatives to the money bail system.

The NJC focus group was effective in identifying key obstacles to improving pretrial justice and in suggesting practical ways to undertake improvements at the local level. Having the support of state chief justices should be valuable for trial court judges who are prepared to initiate reform efforts at the local level. We are optimistic that trial court judges throughout the country will build on the foundation that has been developed, to work – optimally in collaboration with other stakeholders and with the support of their state chief justices – to implement changes in practices that will incorporate the core principles that are at the root of true pretrial justice.

NJC

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The National Judicial College

Judicial College Building / MS 358 | Reno, NV 89507 | www.judges.org | (800) 25-JUDGE (255-8343)

Essential Elements of a Pretrial System and Agency: Team Pre-work

Pretrial release and detention decisions based on risk and designed to maximize release, court appearance, and public safety

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Legal framework that includes: presumption of least restrictive nonfinancial release; restrictions or prohibition against the use of secured financial conditions of release; and preventive detention for a limited and clearly defined type of defendant

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Release options following or in lieu of arrest

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Defendants eligible by statute for pretrial release are considered for release, with no locally-imposed exclusions not permitted by statute

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Experienced prosecutors screen criminal cases before first appearance

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Defense council active at first appearance

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Collaborative group of stakeholders that employs evidence-based decision making to ensure a high functioning system

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Dedicated pretrial services agency

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Operationalized Mission

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Universal screening

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Validated pretrial risk assessments

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Sequential bail review

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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_____

Risk-based supervision

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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Performance measurement feedback

Please describe your jurisdiction's current status with this element:

1=Not in place, not planned

2=Not in place, being discussed

3=Not in place, but in development

4=In place and meets the Framework

5=In place, but does not meet Framework

1	2	3	4	5
◯	◯	◯	◯	◯

Do you anticipate this as an Action Planning Item?

◯ YES

◯ NO

If YES, what are the anticipated Action Areas?

Education:_____

Policy:_____

Practice:_____

Personnel:_____

Resources:_____

NOTES:_____
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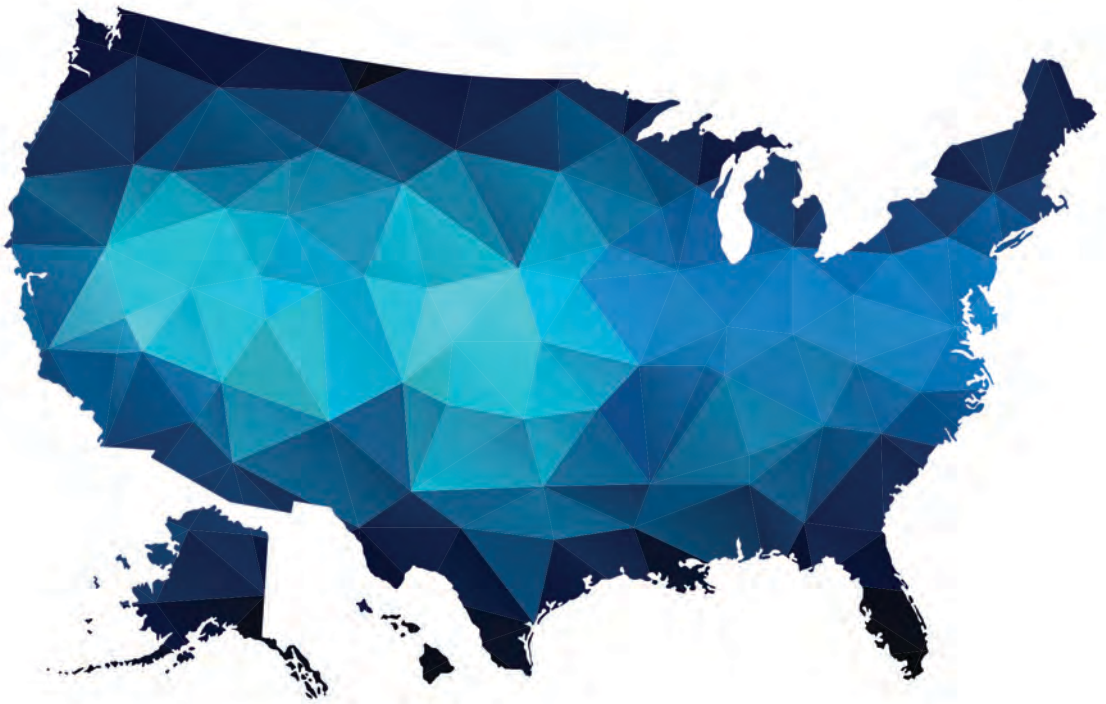
TAB 9

THE STATE OF PRETRIAL JUSTICE IN AMERICA

NOVEMBER 2017



PRETRIAL JUSTICE INSTITUTE

20171212-02

A Message from Cherise Fanno Burdeen

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

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

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

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

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

—Cherise Fanno Burdeen
CEO, Pretrial Justice Institute

Table of Contents

The State of Pretrial Justice

The past five years have witnessed a remarkable growth in support for reforming our nation's pretrial justice system (the portion of criminal justice practice that begins with a person's first contact with law enforcement and ends once any resulting charges are resolved, usually through a plea, a trial, or dismissal). This unprecedented interest emerges from a growing awareness that existing pretrial operations lead to unnecessary detention of poor and working class people—disproportionately people of color—while those with money are able to go free with little or no supervision, regardless of any danger they may present.[1] Current pretrial justice practice is, in short, unfair, unsafe, a waste of public resources, and a significant contributor to the nation's widely recognized problem of mass incarceration.[2]

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

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

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

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

Washington, DC

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

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

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

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

Background

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

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

New Jersey

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

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

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

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

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

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

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

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

STATE TO WATCH

Alaska

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

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

STATE TO WATCH

Arizona

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

"Establishing this baseline will enable each state to set goals and demonstrate progress."

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

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

Methodology

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

The Measures

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

1. Rate of unconvicted people in local jails,

2. Percentage of people living in a jurisdiction that uses evidence-based pretrial assessment to inform pretrial decisions, and

3. Percent of a state's population living in a jurisdiction that has functionally eliminated secured money bail.

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

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

STATE TO WATCH

California

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

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

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

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

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

STATE TO WATCH

Indiana

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

STATE TO WATCH

Maryland

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

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

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

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

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

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

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

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

Data Limitations

The measures presented here reflect work that has been completed, not work in progress. This is an important distinction, since many states are actively engaged in improvement efforts whose results have yet to be reflected in the measures used in this report. New Mexico, for example, is on a path to implement validated pretrial assessment tools in every court in the state, but that has yet to happen and so is not reflected in New Mexico's grade. An important accompaniment to this report are the profiled States to Watch, which discuss several of these cases in more detail.

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

STATE TO WATCH

New Mexico

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

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

3DAYS COUNT™
Commonsense Pretrial

AN UPDATE ON 3DAYSCOUNT SITES

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

Guam

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

Illinois

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

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

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

Connecticut

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

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

Washington

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

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

For more information about 3DaysCount, visit pretrial.org/3DaysCount.

Overall Scores and Grading

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

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

Results By State

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

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

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

Pretrial Detention Rate: < 10 = ●; 10 to 20 = ◑; 21 + = ○

Pretrial Assessment: 76-100% = ●; 51-75% = ◕; 26-50% = ◑; 1-25% = ◔; 0% = ○

Eliminated Money Bail: 100% = ◑; 0% = ○

Bonus Point: Yes = ◑; No = ○

For detailed results, see Appendix.

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

Summary of Findings

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

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

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

STATE TO WATCH

New York

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

STATE TO WATCH

Ohio

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

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

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

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

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

Beyond The Measures

High detention rates, limited implementation of evidence-based

STATE TO WATCH

Texas

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

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

STATE TO WATCH

Utah

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

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

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

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

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

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

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

How to Use These Results

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

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

States may wish to turn to PJI's quarterly publication, *Where Pretrial Improvements are Happening,* for insights on how and where to begin (or continue) this work. This document provides up-to-date information on activities categorized by changes in practice, judiciary-led change, executive branch brand-led change, community and grassroots-led change, legislative change, and change through litigation. The work described runs the gamut from small counties seeking solutions to crowded jails to multi-state philanthropic initiatives aimed at creating lasting, systemic improvements.

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

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11. Non-BJS sources include—Alaska: 2015 Alaska Criminal Justice Commission Justice Reinvestment Report; Connecticut: June 2013 Criminal Justice Policy & Planning Division Monthly Indicators Report from the Connecticut Statistical Analysis Center; Hawaii: State of Hawaii Department of Public Safety 2013 Annual Report; Rhode Island: Rhode Island Department of Corrections Planning and Research 2013 Fiscal Year Annual Population Report; Vermont: Average Monthly Detained Counts for July 2013.
12. Washington, DC has characteristics similar to other major cities, not states that are more diverse in density and population. For that reason, including its data with that of states can be misleading.
13. *Developing a National Model for Pretrial Risk Assessment*. Report. The Laura and John Arnold Foundation. 2013. 2.
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16. U.S. Department of Justice. Office of Public Affairs. "Department of Justice Files Statement of Interest in Clanton, Alabama, Bond Case." News release, February 13, 2013. Accessed October 17, 2017. https://www.justice.gov/opa/pr/department-justice-files-statement-interest-clanton-alabama-bond-case.
17. Stack v. Boyle (November 5, 1951).

PJI Publications referenced in this report:

Improving Pretrial Justice in New Jersey
Questions About Pretrial Assessment
Where Pretrial Improvements are Happening

To access these and other useful resources, visit the University of Pretrial at *www.pretrial.org/up/*

Appendix

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

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

LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

A BENCH CARD FOR JUDGES

Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court:

1. Holds a hearing;
2. Makes a finding that the failure to pay was willful and not due to an inability to pay; and
3. Considers alternative measures of punishment other than incarceration.

Bearden v. Georgia, 461 U.S. 660, 671–72 (1983). The U.S. Supreme Court has recognized that punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay or reduction of the amount owed. Id. at 671-72. The court may incarcerate a person who has made sufficient bona fide efforts to pay only if alternative measures are not adequate to meet the State's interest in punishment and deterrence. Id. at 672.

Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

1. Adequate Notice of the Hearing to Determine Ability to Pay

Notice should include the following information:

a. Hearing date and time;

b. Total amount claimed due;

c. That the court will evaluate the person's ability to pay at the hearing;

d. That the person should bring any documentation or information the court should consider in determining ability to pay;

e. That incarceration may result, only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;

f. Right to counsel*; and

g. That a person unable to pay can request payment alternatives, including community service and/or a reduction of the amount owed.

2. Meaningful Opportunity to Explain at the Hearing

The person must have an opportunity to explain:

a. Whether the amount charged as due is incorrect; and

b. The reason(s) for any nonpayment (e.g., inability to pay).

3. Factors the Court Should Consider to Determine Willfulness[1]

a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG)[2] ;

For 2016, 125% of FPG is:

$14,850 for an individual;	*$30,375 for a family of 4;*
$20,025 for a family of 2;	*$35,550 for a family of 5;*
$25,200 for a family of 3;	*$40,725 for a family of 6.*

b. Receipt of needs-based, means-tested public assistance including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits (Such benefits are not subject to attachment, garnishment, execution, levy or other legal process);

[1] See *Bearden v. Georgia*, 461 U.S. 660 (1983)
[2] U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2016, https://aspe.hhs.gov/poverty-guidelines

c. Financial resources, assets, financial obligations and dependents;

d. Whether the person is homeless, incarcerated, or resides in a mental health facility;

e. Basic living expenses including but not limited to food, rent/mortgage, utilities, medical expenses, transportation, and child support;

f. The person's efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation or driving privileges;

g. Other LFOs owed to the court or other courts;

h. Whether LFO payment would result in manifest hardship to the person or his/her dependents; and

i. Any other special circumstances that may bear on the person's ability to pay.

4. Findings by the Court

The court should find, on the record, that the person was provided prior adequate notice of:

a. Hearing date/time

b. Failure to pay an LFO is at issue;

c. The right to counsel*;

d. The defense of inability to pay;

e. The opportunity to bring any documents or other evidence of inability to pay; and

f. The opportunity to request an alternative sanction to payment or incarceration.

After the ability to pay hearing, the court should also find on the record that the person was given a meaningful opportunity to explain the failure to pay.

If the Court determines that incarceration must be imposed, the Court should make findings about:

1. The financial resources relied upon to conclude the nonpayment was willful; and/or
2. Why alternate measures are not adequate to meet the state's interests in punishment and deterrence given the particular violation.

Alternative Sanctions Courts Should Consider Other than Imprisonment When There Is an Inability to Pay

a. Reduction of the amount due;

b. Extension of time to pay;

c. A reasonable payment plan or modification of an existing payment plan;

d. Credit for community service [*Caution*: Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual];

e. Credit for completion of a relevant, court-approved program (e.g., education, job skills, mental health or drug treatment); or

f. Waiver or suspension of the amount due.

*Determining whether an indigent defendant has a right to counsel pursuant to the federal and state constitutions, state statute, or court rule requires complex analysis. See *Best Practices for Determining Right to Counsel in Legal Financial Obligation Cases*.

This bench card was produced by the National Task Force on Fines, Fees and Bail Practices. The Task Force is a joint effort of the Conference of Chief Justices and the Conference of State Court Administrators, sponsored by the State Justice Institute and coordinated by the National Center for State Courts.

A Brief Guide to the Work of the National Task Force on Fines, Fees, and Bail Practices

State courts are dynamic institutions, and the manner in which they administer justice must regularly be assessed and continually improved. Whether the demands placed on courts relate to funding, changing socioeconomic factors, or shifting public demands, judges and court leaders must be responsive to the issues facing their communities and be accountable for the manner in which they function.

Important questions have arisen over the last several years concerning the imposition and enforcement of legal financial obligations and the ways courts, in coordination with their justice system partners, manage the pretrial release of individuals awaiting trial. Courts are not revenue centers, but there is a constant temptation to view them as such, and historically litigants and defendants are charged fees for using courts. The issue is made more complex because supervisory authority over many municipal courts resides with the municipality rather than the state court system, exacerbating the pressure to produce revenue.

The Conference of Chief Justices (CCJ), the Conference of State Court Administrators (COSCA) and others (including the National Center for State Courts) have drafted guiding principles, prepared studies, and developed tools and templates to help courts focus on governance, inter branch relations, performance measurement, performance management, and related concepts.[1] Taken together these resources make clear that independence, fairness, transparency, and accountability are among the most important values to which courts can aspire.

Most courts operate in a manner consistent with the concepts and the values outlined in these resources, though all court leaders must continue to be vigilant in ensuring that they are doing so adequately, especially in light of recent research and other developments in the area of how courts meet the needs of people who are socioeconomically disadvantaged.

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[1] *2011-2012 Policy Paper: Courts Are Not Revenue Centers,* Conference of State Court Administrators (2012), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx;

2015-2016 Policy Paper: The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations, Conference of State Court Administrators (2016), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx;

Principles for Judicial Administration, The National Center for State Courts and The State Justice Institute (July 2012), http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Judicial%20Administration%20Report%209-20-12.ashx

There are due process and equal protection requirements that courts must adhere to that relate to the use of ability to pay determinations, the limited conditions under which incarceration can be used for individuals unable to satisfy their court ordered legal financial obligations (LFO), and the need for the use of alternatives to incarceration for those individuals unable to pay.

The U.S. Supreme Court has held that converting an individual's fine to a jail term solely because the individual is indigent violates the Equal Protection Clause of the United States Constitution. *Tate v. Short,* 401 U.S. 395, 398 (1971). Courts may only jail an individual when that person has the means to pay but refuses to do so. *Tate*, 401 U.S. at 400. *Bearden v. Georgia,* 461 U.S. 660, 662-63 (1983) held that courts cannot incarcerate for failure to pay without first making an inquiry into facts that demonstrate the defendant had the ability to pay, willfully refused to pay, and had access to adequate alternatives to jail for non-payment.

The Supreme Court has clearly set forth the guiding principles, and it is the responsibility of court leaders to ensure that these principles have been integrated into practice.

As a way of drawing attention to these issues and promoting ongoing improvements, in 2016 the CCJ and COSCA established the National Task Force on Fines, Fees, and Bail Practices (the "National Task Force") to develop recommendations that promote the fair and efficient enforcement of the law; to ensure that no citizen is denied access to the justice system based on race, culture, or lack of economic resources; and to develop policies relating to the handling of legal financial obligations that promote access, fairness, and transparency. The work of the National Task Force is intended to apply to any non-federal adjudicative body or entity, however denominated (including without limitation any court of general jurisdiction, court of limited jurisdiction, county court, municipal court, traffic court, mayor court, village court, or justice of the peace), that is empowered by law to levy fines, assess fees, or order imprisonment in connection with misdemeanors or infractions (including without limitation traffic-related offenses).

The National Task Force will continue its efforts on longer-term goals and its examination and expansion upon its work in order to promote its widest application. In the meantime, the following attached **Key Resources,** which are also available at [*insert National Task Force web site or hyperlink*], will assist courts now as they address the critical issues of fines, fees, and bail practices:

- ***A Brief Guide to the Work of the National Task Force on Fines, Fees, and Bail Practices***
- ***Bench Card on Lawful Collection of Legal Financial Obligations***
- ***Model Political Subdivision Court Registration Act***
- ***Model Political Subdivision Court Registration Form***

- ***Model Uniform Citation Notice language***

- ***Sample Court Rule on Recording of Limited Jurisdiction Proceedings Washington State's Administrative Rule for Courts of Limited Jurisdiction, ARLJ 13***

Model Political Subdivision Court Registration Act

Introductory Note:

This "Model Political Subdivision Court Registration Act" is offered for the consideration of each State and U.S. Territory to assure that the State's highest ranking judicial officer, the State Court Administrator, or both are kept apprised, on a regular basis, of every court operating within the State's borders with the authority to levy fines, assess fees, or impose incarceration. The Courts and adjudicative bodies that would be affected by this Model Act include courts of general jurisdiction as well as courts of limited jurisdiction, including municipal courts, county courts, traffic courts, mayor courts, village courts, justices of the peace, and similar entities. Courts or other adjudicative bodies that lack the authority to levy fines, assess fees, or impose incarceration would not be covered by this Model Act.

Language enclosed in brackets is intended to provide alternative formulations of words or to express concepts rather than precise verbiage in order to leave room for individual States to tailor the provisions to their own circumstances. For example, "[State Court of Last Resort]" is intended as a placeholder for "Supreme Court" or "Court of Appeals" or "Supreme Judicial Court" or any other variation on this theme. Similarly, "[ninety] days" could be recast by an individual State as any time period, 30 days, 60 days, 120 days, etc. The default choice was "ninety" days, except in Section 4(a)(2), where "thirty" was chosen to reflect that a shorter period of time would be appropriate given the different information required for registration by a Court as opposed to registration by a Political Subdivision. The Political Subdivision could give 90 days' advance notice before a newly created Court commences operations, whereas the Court might not know that far in advance the names of the judges who will serve on the court (thus a shorter period for registration before commencement of operations would seem reasonable). Bracketed language may also be included as optional supplementary language, such as the phrase "[or is planned to be in operation within a [24]-month period]" in Section 2(a).

SEC. 1. SHORT TITLE. – This statute shall be known as the "Political Subdivision Court Registration Act."

SEC. 2. DEFINITIONS. – Except as otherwise specifically provided in this Court Registration Act, for purposes hereof the following definitions shall apply:

(a) "COURT." – The term "Court" means any non-federal adjudicative body or entity, however denominated (including without limitation any court of general jurisdiction, court of limited jurisdiction, county court, municipal court, traffic court, [mayor court], [village court] [justice of the peace]), that is in operation [or is planned to be in operation within a [24]-month period] within any Political Subdivision and that is empowered by law to levy fines, assess fees, or order imprisonment in connection with misdemeanors or infractions (including without limitation traffic-related offenses).

(b) "JOINT COURT." – The term "Joint Court" means any Court established by two or more Political Subdivisions pursuant to Section 4(b) of this Act.

(c) "POLITICAL SUBDIVISION" means, for purposes of this Act, any county, city, district, municipality, town, village, or similar entity within this State, whether incorporated or unincorporated.

SEC. 3. ESTABLISHMENT OF REGISTRY. – The State Court Administrator shall establish a registry of Courts subject to this Act. The registry shall include all information required to be provided by Political Subdivisions and Courts to the State Court Administrator under this Act and such other information as the State Court Administrator may, in his or her discretion, prescribe.

SEC. 4. REQUIRED REGISTRATION. –

(a) (1) BY POLITICAL SUBDIVISION. – Not less frequently than [annually] [biennially] [other periodicity], each Political Subdivision shall submit to the State Court Administrator, with a required copy to the [Chief Justice/Chief Judge] of the [State Court of Last Resort], a registration providing the name of each Court (whether established under this Act or otherwise) operating within its borders, the Court's address (or addresses, if the Court operates at more than one location), and such other information as may be required on a form and in a format (hard copy, electronic filing, or otherwise) prescribed by the State Court Administrator. In the event of a newly formed Court, such form shall be submitted to the State Court Administrator no later than [ninety] days prior to the date such newly formed Court begins operations.

(2) BY COURT. – Not less frequently than [annually] [biennially] [other periodicity], the presiding or administrative judge of each Court shall submit to the State Court Administrator, with a required copy to the [Chief Justice/Chief Judge] of the [State Court of Last Resort], a registration providing the name, address (or addresses, if the Court operates at more than one location) of the Court, the number of judges authorized to be on the Court, how they are selected, the duration of their terms of office, whether judges are full-time or part-time, the name and e-mail address of each judge serving on the court, the minimum qualifications (if any) for a person to serve as a judge of the Court, the nature of and limitations (if any) on its jurisdiction, whether jury trials are conducted, the maximum amount of fines (if any) the Court can impose, the maximum term of imprisonment (if any) the Court can impose, the source(s) of the Court's funding, and such other information as may be required on a form and in a format (hard copy, electronic filing, or otherwise) prescribed by the State Court Administrator. In the event of a newly formed Court, such form shall be submitted to the State Court Administrator no

later than [thirty] days prior to the date such newly formed Court begins operations.

(b) JOINT COURTS PERMITTED. – Except as otherwise provided by law, two or more Political Subdivisions may enter into an agreement sharing a single Joint Court with jurisdiction over persons residing and events occurring within any of the Political Subdivision parties to such agreement and providing for the administration of such Joint Court. A copy of each agreement establishing a Joint Court shall be filed with the State Court Administrator [, with a required copy to the [Chief Justice/Chief Judge] of the [State Court of Last Resort]].

(c) DISCONTINUATION OF COURT. – If for any reason a Court should cease to exist, the Political Subdivision shall [promptly] [within _____ days] thereafter transmit notice thereof, by such means as shall be prescribed by the State Court Administrator, to the State Court Administrator, the [Chief Justice/Chief Judge] of the [State Court of Last Resort], and the presiding judge of every Court within the Political Subdivision).

Model Political Subdivision Court Registration Form

Model Registration Form

Introductory Note: This form was created to accompany the Model Political Subdivision Court Registration Act but can be used, in whole or in part, separately and independently, as best suits the needs of a particular State. The purpose of this form is to assure that the competent authorities in the State's judicial branch – which could be the highest ranking judicial officer, the State Court Administrator, or both – are kept up-to-date on every court operating within the State's borders with the authority to levy fines, assess fees, or impose incarceration. These can include courts of general jurisdiction as well as courts of limited jurisdiction, including municipal courts, county courts, traffic courts, mayor courts, village courts, justices of the peace, and similar entities.

General Court Information

Name of Political Subdivision and Court:	
Address:	**Zip Code:**
Court Administrator:	**Contact Number:**
Name of Presiding/Administrative Judge:	

Court Jurisdiction

☐ General Jurisdiction ☐ Limited Jurisdiction

Jury Trials: ☐ Yes ☐ No

Indicate all areas where the court has jurisdiction:

□ Tort	□ Felony
□ Contract	□ Misdemeanor
□ Real Property	□ Parking
□ Probate/Estate	□ Traffic Violations
□ Mental Health	□ Ordinance Violations
□ Domestic Relations	□ Juvenile
□ Small Claims	□ Criminal Appeal
□ Civil Appeal	□ Other:

Maximum Monetary Penalty That Can Be Imposed: $_____

Maximum Incarceration: _____

Is this court or its jurisdiction shared by more than one municipality, district, county, city, town, village, or any other governing body of an established population? □ Yes □ No

If yes, please list the name(s): _____

Judges

Judges are: □ Elected □ Appointed by:_____
Length of term:_____ years.

How (if at all) can a judge's term be extended?

□ Reappointment □ Reelection □ Retention without election □ Other:_____

Number of judges employed by the court:

Full-time: _____
Part-time: _____
Other (please specify): _____

Please attach to this form the name and e-mail address of each judge currently serving.

Is this court or its jurisdiction shared by more than one municipality, district, county, city, town, village, or any other governing body of an established population? □ Yes □ No

If yes, please explain:_____
_____

Qualifications to hold judicial office: please mark all that apply

- □ U.S. citizen
- □ State resident; year requirement (if applicable):_____
- □ Qualified elector
- □ Must be a resident where the court is located
- □ High school diploma or equivalent
- □ Law degree
- □ Admitted to practice law in the state
- □ State bar member
- □ Minimum years in practice:_____
- □ Minimum age requirement:_____
- □ Maximum age requirement to run for judicial office or to be appointed:_____
- □ Mandatory retirement age:_____

Education requirements: please mark all that apply

- □ Formal training on duties and functions of the court before a judge takes office.
- □ Judicial certification; Brief description of certification:_____
  _____
- □ _____ hours of continuing judicial education per year.
- □ Attend yearly training conferences.
- □ Pass a certification examination.
- □ _____ hours of continuing judicial education per year.
- □ Report yearly continuing judicial education hours and/or recertification to the state.
- □ Other: _____

Funding

Where does the court receive its funding? Check all that apply.

□ State Government □ Local Government □ Court Revenues

When assessing and collecting fines and fees, approximately what percentage of collections goes to the local government the state, and the court? If this is not known, please check the "Uncertain" box.

Percentages: _____%_ Local Government _____%_ State _____%_ Court □ Uncertain

Appeals Process

Is this court a court of record? □ Yes □ No

To what court are judgments and rulings appealed? _____

Sample Court Rule: Washington State Rule on Recording of Limited Jurisdictions' Proceedings

ARLJ 13
LIMITED JURISDICTION COURTS ARE REQUIRED TO RECORD ALL PROCEEDINGS ELECTRONICALLY

(a) Generally. All limited jurisdiction courts shall make an electronic record of all proceedings and retain the record for at least as long as the record retention schedule dictates. The judicial officer shall assure that all case participants identify themselves for the record in keeping with RALJ 5.2(a).

(b) Nonelectronic Record in Emergency. In the event of an equipment failure or other situation making an electronic recording impossible, the court may order the proceeding to be recorded by nonelectronic means. The nonelectronic record must be made at the court's expense, and in the event of an appeal, any necessary transcription of the nonelectronic record must be made at the court's expense.

[Adopted effective October 1, 2002; amended effective September 1, 2015.]

Sample Language for Model Uniform Citation

If you are assessed fines and court costs as a result of this citation and you are unable to pay, bring this to the attention of the judge. For more information, contact the court or an attorney, or visit the following website: [*insert your court's website here*].

Letter of Transmittal

Nevada Advisory Committee to the
U.S. Commission on Civil Rights

The Nevada Advisory Committee to the U.S. Commission on Civil Rights submits this advisory memorandum regarding the potential for disparate impact on the basis of race, color, or other federally protected category in the enforcement of municipal fines and fees. The Committee submits this advisory memorandum as part of its responsibility to study and report on civil rights issues in the state of Nevada and to supplement the 2017 statutory enforcement report. The contents of this advisory memorandum are primarily based on testimony the Committee heard during public meetings on March 15, 2017 held simultaneously in Las Vegas and Reno.

This advisory memorandum begins with a brief background on the topic to be considered by the Committee. It then presents an overview of the testimony received. To conclude, this memorandum identifies recommendations for addressing civil rights concerns directed to various stakeholders at the federal and state level. In recognition of the Commission's continued study on this topic and in lieu of providing a detailed discussion of each finding presented, the Committee offers findings and recommendations for addressing this problem of national importance.

Nevada Advisory Committee to the
U.S. Commission on Civil Rights

Wendell Blaylock, *Chair, Nevada Advisory Committee*, Las Vegas

Bob Beers, Las Vegas

Kathleen Bergquist, Las Vegas

Sondra Cosgrove, Las Vegas

Carol Del Carlo, Incline Village

Debra Feemster, Sparks

David Fott, Las Vegas

Emma Guzman, Reno

Kara Jenkins, Las Vegas

Kay Kindred, Las Vegas

Theresa Navarro, Reno

Jon Ponder, Las Vegas

Matthew Saltzman, Las Vegas

Ed Williams, Las Vegas

Advisory Memorandum

To: The U.S. Commission on Civil Rights
From: The Nevada Advisory Committee to the U.S. Commission on Civil Rights
Date: June 13, 2017
Subject: Municipal Fines and Fees in the State of Nevada

On March 15, 2017, the Nevada Advisory Committee (Committee) to the U.S. Commission on Civil Rights convened public meetings held simultaneously in Las Vegas and Reno to hear testimony to examine the potential for disparate impact on the basis of race, color, or other federally protected category in the enforcement of municipal fines and fees. The following advisory memorandum results from the following sources: (i) testimony provided during the March 15, 2017 meeting of the Nevada Advisory Committee, (ii) supplementary testimony provided during a March 29, 2017, meeting of the Nevada Advisory Committee, and (iii) written testimony and comment submitted to the Committee during the thirty-day public comment period. It begins with a brief background of the topic to be considered by the Committee. It then presents an overview of the testimony received. To conclude, this memorandum identifies recommendations for addressing civil rights concerns directed to various stakeholders at the federal and state level. This memo, including the recommendations within it, was adopted by the Committee on May 25, 2017.

Background

The shooting death of unarmed teenager Michael Brown by police in Ferguson, Missouri, on August 9, 2014, started a national conversation on policing which led to a report released by the U.S. Department of Justice (DOJ), Civil Rights Division analyzing the practices of the Ferguson Police Department. Among its findings, the report revealed that Ferguson's law enforcement efforts were focused on generating revenue by enforcing municipal fines and fees at the expense of ensuring public safety needs.[1] Further, the report found that the practice of raising revenue through the court system challenges the independent role of the judiciary, shifts the essential functions of the courts, and adversely impacts the most vulnerable communities, especially those living in or near poverty.[2] To address these issues, the DOJ issued five resources, four of which were addressed to chief justices and state court administrators,[3] and one addressed to recipients

[1] U.S. DEP'T OF JUSTICE, C.R. DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [hereafter INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT].
[2] *Ibid.*
[3] Press Release, U.S. Dep't of Justice, Off. of Pub. Aff., Justice Department Announces Resources to Assist State and Local Reform Fine and Fee Practices (Mar. 14, 2016), https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices (last visited April 10, 2017).

of financial assistance from various federal agencies dealing with juvenile justice matters.[4] These resources are:

1. Dear Colleague Letter[5] from the Civil Rights Division and the Office for Access to Justice to provide greater clarity to state and local courts regarding their legal obligations with respect to the enforcement of court fines and fees.

2. Announcement of $2.5 million in competitive grants[6] through the Bureau of Justice Assistance (BJA) to state, local or tribal jurisdictions that, together with community partners, want to test strategies to restructure the assessment and enforcement of fines and fees.

3. BJA support for the National Task Force on Fines, Fees, and Bail Practices that will be responsible for drafting model statutes, court rules and procedures, and development of an online clearinghouse of best practices.

4. A resource guide compiled by the Office of Justice Programs Diagnostic Center that highlights issue studies and other publications related to the assessment and enforcement of court fines and fees.

5. Advisory letter for recipients of financial assistance to remind them of their constitutional and statutory responsibilities related to collecting fines and fees from youth involved with the juvenile justice system. Akin to the Dear Colleague Letter, this correspondence offers recommendations to improve the administration of juvenile fines and fees.

The U.S. Constitution along with other federal law protect citizens from government systems that raise revenue from its citizens. The Due Process Clause of the Fourteenth Amendment[7] bars criminal adjudication by individuals who have a financial stake in cases they decide.[8] Secondly, the Equal Protection Clause of the Fourteenth Amendment ensures that no state shall deny any persons "the equal protection of the laws."[9] The Eighth Amendment to the U.S. Constitution forbids the excessive levying of fines.[10] Finally, the Title VI of the Civil Rights Act of 1964, as

[4] U.S. DEP'T OF JUSTICE, ADVISORY FOR RECIPIENTS OF FINANCIAL ASSISTANCE FROM THE U.S. DEP'T OF JUSTICE ON LEVYING FINES AND FEES ON JUVENILES (2017), https://ojp.gov/about/ocr/pdfs/AdvisoryJuvFinesFees.pdf.
[5] Letter from the U.S. Dep't of Justice (Mar. 14, 2016), https://www.justice.gov/crt/file/832461/download (last visited April 10, 2017).
[6] U.S. DEP'T OF JUSTICE, OFF. OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE, THE PRICE OF JUSTICE: RETHINKING THE CONSEQUENCES OF JUSTICE FINES AND FEES (2016), https://www.bja.gov/funding/JRIpriceofjustice.pdf (last visited April 10, 2017).
[7] U.S. CONST. amend. XIV, § 1.
[8] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) and Caperton v. A.T. Massey Coal Co., 556 U.S. 883-884 (2009).
[9] U.S. CONST. amend. XIV, § 1.
[10] U.S. CONST. amend. VIII.

amended, prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.[11]

The Committee is aware that the U.S. Commission on Civil Rights (Commission) is presently studying the issue of municipal fines and fees and the effectiveness of DOJ's enforcement efforts. To fulfill this study, the Commission has invited its advisory committees to consider undertaking studies on the civil rights implications of the enforcement of municipal fines and fees. As such – and in keeping with their duty to inform the Commission of: (ii) matters related to discrimination or a denial of equal protection of the laws and (ii) matters of mutual concern in the preparation of reports of the Commission to the President and the Congress, the Committee submits the following findings and recommendations to the Commission regarding the potential for disparate impact on the basis of race, color, or other federally protected category in the levying of fines and fees Nevada. These findings and recommendations are intended to highlight the most salient civil rights themes as they emerged from the Committee's inquiry. In recognition of the Commission's continued study on this topic and in lieu of providing a detailed discussion of each finding presented, the Committee offers findings and recommendations, along with supplementary resources, as topics of reference for the Commission's 2017 statutory enforcement report. The complete meeting agenda, minutes, and transcripts are included in Appendix A and B for further reference.

Overview of Testimony

The Committee approached this project from a neutral posture and sought input from local, state, and national stakeholders representing various perspectives on the topic. During the March 15, 2017 Committee meetings in Las Vegas and Reno, the Committee heard testimony regarding potential disparities in the administration of fines and fees on the basis of race or color,[12] as well as recommendations to address any related concerns regarding equal protection and the right to due process of law. The Committee heard from government officials and law enforcement who have specific knowledge of the administration of fines and fees; policy experts who offered the national, state, and local trends; and community members directly impacted by municipal fines and fees. The Committee also heard testimony from elected officials and community advocates on their efforts to address disparate impact of fines and fees affecting individuals of federally protected classes. To accommodate a scheduled panelist who was unable to attend the live hearing, the Committee heard from a policy expert who analyzes fines and fees levied on juveniles and their families on March 29, 2017. In addition, the Committee received written statements offering supplemental information on the topic.[13] Notably, despite several outreach attempts, no other State officials or State representatives were able to participate to explain the

[11] 42 U.S.C. § 2000(d). (2012).
[12] Testimony was also heard on the treatment of individuals with mental health issues and their interaction with the law enforcement and the court system.
[13] Written testimony submitted can be found in Appendix D.

fiscal matters related to fines and fees or matters related to potential reform efforts. Additionally, Chief Justice James Hardesty of the Nevada Supreme Court was invited to provide testimony, but due to his involvement with the Nevada Advisory Commission on the Administration of Justice and the National Task Force on Fines and Fees, and Bail Practices, he was unavailable to provide comments related to state efforts. It is within this context that the Committee presents the findings and recommendations that follow.

Findings

The section below provides findings received and reflects views of the cited panelists. While each assertion has not been independently verified by the Committee, panelists were chosen to testify due to their professional experience, academic credentials, subject expertise, and firsthand experience with the topics at hand. A brief biography of each panelist and his or her credentials can be found in Appendix C.

1. Testimony indicated the following concerns regarding a severe deficit of demographic data collection and tracking:

    a. Nevada courts and law enforcement are not required to collect demographic information regarding who utilizes the court system and who interacts with law enforcement. Information is not recorded and readily accessible from the courts regarding who (i) have paid off fines and fees, (ii) are on a payment plan, (iii) were given the alternative to perform community service in lieu of paying off fines and fees, and (iv) was given a hearing and of what type. Similarly, law enforcement do not maintain demographic information for individuals (i) with a bench warrant as a result of the inability to pay, (ii) who are being held in jail as a result of inability to pay and for how long, and (iii) who are being stopped and for what violations.[14] As such, it is not possible to monitor or assess the potential for disparate impact on the basis of race, color, disability, or other federally protected category.

    b. Widely used case management databases by courts and law enforcement are largely outdated and do not have the appropriate fields to enter demographic categories. Efforts to upgrade these systems would require significant funding. This poses a challenge for potential state reform efforts that would require courts and law enforcement to collect demographic information.[15] Additionally, there is concern

[14] Public Meeting: Municipal Fines & Fees in Nev.: Hearing Before the Nevada Advisory Committee to the U.S. Commission on Civil Rights 180 lines 13-20 (Nev. 2017) (statement of Amy Rose, Legal Director, American Civil Liberties Union, Nev.), https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261 [hereafter Transcript].
[15] Transcript (statement of Leisa Moseley, Founder, The Action Company) 105 lines 9-23.

regarding how a potential statewide system upgrade would be funded as taxes are largely unpopular among Nevada residents.[16]

c. Incomplete, missing, and inaccurate demographic data shared between courts and law enforcement[17] make it difficult to ascertain the extent to which disparate impact affects a federally protected category. However, an advocate warned that if data driven law enforcement efforts are pursued as a result of collecting demographic information, it may be used to reinforce racial profiling in predominantly minority communities.[18]

2. There is consensus in research and testimony that explains individuals impacted by fines and fees are overwhelmingly poor. While there is insufficient demographic data collected by law enforcement and the courts[19] to assess whether federally protected categories of individuals are impacted, research and testimony indicate there is reason for concern.

   a. In 2015, the Las Vegas Review-Journal investigated law enforcement data and found that residents living in the seven poorest, statistically African-American and Hispanic zip codes account for nearly two-thirds of traffic citations.[20]

   b. According to the Kenny Guinn Center for Policy Priorities, North Las Vegas – a city with a high rate of poverty and high concentration of minority communities – collected $10.7 million in fines, fees, and assessments out of the $13.2 million originally imposed.[21]

   c. A 2002 study, Commissioned by the Nevada Legislature, found that African-American and Hispanic residents in Nevada are more likely to be pulled over for traffic stops than White residents. African-American residents also were more likely to be searched statewide. Across all participating law enforcement agencies, African-American drivers were searched at a high rate, more than twice the rate of White drivers (9.5 percent to 3.9 percent).[22]

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[16] Transcript (statement of Dustin Marcello, Esq., Def. Att'y, Pitaro & Fumo Law) 218 line 23-219 line 16; Transcript (statement by Hannah Brown, President Emeritus, Urban Chamber of Commerce) 219 lines 17-23.
[17] Transcript (statement of Dana Hlavac, Ct. Adm., L.V. Mun. Ct.) 12 lines 16-20.
[18] Transcript (statement of Marcello) 205.
[19] Transcript (statement of Hlavac) 11 lines 14-13 line 2.
[20] James DeHaven, *Poor Residents Take Brunt of Planned Vegas Muni Court Payments*, L.V. Rev. J, Jun. 15, 2015, https://www.reviewjournal.com/local/local-las-vegas/poor-residents-take-brunt-of-planned-vegas-muni-court-payments/.
[21] Transcript (statement of Megan Rauch, 114 lines 5-14.
[22] RICHARD C. MCCORKLE, NEVADA OFFICE OF THE ATT'Y GEN. & U. OF NEVADA., LAS VEGAS., DEP'T OF CRIM. JUSTICE, A.B. 500 TRAFFIC STOP DATA COLLECTION STUDY: A SUMMARY OF FINDINGS (U. of Nev., Las Vegas, Dept. of Crim. Just. 2003); *Blacks, Hispanics in Nevada More Likely to be Pulled Over for Traffic Stops*, Las Vegas Sun, Jan. 31, 2003, https://lasvegassun.com/news/2003/jan/31/blacks-hispanics-in-nevada-more-likely-to-be-pulle/.

d. According to a report written by the Juvenile Law Center, youth of color were more likely than their White counterparts to have unresolved fines or fees after closed cases, which relate to higher recidivism rates. It notes that the fees structures that include a failure to pay requirement may contribute to racial disparities in the juvenile justice system nationally. [23]

e. The National Council on Crime and Delinquency conducted a study on racial and ethnic disparities in the U.S. Criminal Justice System and found that African-Americans comprise 13 percent of the population but 28 percent of those arrested and 40 percent of those incarcerated. Notably, African-Americans are also almost five times more likely than White defendants to rely on indigent defense counsel.[24]

3. Out of eight possible fines and fees, Nevada youth and their families are required to pay up to six types of fines and fees as they move through the juvenile justice system. Of the six fines and fees, three are mandatory and the remaining are made by judicial determination.[25] Collection of these legal financial obligations raise concerns about (i) its practicability as youth have limited or no access to money, (ii) its rehabilitative purpose, and (iii) its disparate impact on youth of color in the justice system.[26]

4. Testimony indicated the following concerns regarding due process of law in imposing and resolving fines and fees:

   a. The use of counsel to challenge fines and fees is costly. In many cases, the fee amount is significantly more than the actual fine. It is often not logical to hire an attorney to represent the individual, especially if the individual is indigent, because the legal costs would be too expensive.[27] As a result, defense lawyers have turned away individuals dealing with high fines and fees which leave individuals with few options to address their debt.[28]

   b. In some cities, traffic commissioners are appointed by city council members to address minor traffic violations and conduct indigency inquiries. These individuals

[23] ALEX R. PIQUERO & WESLEY G. JENNINGS, JUSTICE SYSTEM–IMPOSED FINANCIAL PENALTIES INCREASE THE LIKELIHOOD OF RECIDIVISM IN A SAMPLE OF ADOLESCENT OFFENDERS (Youth Violence and Juvenile Just. 2016).
[24] CHRISTOPHER HARTNEY & LINH VUONG, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIM. JUSTICE SYSTEM (Nat'l Council on Crime and Delinquency 2009), http://www.nccdcrc.org/nccd/pdf/CreatedEqualReport2009.pdf. (last visited April 14, 2017).
[25] Transcript (statement of Rauch) 109 lines 1-24.
[26] Nevada Advisory Committee to the U.S. Commission on Civil Rights Meeting Minutes, March 29, 2017 (Nev. 2017) 5-6 (statement by Jessica Feierman, Associate Director, Juvenile Law Center) https://database.faca.gov/committee/meetingdocuments.aspx?flr=147671&cid=261 [hereafter Transcript 2].
[27] Transcript (statement of Marcello) 195 line 16-196 line 19.
[28] Transcript (statement of Joseph Maridon, Esq., Las Vegas) 245 lines 6-11.

have the authority to waive a defendant's rights to trial and allow him or her to pay for the fine and fee, or determine alternative payment options.[29] Without judicial oversight, it is difficult to ensure that these duties are done in a manner consistent with due process and equal protection. Additionally, this may pose a conflict as there is no political recourse if a defendant feels these individuals dealt with their case unfairly.[30]

c. Data indicating the sources of fines and fees revenue contributing to the operating budgets of courts is limited. The first and only time that the Nevada Judicial Branch produced a report clearly presenting its funding sources and operations was in 2003.[31] Strikingly, 71 percent of collected fines and 100 percent of state-mandated administrative assessments funded municipal courts.[32]

d. State-mandated administrative assessment fees are used to pay for special projects such as upgrading case management systems [33] and operating specialty courts.[34] For the City of Las Vegas, in particular, administrative assessment fees are used to pay for the construction of the Regional Justice Center until the year 2045.[35]

e. To address unsuccessful attempts at recovering originally imposed fines and fees, cities across the state use varying collection methods such as organizing "warrant amnesty" events,[36] offering payment plan options, and outsourcing to private collection agencies.[37] Local media reporting brought attention to the increased revenue flowing into the courts, which advocates warn exacerbates community and police tensions.[38]

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[29] Transcript (statement of Bill Zihlmann, Ct. Admin., Henderson Muni Ct.) 29 lines 18-22.
[30] Transcript (statement of Marcello) 197 lines 8-10.
[31] SUP. CT. OF NEVADA, CT. FUNDING COMMISSION, NEVADA JUDICIAL BRANCH FUNDING: RESOURCES AND OPERATIONS DURING FISCAL YEAR 2003, A REPORT OF THE SUP. CT. OF NEVADA CT. FUNDING COMMISSION, iv (2005) nvcourts.gov/AOC/Documents/Court_Funding_Commission_Report/ (last visited April 5, 2017).
*The report was created by the Commission of the Supreme Court of Nevada to assess the level of funding and resources in, and services offered by, each court within the Nevada Court system. It noted, "Never before in the history of Nevada has anyone known at any particular point in time, by any estimate, the cost of operating the courts in Nevada or what we get for our money." A Message from Deborah A. Agosti, Senior Justice and Chair of Court Funding Commission.
[32] Transcript (statement of Dr. Nancy E. Brune, Executive Director, Kenny Guinn Center for Pol'y Priorities) 111 line 10-112 line 7.
[33] Transcript (statement of Dexter Thomas, Ct. Admin., Reno Just. Ct.) 45 lines 18-21.
[34] Transcript (statement of Hlavac) 14 lines 17-22.
[35] *Ibid.,* lines 12-16.
[36] Transcript (statement by Thomas Harvey, Executive Director, ArchCity Defenders) 147, line 12 -148 line 11; Transcript (statement by Thomas) 45 line 22-46 line 8.
[37] Transcript (statement by Zihlmann) 30 lines 23-25.
[38] Transcript (statement by Harvey) 147 line 12-149 line 7.

f. As cities struggle to collect from citizens, especially juveniles and/or indigents, panelists questioned the sustainability of the State's long-standing fiscal model to fund city agency operations through fines, fees, and administrative assessment fees.[39]

5. Testimony indicated the following concerns regarding the ability-to-pay determination and equal protection of the law in resolving fines and fees:

   a. *Gilbert v. Nevada*[40] the Nevada Supreme Court ruling held that an individual should be given an opportunity to explain his or her inability to pay before being jailed, in what is known as "Gilbert hearing." However, some judges across the state may still not allow individuals to explain their financial circumstances and are continuing to sentence them to jail for failure to pay.[41]

   b. Nevada law does not provide a grace period for individuals on payment plans. Therefore, individuals who are late on fines and/or fees payments can still be arrested, even if past payments were made on time.[42] Individuals who are arrested in this way may be victims of an unconstitutional deprivation of liberty.

   c. Administrative assessment fees enforced by the State are required to be paid off before fines. For an individual who has committed multiple offenses, each offense is assigned a separate case and consequently, a separate administrative assessment fee is applied.[43] This compounding of fees may cause increased hardship for indigent defendants to pay off fees even before attempting to pay off the remainder of fines associated to each offense. This is particularly challenging as individuals must pay these fees before they can appeal their case before a judge requesting for an alternative payment option.

   d. Community service is not a widely used payment alternative across courts,[44] but if granted, the pay-off for performing community service is paltry. In Las Vegas, one

[39] Transcript (statement by Marcello) 206 line 6 -207 line 1; Transcript 2 (statement by Feierman) 5 ¶ 4.
[40] See Gilbert v. State, 669 P.2d 699 (Nev. Sept. 27, 1983).
[41] Written Testimony before the Nevada Advisory Committee to the U.S. Commission on Civil Rights, March 15, 2017, (Nev. 2017) 13 (statement by Jeffrey Barr, Esq.). https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261 [hereafter Written Testimony]; Transcript (statement by Jesiah Dechanel, Las Vegas) 238 line 19- 241 line 13.
* A 73-year-old Nevada woman was jailed for 21 days for failure to pay for fines and fees over a civil lawsuit with her neighbor. She initially was given the option to perform community service to pay down the amount, but due to her health condition and the extreme desert heat, it was out of the question. While in jail, she was among others who faced a similar burden of inability to pay down their fines and fees.
[42] Transcript (statement by Moseley) 85 lines 12-18.
[43] Transcript (statement by Marcello) 201 lines 2-10.
[44] Written Testimony (statement by Michael Bluestein, Las Vegas) 15.

hour of community service equates to ten dollars.[45] This alternative may leave individuals, especially those with unpredictable work schedules and/or are minimum wage earners, struggling to pay off their fines and fees. Similarly, it causes an additional financial and scheduling burden on parents who must pay and arrange for childcare while they perform community service.

6. State officials and lawmakers have been involved in reform efforts that address fines and fees, but little progress has been made to date.

    a. In the last two legislative sessions, lawmakers attempted to address the classification of traffic violations. Thirty-seven states across the country consider these violations civil matters. In Nevada, traffic violations are treated as criminal infractions which are subject to a bench warrant for failure to appear in court. Due to its contentious language surrounding reclassification and its implications regarding the sustainability of court operations, legislation to decriminalize traffic violations into a civil matter was unsuccessful.[46] In its recent legislative session, a concurrent resolution was introduced in the Nevada Assembly that directs the Nevada Legislative Commission to conduct an interim study concerning treating certain traffic and related violations as civil infractions and is awaiting Senate approval.[47]

    b. The Nevada Advisory Commission on the Administration of Justice is currently reviewing the State's administration of fines and fees practices by identifying areas for reform consideration and is an active member of the National Task Force on Fines and Fees, and Bail Practices. At this writing, the Nevada Advisory Commission on the Administration of Justice has not released any official statements or findings related to their review.

Recommendations

The recommendations below are not listed by preference of suggested action.

1. The U.S. Commission on Civil Rights should issue a formal request to the U.S. Department of Justice to:

    a. Require consistent and complete reporting of demographic information by state and local courts and law enforcement. Where possible, such data should include, but are not limited to: (i) race, (ii) color, and (iii) veteran status. Such data should

[45] Transcript (statement by Rauch) 114 lines 23-25.
[46] Transcript (statement by Michele Fiore, Former Assemblywoman, District 4) 78 line 3-80 line 2.
[47] Assemb. Con. Res. 9, 79th Leg., Reg. Sess. (Nev. 2017). https://www.leg.state.nv.us/Session/79th2017/Reports/history.cfm?BillName=ACR9 (last visited May 11, 2017).

reference the zip code where the violation occurred and type of violation. Additionally, this information should be made publicly available, and disaggregated by court cases.

b. Require the Department to keep their commitment to supporting state judges, court administrators, policy makers and advocates in ensuring justice for all people, regardless of their financial circumstance, by upholding its initial guidance and resources. This entails keeping the "Dear Colleague" letter visible and available on the Department of Justice website and recirculating it to state and local courts.

c. Continue funding the grant program, *The Price of Justice: Rethinking the Consequences of Justice Fines and Fees,* administered by the BJA, in the next fiscal year in hopes that Nevada and other states may have the opportunity to compete for funding. In addition, the Committee recommends that grantees are given the opportunity to showcase their strategies to states to support best practice sharing.

d. Require that individuals be afforded the right to court-appointed counsel.

2. The Commission should issue a formal recommendation to the Governor and State of Nevada Legislature urging the state to:

a. Require mandatory annual reporting of revenue generated from fines and fees to be submitted to the Administrative Office of the Courts as was done in 2003.

b. Increase annual funding for the Administrative Office of the Courts grant program[48] to ensure courts can address their infrastructural technology needs.

c. Eliminate the use of failure-to-pay warrants and any associated fees.

d. Institute mandatory training of all judges, court staff, law enforcement, prosecutors and public defenders on the use of the bench card.[49]

[48] Sup. Ct. of Nevada, Admin. Office of the Courts, AOC Grant Program Overview, Projects & Programs Page, http://nvcourts.gov/AOC/Programs_and_Services/AOC_Grant_Program/Overview/ (last visited April 5, 2017).

[49] NATIONAL TASK FORCE ON FINES, FEES AND BAIL PRACTICES, CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF ST. CT. ADMIN., LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES (2017) http://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx (last visited April 5, 2017).

e. Develop and implement clear standards for court administrators and judges to determine an individual's inability to pay.

f. Institute a limitation on jail for nonpayment.

g. Commission a state study to identify alternative funding streams which courts may use to operate to reduce the dependency on revenue collected from fines and fees.

h. Submit report to all municipal and justice courts for review.

Appendix

A. Hearing Agenda & Minutes

B. Hearing Transcripts

C. Panelist Profiles

D. Written Testimony

Appendix A

Nevada Advisory Committee to the U.S. Commission on Civil Rights
Municipal Fines and Fees Hearing
March 15, 2017

Opening Remarks and Introductions (9:00 am – 9:15 am)

Government and Law Enforcement Panel (9:15 am – 10:30 am)
Dana Hlavac, Court Administrator, Las Vegas Municipal Court
Bill Zihlmann, Court Administrator, Henderson Municipal Court
Earl Mitchell, Constable, City of Henderson Township
Sam Diaz, Commission Officer and Government Liaison, and Kelly McMahill, Lieutenant, Las Vegas Metropolitan Police Department
* Dexter Thomas, Court Administrator, Reno Justice Court

Elected Officials Panel (10:45 am – 11:45 am)
* Dina Neal (D), Assemblywoman, District 7
Michele Fiore (R), Former Assemblywoman, District 4
* Leisa Moseley, Founder, The Action Company

Break (11:45 am – 1:15 pm)

Policy Experts Panel (1:15 pm – 2:30 pm)
*Egan Walker, Justice, Second Judicial District Court
Jessica Feierman, Associate Director, Juvenile Law Center
Dr. Nancy E. Brune, Executive Director and Megan Rauch, Director of Education Policy, Kenny Guinn Center for Policy Priorities
Nicole Austin-Hillery, Director and Counsel, Brennan Center for Justice at New York University
Thomas Harvey, Executive Director, ArchCity Defenders

Advocates and Community Members Panel (2:45 pm – 4:00 pm)
Amy Rose, Legal Director, American Civil Liberties Union, Nevada
Alex Cherup, Vice President, National Association for The Advancement Of Color People, Las Vegas
Dustin Marcello, Defense Attorney, Pitaro & Fumo Law
Hannah Brown, President Emeritus, Urban Chamber of Commerce

Open Forum (4:15 pm – 5:00 pm)

Closing Remarks (5:00 pm – 5:15 pm)

* Panelists joining via teleconference in Reno, Nevada

NEVADA ADVISORY COMMITTEE TO
THE U.S. COMMISSION ON CIVIL RIGHTS
MEETING MINUTES

March 15, 2017

The Nevada Advisory Committee to the U.S. Commission on Civil Rights (Committee) convened at two locations to hear testimony to determine if the use of municipal fines and fees disproportionately affect members of a federally protected class and to identify what solutions exist to remedy its impact. The primary location was at the Nevada Department of Employment, Training and Rehabilitation at 2800 E. St. Louis Ave., Las Vegas, NV 89104 and at Nevada Department of Employment, Training and Rehabilitation at 1325 Corporate Blvd., Reno, NV 89502 via video conference. Wendell Blaylock chaired the meeting and performed the initial roll call of committee members present. The meeting was open to the public and took place from 9:00 AM to 4:39 PM PDT.

State Advisory Committee Members:

Present:

- Sondra Cosgrove
- Carol Del Carlo
- Wendell Blaylock
- Theresa Navarro (in Reno)
- David Fott
- Kay Kindred
- Jon Ponder
- Kathleen Bergquist
- Kara Jenkins

Absent:

- Emma Guzman
- Bob Beers
- Matthew Saltzman
- Debra Feemster
- Ed Williams

Commission Staff present:

- David Mussatt, Supervisory Chief, Regional Programs Unit
- Ana Victoria Fortes, Civil Rights Analyst
- Angelica Trevino, Support Specialist
- Carolyn Allen (in Reno), Administrative Assistant

Members of the Public present:

- Lonnie Feemster
- Pat Lynch
- Joseph Maridon
- Lucy Hood
- Jo Cato
- Gloria Yasal
- Jesiah Yasal

Meeting Notes/Decisions Made:

The Committee heard testimony from the following individuals according to the agenda noted:
Opening Remarks and Introductions (9:00 am – 9:15 am)

Government and Law Enforcement Panel (9:15 am – 10:30 am)

- Dana Hlavac, Court Administrator, Las Vegas Municipal Court
- Bill Zihlmann, Court Administrator, Henderson Municipal Court
- Earl Mitchell, Constable, City of Henderson Township
- Sam Diaz, Commission Officer and Government Liaison and Kelly McMahill, Lieutenant, Las Vegas Metropolitan Police Department
- *Dexter Thomas, Court Administrator, Reno Justice Court

Elected Officials Panel (10:45 am – 11:45 am)

- *Dina Neal (D), Assemblywoman, District 7
- Michele Fiore (R), Former Assemblywoman, District 4
- *Leisa Moseley, Founder, The Action Company

Policy Experts Panel (1:15 pm – 2:30 pm)

- *Egan Walker, Justice, Second Judicial District Court
- Dr. Nancy E. Brune, Executive Director and Megan Rauch, Director of Education Policy, Kenny Guinn Center for Policy Priorities
- Nicole Austin-Hillery, Director and Counsel, Brennan Center for Justice at New York University
- Thomas Harvey, Executive Director, ArchCity Defenders

Advocates and Community Members Panel (2:45 pm – 4:00 pm)

- Amy Rose, Legal Director, American Civil Liberties Union, Nevada
- Alex Cherup, Vice President, National Association for The Advancement Of Color People, Las Vegas
- Dustin Marcello, Defense Attorney, Pitaro & Fumo Law
- Hannah Brown, President Emeritus, Urban Chamber of Commerce

Open Forum (4:15 pm – 5:00 pm)

Closing Remarks (5:00 pm – 5:15 pm)
* Panelists joining via video conference in Reno, Nevada

Also invited to testify were Nevada Supreme Court Justice James Hardesty, Associate Director for the Juvenile Law Center Jessica Feierman, and Partner for Ashcraft & Barr LLP Jeffrey Barr were unable to attend.

Testimony focused on determining if the use of municipal fines and fees disproportionately affect members of a federally protected class. It also discussed what solutions exist to remedy its impact.

At the conclusion of testimony given on each panel, Committee members had the opportunity to ask questions of the panelists.

No decisions were made and no votes taken. A transcript of the proceedings will be available and included with meeting records within 30 days.

Public Comment:
During the Open Forum session listed on the above agenda, the meeting welcomed for comments from members of the public. During the session, testimony was received from:

- Lonnie Feemster
- Pat Lynch
- Joseph Maridon
- Jesiah Yasal

Written testimony from members of the public will continue to be accepted until April 14, 2017. For more information contact the USCCR Western Regional Office at (213) 894-3437.

Adjournment:
Meeting adjourned at 4:39 PDT.

Appendix B

Nevada Advisory Committee March 15 Briefing Transcript

The full transcript of the Nevada Advisory Committee to the U.S. Commission on Civil Rights Hearing held on March 15, 2017 is available at https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261

Nevada Advisory Committee March 29 Briefing Transcript

The full transcript of the Nevada Advisory Committee to the U.S. Commission on Civil Rights Public Meeting held on March 29, 2017 is available at https://database.faca.gov/committee/meetingdocuments.aspx?flr=147671&cid=261

Appendix C

Nevada Advisory Committee March 15 Briefing Panelists Biographies

The Panelists' Biographies of the Nevada Advisory Committee to the U.S. Commission on Civil Rights Hearing held on March 15, 2017 is available at https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261

Appendix D

Nevada Advisory Committee March 15 Public Briefing Written Testimony

The full written testimony for the Nevada Advisory Committee to the U.S. Commission on Civil Rights Public Hearing on Municipal Fines and Fees in the State of Nevada, held on March 15, 2017 is available at https://database.faca.gov/committee/meetingdocuments.aspx?flr=147607&cid=261

CALIFORNIA FORUM

Unfair and unsafe: Even prosecutors want to end California's reliance on money bail

BY DAVID LABAHN
Special to The Sacramento Bee

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Some believe requiring people who have been arrested for a crime to pay bail is necessary to ensure their return to court and protect public safety. As a California prosecutor, I have found that accountability and community safety can be achieved by alternate means.

I am not alone. District attorneys in Manhattan and Brooklyn announced earlier this month that they will no longer request money bail in most misdemeanor cases. They join the growing ranks of prosecutors around the nation that recognize traditional money bail unnecessarily incarcerates individuals and does not promote

public safety. Instead they support making pretrial release decisions based on validated risk assessment tools and, when necessary for public safety, pretrial services. It is time California does the same.

The state's current bail system automatically sets the amount a defendant must pay to be released before his or her trial. Each county determines those amounts based on the severity of the alleged crime, but often those amounts are incredibly high.

The median bail amount in California is $50,000, more than five times the national median, according to the Public Policy Institute of California. If the individual is not released on his or her own recognizance, to get out of jail while awaiting trial, an individual must either post the full amount themselves or pay a bondsman a nonrefundable fee.

Some defendants cannot afford to pay even low bail amounts and are detained. Even if those individuals pose no flight risk or danger to the public, they must sit in jail until their matter is resolved.

We can do better. A system that uses wealth as a criterion for release fails the public. It allows dangerous individuals to walk free merely because they can afford to do so. As a career prosecutor, I find that this practice is often contrary to public safety.

At the same time, those unlikely to reoffend often must endure long jail stays while courts resolve their cases. Even a few days behind bars can carry drastic consequences. Some people lose access to social services, housing, employment,

and child custody. Rather than supporting themselves and their families during this time, less wealthy defendants languish behind bars. This destabilizes communities and as a result further endangers public safety.

Risk, danger to the community and data-driven practices should guide pretrial release decisions. Other jurisdictions have already successfully limited money bail.

Washington, D.C., for example, releases more than 90 percent of criminal defendants with no financial obligations. With the assistance of pretrial services, 88 percent of those released return for all scheduled court appearances, and 99 percent are not rearrested for a crime of violence.

Closer to home, Santa Clara County has proven the effectiveness of quality pretrial services in lieu of cash bail. Ninety-five percent of participants in their pretrial program made it to all scheduled court appearances and 99 percent remained arrest free. California state and county governments should take advantage of other jurisdictions' successes by implementing their effective practices.

Support for bail reform in California is growing. In October, a task force appointed by Chief Justice Tani Cantil-Sakauye recommended that risk, rather than wealth, inform release decisions.

Gov. Jerry Brown also has acknowledged the inequities of money bail and has committed to finding solutions to better protect the public. The governor and chief justice are currently working with legislators to find solutions this term.

Of course, truly dangerous individuals should remain in jail before trial. Limiting money bail does not impede this effort. In fact, reforming our system to base release decisions on risk would help prevent dangerous individuals from buying their way out of jail.

Our current money bail system does not adequately protect the public and unnecessarily incarcerates too many Californians. California should be a national leader on this issue. The time for meaningful bail reform is now.

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