OHIO
CRIMINAL SENTENCING COMMISSION
Chief Justice Maureen O'Connor, Chair • Sara Andrews, Director

AGENDA March 17, 2016 10:00 a.m.
Moyer Judicial Center, Room 101

I. Call to Order & Roll Call of Commission Members, Advisory Committee
Vice-Chair Selvaggio

II. Approval of Minutes from November 19, 2015
Vice-Chair Selvaggio

III. Items for Commission Vote and Discussion:

A. Adult Extended Sentence Review – draft language – Jo Ellen
Summary: The Ad Hoc Committee on Extended Sentences recommends language regarding review of extended sentences for adults. The proposed language only applies to nonviolent F3, and F4 and F5 offenses. The language allows a review of the offender's sentence after a specified time period and specifies the process for that review. *The Commission will be asked to vote to accept the Ad Hoc Committee's language and forward it to the General Assembly.*

B. Juvenile – Restitution – draft language – Paul Dobson
Summary: The Juvenile Justice committee recommends language making changes to 2152.20 regarding restitution. Specifically, the committee recommends pulling restitution out of 2152.20 and making a separate section dealing solely with restitution. In addition, the committee recommends insertion of language regarding ability to pay and reducing a restitution order to a civil judgment. *The Commission will be asked to vote to accept the committee's language and forward it to the General Assembly.*

C. Sex Offender Registration – analysis and recommendations – Jill Beeler
Summary: The Ad Hoc Committee has expanded its membership and created a detailed analysis of the issues, data and recommendations. The consensus is moving toward a risk based rather than offense based registry. A Community Forum focused on the sex offender registry has been scheduled by the Ohio Alliance to End Sexual Violence and several of the Ad Hoc Committee members will be on the panel. *After discussion the Commission will be asked accept the Ad Hoc Committee's recommendations and forward the analysis to the Recodification Committee as part of the 2907, 2950 workgroup presentations.*

D. Rights Restoration – Record Sealing – Professor Berman
Summary: The Ad Hoc Committee has expanded its membership, is working from a draft background and analysis paper – which ultimately suggests repeal and rewrite of the record sealing statutes. The Ad Hoc Committee has also reviewed draft legislation shared by Senator Seitz and drafted a response to the Senator. *The Commission will be asked to endorse the communication to Senator Seitz.*

E. Foster – reference materials on line – Jo Ellen
http://www.supremecourt.ohio.gov/Boards/Sentencing/committees/CJSentencing/default.asp#
Summary: At the February meeting of the Sentencing/Criminal Justice Committee, Steve Hardwick with the Ohio Public Defender's office and Brian Martin with the Department of Rehabilitation and Correction gave a presentation regarding the legal history of *State v. Foster* and its impact on the inmate population. *The Commission will discuss whether to pursue what, if any, further action on the subject.*

F. Bail Reform – Jo Ellen and Sara
Summary: Director Andrews has secured technical assistance from the National Institute of Corrections to frame and pursue objectives in the reform of bail in Ohio. Representatives from NIC will be in Ohio in late April for a meeting with the Bail Reform subcommittee. Additionally, the subcommittee has expanded membership, surveyed jail administrators and judges on pretrial services and is in the process of compiling that information. *The Commission will be asked if any other members wish to participate on the subcommittee.*

G. Data project – Sara
Summary: Director Andrews has proposed a data project and partnership with the University of Cincinnati, Institute of Crime Science (ICS). The goal of the project generally is to identify criminal justice indicators and overlay the various agency and local data sets in one place to evaluate what the data tells us. The ICS team will be conducting a data analytics demonstration in early June 2016. *The Commission will be asked to support the project.*

IV. Sentencing & Criminal Justice Committee Work Chart Item #3: Transitional Control update – DRC
Summary: The Department has several internal projects underway including a pilot imposing Post Release Control for discretionary cases – ie. does the threat of post release control incentivize inmates to successfully complete transitional control; beginning July 1 for female inmates the Department will no longer allow inmates to waive participation in transitional control – all eligible offenders will be considered for the program. *The Commission will discuss if further action is needed on this topic or if the priority can be characterized as complete.*

V. General Committee Updates:
[For more detail refer to respective committee meeting notes and/or work charts]
http://www.supremecourt.ohio.gov/Boards/Sentencing/default.asp

A. Sentencing & Criminal Justice, Chair Judge Spanagel & Chair Yates

1. OVI Redo – Judge Spanagel *[general update]*

2. HB 307/SB204 – discretionary driver's license suspension bills – Judge Spanagel *[update]*

3. HB388 – Annie's Law – Judge Spanagel *[update]*

B. Juvenile Justice, Chair Dobson

1. SB272 Update

2. JSORN

3. Mandatory Bindover

C. Data Collection & Sharing, Chair Judge Dumm

1. Data Primer Repository – Judge Dumm & Erin Waltz
   [update on work to date & input requested]

VI. Food for Thought – Lunch provided for those who reserved one

VII. Recodification Committee Update – Judge Fredrick Pepple & Other Mutual Members

VIII. Member Updates/New Business

IX. Adjourn

2016 Full Commission Meeting dates
Thursday, June 23, 2016 10:00a
Thursday, Sept. 15, 2016 10:00a
Thursday, Dec. 15, 2016 10:00a

§2929.202. Review of Extended Sentences

(A) Eligibility & Timing. Except for sentences agreed to by the defendant, state, and court, a prisoner serving an extended prison sentence for multiple counts or offenses who is not otherwise eligible for parole review may, after completing any mandatory period of incarceration, apply to the Parole Board for a review as follows:

(1) If the prisoner's most serious offense of commitment is a felony of the fifth degree and the prisoner was sentenced to more than five years incarceration, the prisoner may apply for review after serving five years.

(2) If the prisoner's most serious offense of commitment is a felony of the fourth degree and the prisoner was sentenced to more than eight years incarceration, the prisoner may apply for review after serving eight years.

(3) If the prisoner's most serious offense of commitment is a felony of the third degree requiring a sentence that does not exceed thirty-six months and the prisoner was sentenced to more than twelve years incarceration, the prisoner may apply for review after serving twelve years.

(B) Application Review. Once a prisoner is eligible to apply for review pursuant to division (A) and submits an application, a panel of at least six members of the Parole Board shall review the application to determine if the prisoner merits a full board hearing. In making its determination the panel shall consider if the prisoner's rehabilitative efforts outweigh the interests of justice in having the prisoner serve the full sentence, the suitability factors under OAC 5120:1-1- 07, and any other relevant information.

(C) Denial of Application. If the panel denies the prisoner's application made pursuant to division (B) the prisoner may submit a subsequent application within the timeframe and parameters specified in the denial.

(D) Release Review. If the application is granted, within a reasonable time, the parole board shall conduct a hearing to consider the prisoner's release onto parole supervision. The hearing shall be conducted in accordance with Chapters 2930., 2967., and 5149. of the Revised Code, and in accordance with policies and procedures established by the parole board, provided that such policies and procedures shall permit the prisoner's privately retained counsel or the Ohio Public Defender to appear at the prisoner's hearing to make a statement in support of the prisoner's release. The parole board shall ensure that the prisoner is provided a meaningful opportunity to obtain release and consider the factors in OAC 5120:1-1-07 in making its determination.

(E) Conditions of parole. The parole board shall, in accordance with section 2967.131 of the Revised Code, impose appropriate terms and conditions of release upon each prisoner granted a parole under this division.

(F) Subsequent Release Review. If the parole board denies release, the prisoner is ineligible to apply for subsequent review under this section.

(G) Notice to Ohio Public Defender In addition to any notice to any other person required by rule or statute, the parole board shall notify the Ohio Public Defender of a prisoner's eligibility for full board hearing review under this division at least sixty days before the board begins any review or proceedings of that prisoner under this division.

Sec. 5149.101 Full board hearings.

(A) (1) A board hearing officer, a board member, or the office of victims' services may petition the board for a full board hearing that relates to the proposed parole or re-parole of a prisoner, including, but not limited to, any prisoner described in division (B) of section 2967.13 or section 2929.202 of the Revised Code. At a meeting of the board at which a majority of board members are present, the majority of those present shall determine whether a full board hearing shall be held.

2152.20 Authorized dispositions for delinquent child or juvenile traffic offender.

(A) If a child is adjudicated a delinquent child or a juvenile traffic offender, the court may order any of the following dispositions, in addition to any other disposition authorized or required by this chapter:

(1) Impose a fine in accordance with the following schedule:

(a) For an act that would be a minor misdemeanor or an unclassified misdemeanor if committed by an adult, a fine not to exceed fifty dollars;

(b) For an act that would be a misdemeanor of the fourth degree if committed by an adult, a fine not to exceed one hundred dollars;

(c) For an act that would be a misdemeanor of the third degree if committed by an adult, a fine not to exceed one hundred fifty dollars;

(d) For an act that would be a misdemeanor of the second degree if committed by an adult, a fine not to exceed two hundred dollars;

(e) For an act that would be a misdemeanor of the first degree if committed by an adult, a fine not to exceed two hundred fifty dollars;

(f) For an act that would be a felony of the fifth degree or an unclassified felony if committed by an adult, a fine not to exceed three hundred dollars;

(g) For an act that would be a felony of the fourth degree if committed by an adult, a fine not to exceed four hundred dollars;

(h) For an act that would be a felony of the third degree if committed by an adult, a fine not to exceed seven hundred fifty dollars;

(i) For an act that would be a felony of the second degree if committed by an adult, a fine not to exceed one thousand dollars;

(j) For an act that would be a felony of the first degree if committed by an adult, a fine not to exceed one thousand five hundred dollars;

(k) For an act that would be aggravated murder or murder if committed by an adult, a fine not to exceed two thousand dollars.

(2) Require the child or a parent or parents, guardian, or custodian of the child, or both, to pay costs, including, but not limited to, costs described in section 2746.05 of the Revised Code;

(3) Unless the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under Traffic Rule 13.1 if the court has established a juvenile traffic violations bureau, require the child to make restitution as provided under Revised Code Section 2152.203. ~~to the victim of the child's delinquent act or juvenile traffic offense or, if the victim is deceased, to a survivor of the victim in an amount based upon the victim's economic loss caused by or related to the delinquent act or juvenile traffic offense. The court may not require a child to make restitution pursuant to this division if the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under Traffic Rule 13.1 if the court has established a juvenile traffic violations bureau. If the court requires restitution under this division, the restitution shall be made directly to the victim in open court or to the probation department that serves the jurisdiction or the clerk of courts on behalf of the victim.~~

~~If the court requires restitution under this division, the restitution may be in the form of a cash reimbursement paid in a lump sum or in installments, the performance of repair work to restore any damaged property to its original condition, the performance of a reasonable amount of labor for the victim or survivor of the victim, the performance of community service work, any other form of restitution devised by the court, or any combination of the previously described forms of restitution.~~

~~If the court requires restitution under this division, the court may base the restitution order on an amount recommended by the victim or survivor of the victim, the delinquent child, the juvenile traffic offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and any other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the delinquent act or juvenile traffic offense. If the court decides to order restitution under this division and the amount of the restitution is disputed by the victim or survivor or by the delinquent child or juvenile traffic offender, the court shall hold a hearing on the restitution. If the court requires restitution under this division, the court shall determine, or order the determination of, the amount of restitution to be paid by the delinquent child or juvenile traffic offender. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by or on behalf~~

~~of the victim against the delinquent child or juvenile traffic offender or the delinquent child's or juvenile traffic offender's parent, guardian, or other custodian.~~

~~If the court requires restitution under this division, the court may order that the delinquent child or juvenile traffic offender pay a surcharge, in an amount not exceeding five per cent of the amount of restitution otherwise ordered under this division, to the entity responsible for collecting and processing the restitution payments.~~

~~The victim or the survivor of the victim may request that the prosecuting authority file a motion, or the delinquent child or juvenile traffic offender may file a motion, for modification of the payment terms of any restitution ordered under this division. If the court grants the motion, it may modify the payment terms as it determines appropriate.~~

(4) Require the child or a parent or parents, guardian, or custodian of the child, or both, to reimburse any or all of the costs incurred for services or sanctions provided or imposed, including, but not limited to, the following:

(a) All or part of the costs of implementing any community control imposed as a disposition under section 2152.19 of the Revised Code, including a supervision fee;

(b) All or part of the costs of confinement in a residential facility described in section 2152.19 of the Revised Code ~~or in a department of youth services institution~~, including, but not limited to, a per diem fee for room and board, the costs of medical and dental treatment provided, and the costs of repairing property the delinquent child damaged while so confined. ~~The amount of reimbursement ordered for a child under this division shall not exceed the total amount of reimbursement the child is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement. The court may collect any reimbursement ordered under this division. If the court does not order reimbursement under this division, confinement costs may be assessed pursuant to a repayment policy adopted under section 2929.37 of the Revised Code and division (D) of section 307.93, division (A) of section 341.19, division (C) of section 341.23 or 753.16, division (C) of section 2301.56, or division (B) of section 341.14, 753.02, 753.04, or 2947.19 of the Revised Code.~~

(B) Chapter 2981. of the Revised Code applies to a child who is adjudicated a delinquent child for violating section 2923.32 or 2923.42 of the Revised Code or for committing an act that, if committed by an adult, would be a felony drug abuse offense.

(C) The court ~~may~~ shall, at disposition, hold a hearing ~~if necessary~~ to determine whether a child or a parent or parents, guardian, or custodian of the child, or both, ~~is~~ are able to pay a sanction under this section. The amount ~~of reimbursement~~ ordered ~~for a child under this division~~ shall not exceed the total amount of reimbursement the child or parent or parents ~~is~~ are able to pay ~~as determined at a hearing and shall not exceed the actual cost of the confinement~~. The court may collect any reimbursement ordered ~~under this division~~.

(D) If a child who is adjudicated a delinquent child is indigent, the court shall consider imposing a term of community service under division (A) of section 2152.19 of the Revised Code in lieu of imposing a financial sanction under this section. If a child who is adjudicated a delinquent child is not indigent, the court may impose a term of community service under that division in lieu of, or in addition to, imposing a financial sanction under this section. The court may order community service for an act that if committed by an adult would be a minor misdemeanor.

If a child fails to pay a financial sanction imposed under this section, the court may impose a term of community service in lieu of the sanction.

(E) The clerk of the court, or another person authorized by law or by the court to collect a financial sanction imposed under this section, may do any of the following:

(1) Enter into contracts with one or more public agencies ~~or private vendors~~ for the collection of the amounts due under the financial sanction, which amounts may include interest from the date of imposition of the financial sanction;

(2) Permit payment of all, or any portion of, the financial sanction in installments, by credit or debit card, by another type of electronic transfer, or by any other reasonable method, within any period of time, and on any terms that the court considers just, except that the maximum time permitted for payment shall not exceed five years or the child's twenty-first birthday, whichever occurs first. The clerk may pay any fee associated with processing an electronic transfer out of public money and may charge the fee to the delinquent child.

(3) To defray administrative costs, charge a reasonable fee ~~to a child who~~ to the obligor if the obligor elects a payment plan rather than a lump sum payment of a financial sanction.

2152.203 Restitution

(A) Unless the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under Traffic Rule 13.1, if the court has established a juvenile traffic violations bureau, if a child is adjudicated a delinquent child or a juvenile traffic offender, the court may order the child to make restitution to the victim of the child's delinquent act or juvenile traffic offense or, if the victim is deceased, to a survivor of the victim in an amount based upon the victim's economic loss caused by or related to the delinquent act or juvenile traffic offense. If the court requires restitution under this division, the restitution shall be made directly to the victim in open court or to the probation department that services the jurisdiction or the clerk of courts on behalf of the victim.

(B) If the court requires restitution under this division, the court may order that the restitution be in the form of a cash reimbursement paid in a lump sum or in installments, the performance of repair work to restore any damaged property to its original condition, the performance of a reasonable amount of labor for the victim or survivor of the victim, the performance of community service work, any other form of restitution devised by the court, including, but not limited to, alternative restorative justice or alternative means to restitution, including returning personal property, or any combination of the previously described forms of restitution.

(C) If the court requires restitution under this division, the court may base the restitution order on an amount recommended by the victim or survivor of the victim, the delinquent child, the juvenile traffic offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and any other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the delinquent act or juvenile traffic offense. If the court decides to order restitution under this division and the amount of the restitution is disputed by the victim or survivor or by the delinquent child or juvenile traffic offender, the court shall hold a hearing on the restitution. If the court requires restitution under this division, the court shall determine, or order the determination of, the amount of restitution to be paid by the delinquent child or juvenile traffic offender. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by or on behalf

of the victim against the delinquent child or juvenile traffic offender or the delinquent child's or juvenile traffic offender's parent, guardian, or other custodian.

(D) If the court requires restitution under this division, the court may order the payment of a surcharge, in an amount not exceeding five percent of the amount of restitution otherwise ordered under this division, as costs under section 2152.20 of the Revised Code, to the entity responsible for collecting and processing the restitution payments.

(E) Any court order for restitution expires at the earlier of satisfaction of the restitution order, either through payment, community service, or at the advice of the victim; upon completion of the disposition; or when the delinquent child or juvenile traffic offender against whom the order is made turns twenty-one.

(F) Following an order of restitution and in establishing a payment plan, the court shall consider the child's present and future ability to pay in addition to any other factors the court finds relevant in determining the number and amount of restitution payments.

(G) Except as otherwise provided in this division, an order for restitution imposed pursuant to this section may be reduced to a judgment in favor of the victim upon the termination of the court's jurisdiction at age 21 or, if restitution has not been satisfied after exhausting the options in division (B) of this section, by order of the court, whichever occurs first. Once the restitution order is reduced to a civil judgment under this division, the victim may do any of the following:

(1) Obtain from the clerk of the court in which the judgment was entered a certificate of judgment that shall be in the same manner and form as a certificate of judgment issued in a civil action;

(2) Obtain execution of the judgment or order through any available procedure, including:

(a) An execution against the property of the judgment debtor under Chapter 2329. of the Revised Code;

(b) An execution against the person of the judgment debtor under Chapter 2331. of the Revised Code;

(c) A proceeding in aid of execution under Chapter 2333. of the Revised Code, including:

(i) A proceeding for the examination of the judgment debtor under sections 2333.09 to 2333.12 and sections 2333.15 to 2333.27 of the Revised Code;

(ii) A proceeding for attachment of the person of the judgment debtor under section 2333.28 of the Revised Code;

(iii) A creditor's suit under section 2333.01 of the Revised Code.

(d) The attachment of the property of the judgment debtor under Chapter 2715. of the Revised Code;

(e) The garnishment of the property of the judgment debtor under Chapter 2716. of the Revised Code.

(3) Obtain an order for the assignment of wages of the judgment debtor under section 1321.33 of the Revised Code.

*****THIS DRAFT DOES NOT INCLUDE APPENDICES, IS NOT FINAL AND IS PENDING A MEETING OF THE AD HOC COMMITTEE ON MARCH 14, 2016.*****

I. Executive Summary / Introduction?

The Ohio Criminal Sentencing Commission identified the administration and application of current sex offender registration laws as one of its priorities for 2015 and created an Ad Hoc Committee to address the topic. The Recodification Committee assigned workgroups to chapters 2907 and 2950 of the Ohio Revised Code and those groups are working in collaboration with the Sentencing Commission Ad Hoc committee. The combination of the groups include representation from sheriffs, prosecutors, defense, Department of Rehabilitation and Correction, victims, judges, the Judicial Conference and the Attorney General's Office.

The underlying questions are straightforward, does the current sex offender registration process fulfill its purpose to protect the public and reduce recidivism? Does the current sex offender registration law meet the spirit of how it was intended? There is no research that links registration and reduced recidivism. The front line implication of the laws, the difficulty in the implementation and administration validate the need for reform.

The current offense-based system is not a transparent, accountable risk-based system that allows judicial discretion in placement of an offender within a tier and/or to determine the offense is such that registration furthers the interest of justice. Movement toward a risk based system will create safer communities, protect the public, ensure effective offender management and punishment, advance criminal justice outcomes and ease administrative burden and conserve fiscal resources while improving efficiency, accuracy and efficacy of sex offender registration.

There is no clear evidence to support that SORNA implementation has made the public safer, deterred any sexual offenses, or contributed to the arrest or discovery of any sex offender. Many officials, nationally as well as in Ohio, conclude that the offense-based tier system "pulls too many offenders onto the registry" and overlooks others who are most at risk to reoffend. This costs taxpayers millions of dollars, compromises public safety and dilutes the validity of the registry to the point of ineffectiveness.

The mandates of the Adam Walsh Act (AWA) virtually eliminate the judiciary from exercising any discretion in controlling sex offenders. The AWA prohibits judges from considering each offender as an individual and de-emphasizes individualized risk assessments as a tool for managing and monitoring convicted offenders. Applying risk principles to individualized sentencing allows scant resources to be directed to those at greatest risk for re-offense[1]

The importance of this moment cannot be understated:
For now the first alternative seems bizarrely risky; the second has a very strong element of *inertia* behind it. Palestine Can Wait…For Now Nathan J. Brown July 19, 2012

[1] Huffman p42, [footnote 181]. Huffman, p44 The California Sex Offender Management Board recently recommended that the sex offender registration system in California follow the risk principles of correction in order for resources to be directed to those who pose the highest risk of reoffending. See California Sex Offender Management Board 2014 Annual Report, supra note 118 .

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II. Ad Hoc Committee Members

Jill E. Beeler-Andrews, Ohio Public Defender's Office, Sentencing Commission Advisory Committee Member – Chair
Chrystal Alexander, Office of Victim Services – DRC, Sentencing Commission Member
Sara Andrews, Sentencing Commission
Kari Bloom, Ohio Public Defender's Office, Sentencing Commission Advisory Committee Member
Jo Ellen Cline, Sentencing Commission
Mark Denning, Defiance County Sheriff's Office
Derek DeVine, Seneca County Prosecutor, Sentencing Commission Member
Julie Doepke, Hamilton County Probation, Ohio Victim Witness Association
Judge Michael Donnelly, Cuyahoga County Court of Common Pleas
Judge Gary Dumm, Circleville Municipal Court, Sentencing Commission Member
Katie Hanna, Ohio Alliance to End Sexual Violence
Kelly Heile, Butler County Prosecutor's Office
Cyara Hotopp, OSU School of Law, Criminal Sentencing Commission intern
Judge Huffman, Montgomery County Court of Common Pleas
Matthew A. Kanai, Ohio Attorney General's Office
Brian Martin, Department of Rehabilitation and Correction (DRC), Sentencing Commission Advisory Committee Member
Charles McConville, Knox County Prosecutor
James McFarland, Knox County Sheriff's Office
Karhlton Moore, Office of Criminal Justice Services, Sentencing Commission Advisory Committee Member
Marta Mudri, Ohio Judicial Conference
Sheriff A. J. Rodenberg, Clermont County, Sentencing Commission Member
Judge Nick Selvaggio, Champaign County Court of Common Pleas, Sentencing Commission Member
Sheriff Shaffer, Knox County
Judge Jim Slagle, Marion County Court of Common Pleas
Judge Kenneth Spanagel, Parma Municipal Court, Sentencing Commission Member
Sheriff Larry Sims, Warren County
Erin Waltz, Supreme Court of Ohio Law Library

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III. Background

Since 1963, Ohio has had a sex offender registration statute (former ORC §2950, 130 Ohio Laws 669). Since 1994, when seven year old Megan Kanka of Hamilton, New Jersey, was raped and murdered by a convicted sex offender who lived in her neighborhood, states throughout the United States have adopted "Megan's Laws" that provide community notice about sex offenders. Ohio's original SORN Law, House Bill 180, was adopted in 1996. Ohio's Megan's Law was then amended by Senate Bill 175 which became effective on May 7, 2002. The law authorized a judge to classify offenders based on their likelihood to commit a sexual offense again, a "risk-based classification."

On June 30, 2007, Senate Bill 10 was signed into law in Ohio to implement the federal Adam Walsh Child and Safety Protection Act of 2006. The purpose of the Adam Walsh Act (AWA) is to create stricter requirements for SORN Law in hopes of preventing offenders from slipping through the cracks and hurting children. Senate Bill 10 created an "offense-based classification system". The offense-based classification system turns on the tier of the offense committed ranging from least severe (Tier I) to most severe (Tier III) in determining an offender's registration and notification requirements[2].

In January 2010, Ohio was the only state in compliance with the Sex Offender Registration and Notification Act (SORNA), the Title I portion of the Adam Walsh Child Protection and Safety Act of 2006. SORNA is a three-tiered system, ranking sex offenders based upon the severity of the committed offense. Each tier requires a different time span for which the sex offender must be registered and imposes distinct verification appearance requirements. While jurisdictions need not label their sex offenders according to SORNA's three-tiered system, a jurisdiction must ensure that sex offenders who meet the substantive criteria for placement in a particular tier are, at a minimum, subject to "the duration of registration, frequency of in-person appearances for verification, and extent of website disclosure that SORNA requires for that tier." [3]

The County Sheriff is responsible under Ohio law for the registration of sex offenders. Sex offenders must register with the County Sheriff on scheduled periodic basis, which is determined by their sex offender Tier classification. In addition, sex offenders must register with the County Sheriff any change of residential address, place of employment, or enrollment in a school or institution of higher education.

Tier sex offender classifications are determined based upon criminal conviction of offenses and criteria outlined in the table below.[4]

Tier 1 - Sex offenders must register with the County Sheriff at least once annually for a period of 15 years. In addition, must register any change of residential address, place of employment, or enrollment in a school or institution of higher education.

Tier I Offenses

1. Importuning 2907.07
2. Unlawful Sexual Conduct with a Minor 2907.04 (B)(2), unless consensual, case then not registration offense
3. Voyeurism 2907.08 (C) and (D) against a minor

[2] SORN Law after SB10 – Diroll's docs

[3] http://www.nylslawreview.com/wp-content/uploads/sites/16/2015/06/Volume-59-4.Wang_.pdf

[4] Information from Franklin County Sheriff's Office https://sheriff.franklincountyohio.gov/services/sex-offender-registry/sex-offender-classification.cfm

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4. Sexual Imposition 2907.06
5. Gross Sexual Imposition 2907.05 (A)(1)-(3) (5)
6. Illegal Use of a Minor in Nudity-oriented Material or Performance 2907.323 (A)(3) (AWA non-Ohio)
7. Voyeurism 2907.08 (A)(B) & (E) (Ohio, non-AWA)
8. Child Enticement 2905.05 (sexual motivation) (Ohio, non-AWA)

Tier 2 - Sex offenders must register with the County Sheriff every 180 days for a period of 25 years. In addition, must register any change of residential address, place of employment, or enrollment in a school or institution of higher education.

Tier II Offenses

1. Compelling Prostitution 2907.21
2. Pandering Obscenity Involving a Minor 2907.321
3. Pandering Sexually Oriented Material Involving a Minor 2907.322
4. Illegal Use of a Minor in Nudity-oriented Material or Performance 2907.323 (A)(1) & (2)
5. Child Endangering 2919.22 (B)(5)
6. Kidnapping with Sexual Motivation 2905.01 (A)(1)(3)(5)
7. Unlawful Sexual Conduct with a Minor 2907.04 (B)(1)(3)(4)
8. Any Sexual Offense that occurs after the offender has been classified as a Tier I sex offender

Tier 3 - Sex offenders must register with the County Sheriff every 90 days for life. In addition, must register any change of residential address, place of employment, or enrollment in a school or institution of higher education.

Tier III Offenses

1. Rape 2907.02
2. Sexual Battery 2907.03
3. Aggravated Murder with Sexual Motivation 2903.01
4. Murder with Sexual Motivation 2903.02
5. Unlawful Death or Termination of Pregnancy As A Result of Committing or Attempting to Commit a Felony with Sexual Motivation 2903.04
6. Kidnapping of Minor to Engage in Sexual Activity 2905.01(A)(4)
7. Kidnapping of Minor, Not By Parent 2905.01(B)
8. Gross Sexual Imposition 2907.05 (A)(4) (Under 13)*
9. Felonious Assault with Sexual Motivation 2903.11**
10. Any Sexual Offense that occurs after the offender has been classified as a Tier II sex offender

* Federal offense is victim under 16

Note: Tier III sex offenders are also subject to community notification, which means upon a change of residential address, the County Sheriff will provide notice to a neighborhood within 1,250 feet of the sex offenders residential address. The County Sheriff will also provide notice to schools, registered day-care providers, and law enforcement agencies within the 1,250 foot radius.

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IV. Data

The number of registered sex offenders in Ohio at any given time changes every day. On November 9, 2015 it was 18,690 actively registering offenders[5]. A breakdown with the numbers of offenders in each category is attached, Appendix A. The number of sexually oriented offenders incarcerated in the Department of Rehabilitation and Correction (DRC) on November 1, 2015 was 10,141[i]. The number of offenders incarcerated with a 2907 sex offense as the current most serious was 7,233 and the number incarcerated with a 2907 or sex offender registration violation offense as the current most serious offense was 7,775.[6]

Furthermore, DRC trend data on prison commitments pre and post Adam Walsh shows 547 inmates incarcerated for violating sex offender registration laws. Inmates convicted of ***2950.04 – Duty to Register***, ***2950.05 – Notice of residence address change*** and ***2950.06 – Periodic verification of current residence address*** offenses have increased from 318 inmates (4.3% of total sex offender population) in July 2006 to 547 inmates (7% of the total sex offender population) as of January 1, 2016, resulting in a prison bed impact[ii] of about 250 beds. The overall population has since stabilized to about 550. The combination of 2950. 04, 05, 06 is third most frequently admitted sex offenses today– behind rape and sexual imposition. The trajectory over time and peak in 2008-2009 mirrors intake explosion in prison population in general and is consistent with broader pattern, however after 2008-2009 there has not been a subsequent decline like for other commitments.[7] This information is further illustrated in the attached data brief Appendix B.
Include DRC recidivism data pre and post adam walsh – Brian is working on this

V. Analysis

As noted, in January 2010, Ohio was the only state in compliance with the Sex Offender Registration and Notification Act (SORNA), the Title I portion of the Adam Walsh Child Protection and Safety Act of 2006. July 27, 2011 was the implementation deadline for the comprehensive national system for the registration of sex offenders. The Sex Offender Monitoring, Apprehending, Registering and Tracking (SMART) office that administers SORNA requirements identified the following jurisdictions as meeting the compliance deadline: States of Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee and Wyoming, and the United States territory of Guam, the Commonwealth of Northern Mariana Islands and the U.S. Virgin Islands[8].

That list of compliant states remains unchanged as of today[9].

In an April 2009 National Consortium for Justice Information and Statistics survey on State Compliance with the Sex Offender Registration and Notification Act, eight states (California, Florida, Iowa, Maine, Nevada, Oregon, Vermont, and West Virginia) responded that they were concerned with implementation costs or restricted by their state budget.[10] Five states – Arizona, Arkansas, California, Texas and Nebraska – have neither complied with SORNA nor applied to use JAG funds to come into compliance. Arizona, made a states' rights argument against implementation as an unfunded federal

[5] Information provided from the Ohio Attorney General's Office.
[6] Information provided from the Ohio Department of Rehabilitation and Correction
[7] Department of Rehabilitation and Correction data
[8] http://www.ncsl.org/research/civil-and-criminal-justice/adam-walsh-child-protection-and-safety-act.aspx
[9] http://www.smart.gov/sorna.htm
[10] http://www.search.org/files/pdf/SORNA-StateComplianceSurvey2009.pdf

mandate and expressed the state's sex offender registry does a better job of protecting the public than a system imposed by the federal government. California and Texas referenced economic reasons for their refusal to comply. Nebraska attempted to comply with SORNA in 2010 by changing its sex offender registry to categorize offenders by their convictions rather than by the individualized risk assessments previously used.[11]

Many states found not complying was less costly, like the state of New York. In a letter to Linda Baldwin, director of the U.S. Justice Department's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Risa Sugarman, director of the state's Office of Sex Offender Management, said: "The costs would be far greater than the loss" of federal funding. Officials also purported that the state's current policies for sex offender registration were sufficient for maintaining public safety. "New York believes that our present laws and risk assessment method provide our citizens with effective protection against sexual predators," Sugarman said. The state "will continue its commitment to ensuring that our citizens are protected from sexual predators by the enforcement of all of our laws and the continued cooperation with your office."[12]

The SMART Office is responsible for determining, on a case-by-case basis, whether a jurisdiction has substantially implemented SORNA's baseline requirements. In assessing compliance, the SMART Office considers the totality of a jurisdiction's rules governing the operation of its registration and notification program, including statutes and administrative policies and procedures.[13] Failure to substantially implement SORNA results in a 10 percent reduction in a state's allotted Byrne Memorial Justice Assistance Grant (JAG) funding. Notably, in 2006, it was determined to be more costly – in every state – to implement SORNA than to lose 10 percent of JAG funding[14].

The Office of Criminal Justice Services, Department of Public Safety maintains the JAG funding for Ohio. Funded JAG applications for CY2016 include 186 unique projects in 63 counties for a total amount of $4,418,731.30[15]. The request for proposal illustrating the program areas funded and the specific programs by county by dollar amount are noted in Appendix E.

Ohio remains in substantial compliance and, in fact, often exceeds the baseline SORNA requirements. See charts Appendix C and D.

In 2011, SMART Office officials told a U.S. House Judiciary Subcommittee "that SORNA's tiered classification system [was] a barrier for at least 11 states."[16] Currently, at least half of the fifty states use risk-based assessment systems to classify sexual offenders (rather than the SORNA three-tier system).[17] Moreover, comprehensive studies have shown that actuarial risk assessment scores consistently outperform the SORNA tier system in accurately predicting sexual re-offending.[18] Some states—for example, Montana and New York—have explained that their refusal to comply with SORNA is based on SORNA's mandate to adopt the federal three-tier system.[19]

[11] https://www.prisonlegalnews.org/news/2014/sep/19/some-states-refuse-implement-sorna-lose-federal-grants/
[12] http://www.governing.com/blogs/fedwatch/States-Find-SORNA-Non-Compliance-Cheaper.html
[13] http://www.smart.gov/sorna_tools.htm#sornaguidelines
[14] http://www.ncsl.org/research/civil-and-criminal-justice/adam-walsh-child-protection-and-safety-act.aspx
[15] Data from the Office of Criminal Justices Services, Department of Public Safety
[16] Wang note 142
[17] Wang note 146
[18] Wang note 147
[19] Wang note 148

*****THIS DRAFT DOES NOT INCLUDE APPENDICES, IS NOT FINAL AND IS PENDING A MEETING OF THE AD HOC COMMITTEE ON MARCH 14, 2016.*****

There is no clear evidence to support that SORNA implementation has made the public safer, deterred any sexual offenses, or contributed to the arrest or discovery of any sex offender. Many officials, nationally as well as in Ohio, conclude that the offense-based tier system "pulls too many offenders onto the registry" and overlooks others who are most at risk to reoffend. This costs the taxpayers millions of dollars, compromises public safety, and dilutes the validity of the registry to the point of ineffectiveness.

This phenomenon is demonstrated every day in Ohio court rooms. For example, consider the data collected in Courtroom 19-A, Judge Michael P. Donnelly, Cuyahoga County Court of Common Pleas that suggests legislative intent is frustrated and circumvented in the administration of cases because between the years 2008 and 2014 more than 236 defendants, many of whom were indicted with multiple offenses, and all of whom, if convicted of the indicted offense(s) would have been subject to some level of registration. None of the defendants pled to the indictment and only four pled to offenses that required Tier 1 reporting. 41 offenders were imprisoned in DRC facilities; some were jailed-most with suspended sentences; most were placed on community control sanction. In other words, an offense based registry invites a bargained plea to avoid registration and thwarts public policy with an outcome that the purposes and principles of sentencing, punishing the offender and protecting the public, are lost.

At the same time, there are many less egregious cases subjected to long registration periods like the case of Travis Blankenship, State v. Blankenship, Slip Opinion No. 2015-Ohio-4624. Blankenship, 21, and a 15-year-old girl identified as M.H. started talking online in 2011 through the social media site PhoneZoo.com. During one conversation, they shared their ages. The two met and became involved sexually. M.H. stated that their sexual relationship was consensual. Blankenship was charged with unlawful sexual conduct with a minor. He pled guilty, and was sentenced to five years of community control.[20] Current law requires him to be classified as a Tier II sex offender and to register for 25 years, or until he is 46 years old.

Despite the various efforts to precisely define the term, there is no distinct cohort of sex offenders. Sex offenders and sexual crimes vary widely. The crimes encompassing sex offenses range from misdemeanors, such as urinating in public, to horrific and brutal crimes, such as sexually motivated murder. Crimes falling within the definition of sexual offenses may be forced or consensual, contact or non-contact, violent or passive. Victims may be known to the aggressor or strangers, and include children and adults.[21]

The AWA virtually eliminates any potential for judicial discretion in the management of convicted sex offenders. Instead, the AWA imposes registration and notification obligations based strictly upon offense type, ignoring individual offender characteristics and circumstances. The AWA also establishes mandatory sanctions for an offender's failure to register or to notify authorities of changes in the offender's information. Even though the federal legislation now mandates specific sex offender regulations, the financial and physical burden of sex offender registration and monitoring falls on local jurisdictions.[22]

[20] Court News Ohio http://www.courtnewsohio.gov/cases/2015/SCO/1112/140363.asp#.VroZ-Z0o6Uk
[21] Huffman moral panic, p 10
[22] Huffman, p 30

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VI. Operational Impact, Cost to Administer

In attempting to comply with SORNA, states and local sheriff departments incur significant costs in various areas, including: additional personnel; software installation and maintenance; additional jail and prison space; increased court and administrative needs; law enforcement, including the need to verify information at more frequent intervals; staff overtime and legislative costs associated with adopting and monitoring state laws. Some sheriff offices have dedicated deputies for sex offender registration, compliance and monitoring. Other departments incur the incidental costs/marginal of equipment, vehicles, and the verification, compliance monitoring during the normal course of patrol and other duties, similar to civil process duties.

	County pop	Registered sex offenders	salary	Uniform /equip	Vehicle includes equip & maintenance	overtime	Supplies (office, postage)	Total annual cost
Defiance County			Includes benefits $94,094	$2,000	$32,500	$10,000	$4,000	**$142,594.00**
Warren County[iii]			$57,230.10	----	----	-----	----	**$57,230.10**

Other? Impact on registrants – need to explain the practical problem of defining residence for people who move around a lot, the limited hours Sheriffs Offices are open for registration.

VII. Recommendations

The Adam Walsh Act (AWA) legislation represents an important step in closing gaps through which dangerous sex offenders could slip prior to the federalization of sex offender management. Federal registration mandates can provide for consistency in obligations, management and enforcement of restrictions on sex offenders, but only if all states adopt uniform policies. At some point however, legislative strategies must overcome the moral panic that has overshadowed legislative regulations for the last quarter of a century. The AWA must be amended to reflect what empirical research has revealed about sex offenders and sexual offending. Simply put, no panacea exists to assuage communal anxiety surrounding sex offenders. No all-encompassing strategy will address the unique concerns of specific offenders[23].

There are four strategies which can incorporate scholarly findings into sex offender management practices, all of which necessitate restoring some discretion to the judiciary in sanctioning sex offenders. First, legislation should be modified to authorize judges to determine when individual low-level sex offenders will be subject to registration duties. Second, laws should permit judges to consider risk assessments in managing sex offenders. Third, legislation should enable judges to deregister first time sex offenders after a reasonable period of full compliance with registration obligations. Finally, sex offender management should incorporate the proven practices associated with problem-solving courts[24].

[23] Huffman, p40
[24] Huffman, p44-45

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The essential elements of implementing a risk-based system include:

1. Trial courts need discretion to determine and identify those offenders who pose the most risk and that should be subject to registration. The explanation of the registration requirement should be part of colloquy [advise of potential penalties i.e. up to life] and sentencing, thereby providing meaningful notice to the offender. The requirement to read the form on the record should be eliminated, the form should be signed and reviewed by defendant and counsel. The construct of the AWA impinges on the role of the judge in effective offender management by limiting consideration to offense type only. Consistent with the principles of correctional intervention, the dossier of information the judiciary may consider in fashioning individualized sanctioning should be multi-dimensional, whereas the mandates of the AWA rely on a single, static factor, offense type. Judges must weigh the competing purposes of sentencing, which include rehabilitation, incapacitation, deterrence and retribution[25].

   Discussion: Should the summary include a suggestion that certain offenses, primarily the Tier III offenses should be mandatory registration, without judicial discretion. Some of the literature suggests that violent and the more serious offenses may be appropriate for mandatory registration but the lower level offenses should involve judicial discretion. (added 02-25-16)

   what, if any, burden of proof should attach to the judicial classification? Under Megan's Law, the trial court had to find by clear and convincing evidence that the offender was a sexual predator. Should it be a preponderance of the evidence?
   if the trial judge is permitted the exercise of discretion in making a classification, then abuse of discretion should be the standard of review which grants the court broad latitude in analyzing the risk factors and applying them to a particular offender and offense.

2. Empower the trial court Judge, at the time of sentence, to determine the start and end date of the registration period, eliminating the need for subsequent tolling i.e. the Judge imposes a ten year prison sentence with a 20 year registration period, recognizing the ten years in prison. Additionally, provide the trial court authority to modify the period of registration imposed and require training on appropriate risk assessment tools. Administering an appropriate risk assessment, combined with other tools, creates the greatest potential for risk determination, consistency and limitations i.e. level of risk = judicial discretion = period of registration.

3. Impose the duty to register upon a finding of guilt (only if civil sanction) to account for time between plea and sentence and make it a condition of bond.
   Discussion: is imposition of a duty to register upon a finding of guilty and before sentence dubious? Any concern about imposition of interlocutory orders in criminal cases? Should explain the rationale for change, and why include it in bond? If an offender poses a risk pendente lite, revoke the bond.

4. Allow the Judge discretion to impose GPS on high risk offenders and consider supervision or other contact to supplement registration. This can be funded through cost savings from modification of current law.

[25] Huffman, p43

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5. Redefine jurisdiction to state and require in person annual registration on the offender's date of birth unless there is a significant change status. Clarify days – business, consecutive and allow electronic/on-line updates for routine changes.

6. Allow for a modification of the registration requirement for *all* offenders upon motion of offender or prosecutor.

7. Permit the Judge to impose residency restrictions based upon risk and fact pattern of offense. Consider 'in the vicinity of' or 'on the property' v. residence restriction. Define residence, temporarily domiciled.

8. Eliminate dual registration requirements for subsequent offenses – i.e. 2950.07(C) and specify the default registration period is to the longer period.

9. Community notification – clarify and define who and how often. *Needs discussion*

10. FTR – require knowingly; revisit penalties; account for or toll time incarcerated. *Needs discussion*

11. Recommend and implement a forum for ongoing public education.

12. Clearly articulate policy and specify impact of statutory revision(s) to current registrants.

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[i] includes inmates with both 2907 offenses and a small number of non-2907 offenses with motivation present, or those with a prior sexually oriented offense.
[ii] Bed impact = admissions and length of stay
[iii] Do not track some costs such as, fuel, time in court, vehicle maintenance, supplies

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Chief Justice Maureen O'Connor, Chair • Sara Andrews, Director

Quick Facts

- Ohio is only one of 17 states that has substantially implemented SORNA.
- The spike in ODRC commitments in 2008-09 mirrored all commitments to ODRC; but there has been no subsequent decline in SORNA commitments unlike for all other crimes.
- Ohio's restriction against residing within 1,000 feet of any school premise is not required under federal law.

Sexual Offender Registration Violations 2000-2015

On January 1, 2008 SB10 (127th GA) became effective. The bill made changes to the state's Sex Offender Registration and Notification (SORN) law to bring Ohio into compliance with the national Adam Walsh Child Protection and Safety Act of 2006.

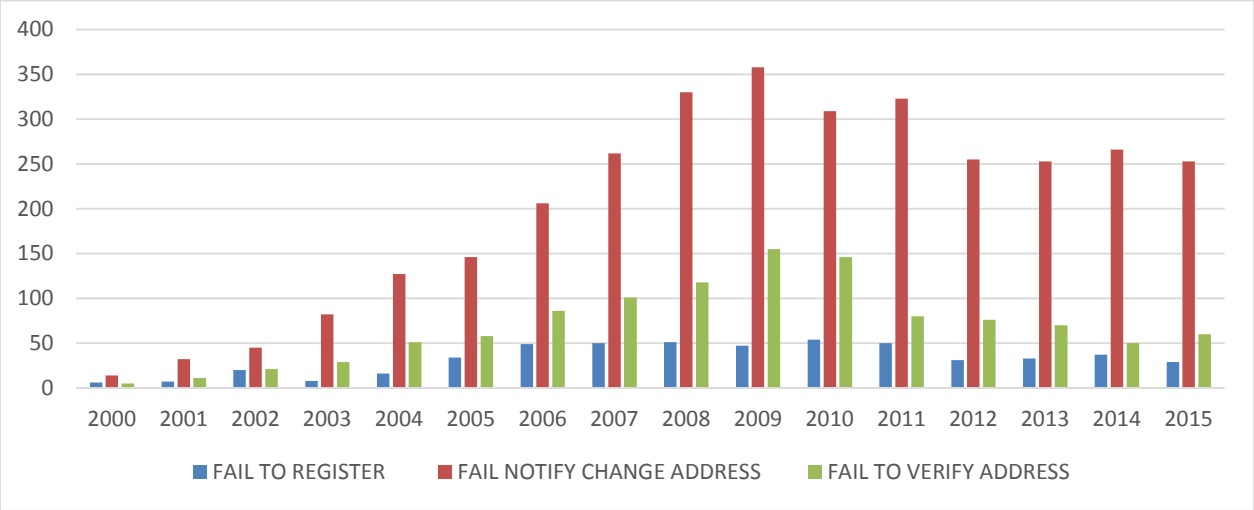
The Sex Offender Registration and Notification (SORN) Law imposes a series of duties and restrictions upon a person who is convicted of or pleads guilty to a "sexually oriented offense" that is not a "registration-exempt sexually oriented offense" or to a "child-victim oriented offense." Among the duties and restrictions is the requirement that a person who is convicted of or pleads guilty to any such offense register a residence address and a school, institution of higher education, or work address, provide notice of a change of address and register the new address, and periodically verify the registered address. There is also a restriction against residing within 1,000 feet of any school premises.

Ohio is only one of 17 states that has substantially implemented SORNA.

Commitments increased since passage of SB 10 – Adam Walsh.

- There has been a significant increase in incarceration for registration violations since SB 10 – Adam Walsh law passed in 2008.
- The combination of 2950. 04, 05, 06 is third most frequently admitted sex offenses today– behind rape and sexual imposition.
- Over the past four years the number of commitments has stabilized to an average 32.5 individuals for failure to register; 256.75 individuals for failure to notify change of address; and 64 individuals for failure to verify address.
- The trajectory over time and peak in 2008-2009 mirrors intake explosion in prison population in general and is consistent with broader pattern, however after 2008-2009 there has not been a subsequent decline like for other commitments.

Figure 1: Commitments to ODRC under ORC 2950.04, 2950.05 and 2950.06, FY 2000-FY 2015

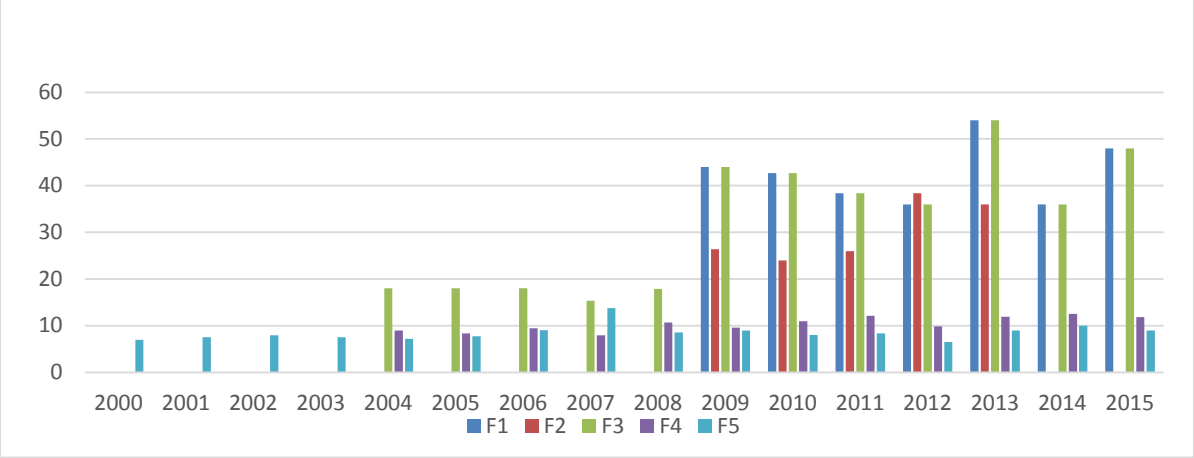


Source: Ohio Department of Rehabilitation and Corrections

The length of commitment has increased since the passage of SB 10 – Adam Walsh.

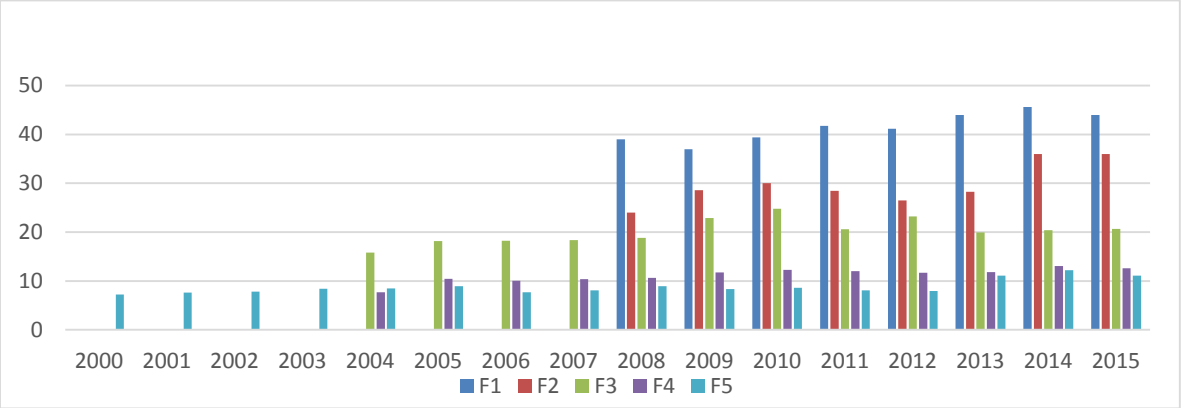
- The addition of first and second degree felonies with the passage of the SORN law has dramatically increased the average incarnation time.
- In the seven years (FY2001-07) prior to the passage of SORN the average term of incarceration under 2950.04 was 22.4 months in the seven years after (FY2009-15) it was 126.8 months; a 466% increase. (Figure 2)
- In the seven years (FY2001-07) prior to the passage of SORN the average term of incarceration under 2950.05 was 23.7 months in the seven years after (FY2009-15) it was 115.95 months; a 389% increase. (Figure 3)
- In the seven years (FY2001-07) prior to the passage of SORN the average term of incarceration under 2950.06 was 24.58 months in the seven years after (FY2009-15) it was 109.99 months; a 347% increase. (Figure 4)

Figure 2: Average Term (months) for 2950.04 Commitments to ODRC by Felony, FY 2000-2015



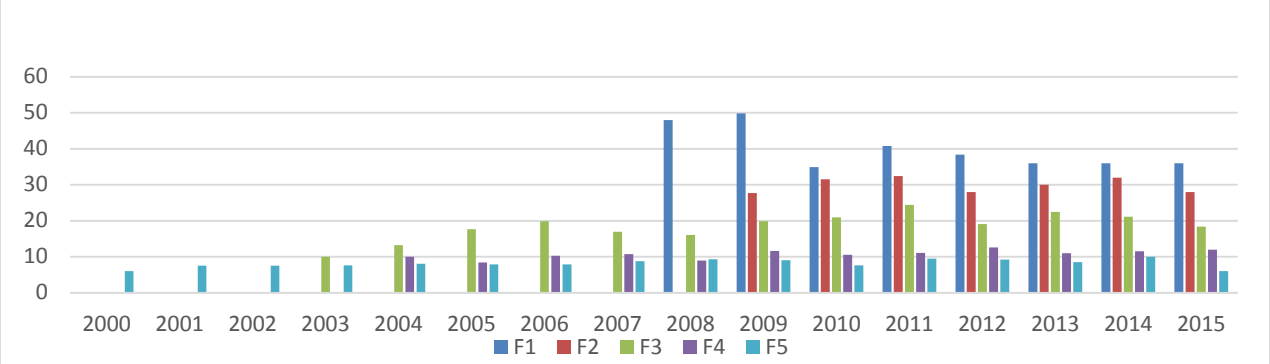
Source: Ohio Department of Rehabilitation and Corrections

Figure 3: Average Term (months) for 2950.05 Commitments to ODRC by Felony, FY 2000-2015



Source: Ohio Department of Rehabilitation and Corrections

Figure 4: Average Term (months) for 2950.06 Commitments to ODRC by Felony, FY 2000-2015



Source: Ohio Department of Rehabilitation and Corrections

1000 Ft. Residency Restrictions.

- The federal SORN law does not require residency restrictions, the General Assembly first enacted sex offender residency restrictions effective July 31, 2003. The restrictions allowed municipalities to prohibit sex offenders from residing within 1,000 feet of any "school premises." In 2007, the General Assembly expanded the law to prevent sex offenders from residing within 1,000 feet of a preschool or child day-care center (ORC 2950.034).
- The US Department of Justice issued a report in October 2014 stating "The evidence is fairly clear that residence restrictions are not effective. In fact, the research suggests that residence restrictions may actually increase offender risk by undermining offender stability and the ability of the offender to obtain housing, work, and family support." (U.S. DOJ Office of Justice Programs, *Sex Offender Management Assessment and Planning Initiative* (SOMAPI), NCJ 247059)

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Sex Offender Registration Ad Hoc Recommendations

The Ohio Criminal Sentencing Commission identified the administration and application of current sex offender registration laws as one of its priorities for 2015 and created an Ad Hoc Committee to address the topic. The Recodification Committee assigned workgroups to chapters 2907 and 2950 of the Ohio Revised Code and those groups are working in collaboration with the Sentencing Commission Ad Hoc committee. The combination of the groups include representation from sheriffs, prosecutors, defense, Department of Rehabilitation and Correction, victims, judges, the Judicial Conference and the Attorney General's Office.

The underlying questions are straightforward, does the current sex offender registration process fulfill its purpose to protect the public and reduce recidivism? Does the current sex offender registration law meet the spirit of how it was intended? There is no research that links registration and reduced recidivism. The front line implication of the laws, the difficulty in the implementation and administration validate the need for reform.

The current offense-based system is not a transparent, accountable risk-based system that allows judicial discretion in placement of an offender within a tier and/or to determine the offense is such that registration furthers the interest of justice. Movement toward a risk based system will create safer communities, protect the public, ensure effective offender management and punishment, advance criminal justice outcomes and ease administrative burden and conserve fiscal resources while improving efficiency, accuracy and efficacy of sex offender registration.

There is no clear evidence to support that SORNA implementation has made the public safer, deterred any sexual offenses, or contributed to the arrest or discovery of any sex offender. Many officials, nationally as well as in Ohio, conclude that the offense-based tier system "pulls too many offenders onto the registry" and overlooks others who are most at risk to reoffend. This costs taxpayers millions of dollars, compromises public safety and dilutes the validity of the registry to the point of ineffectiveness.

The mandates of the Adam Walsh Act (AWA) virtually eliminate the judiciary from exercising any discretion in controlling sex offenders. The AWA prohibits judges from considering each offender as an individual and de-emphasizes individualized risk assessments as a tool for managing and monitoring convicted offenders. Applying risk principles to individualized sentencing allows scant resources to be directed to those at greatest risk for re-offense[1]

There are four strategies which can incorporate scholarly findings into sex offender management practices, all of which necessitate restoring some discretion to the judiciary in sanctioning sex offenders. First, legislation should be modified to authorize judges to determine when individual low-level sex offenders will be subject to registration duties. Second, laws should permit judges to consider risk assessments in managing sex offenders. Third, legislation should enable judges to deregister first time sex offenders after a reasonable period of full compliance with registration obligations. Finally, sex offender management should incorporate the proven practices associated with problem-solving courts[2].

The construct of the AWA impinges on the role of the judge in effective offender management by limiting consideration to offense type only. Consistent with the principles of correctional intervention, the dossier of information the judiciary may consider in fashioning individualized sanctioning should be multi-dimensional, whereas the mandates of the AWA rely on a single, static factor, offense type. Judges must weigh the competing purposes of sentencing, which include rehabilitation, incapacitation, deterrence and retribution[3].

[1] Huffman p42, [footnote 181]. Huffman, p44 The California Sex Offender Management Board recently recommended that the sex offender registration system in California follow the risk principles of correction in order for resources to be directed to those who pose the highest risk of reoffending. See California Sex Offender Management Board 2014 Annual Report, supra note 118 .
[2] Huffman, p44-45
[3] Huffman, p43

Therefore, a hybrid system of sex offender registration is recommended. A hybrid system provides mandatory registration for serious, high risk offenders, while giving trial courts discretion for first time low level offenders after consideration of an appropriate risk assessment. Therefore, the essential elements of implementing a hybrid risk and offense based system include:

1. Review current Tier based offense classifications for potential adjustment.

2. Maintain the child victim offender provisions.

3. Retain Tier based offense classifications and prescribed registration periods, but allow the option, based upon empirical evidence, data and additional factors for deregistration. The provision for deregistration can be crafted similar to the judicial release process and should specify the number of applications an offender may file and the time between applications.

4. Tier 3 offender registration and offenders with a prior conviction for a sexual offense should remain offense-based and mandatory. Allow the option for deregistration after a period of time, sufficient empirical evidence, data, and other factors [must register with the County Sheriff every 90 days for life. In addition, must register any change of residential address, place of employment, or enrollment in a school or institution of higher education].

5. Tier 2 offender registration should be risk based, determined by the trial court with a presumption in favor of registration, using a clear and convincing standard and a validated, dynamic sex offender specific risk assessment and evaluation. Tier 2 offender registration should include the option for deregistration after a period of time, sufficient empirical evidence, data and other factors. Maintain the registration period with current law [register with the County Sheriff every 180 days for a period of 25 years].

6. Tier 1 offender registration should be risk based, determined by the trial court using a clear and convincing standard and a validated, dynamic sex offender specific risk assessment and evaluation and include the option for deregistration after a period of time, sufficient empirical evidence, data and other factors. Maintain the registration period with current law [register with the County Sheriff at least once annually for a period of 15 years].

7. The explanation of the registration requirements and potential penalties should be part of a meaningful colloquy at the time of plea and sentencing, thereby providing meaningful notice to the offender. The requirement to read a form on the record should be eliminated; rather the form should be signed and reviewed by defendant and counsel.

8. Clarify, define, and simplify the tolling of registration to provide for consistency and accuracy of registration periods.

9. Consider a centralized/State system and one county registration, by redefining jurisdiction to “State”.

10. There is no empirical evidence to support public safety is enhanced through residency restrictions. Therefore, permit the Judge to impose residency restrictions based upon risk and fact pattern of offense.

11. Maintain in person registration for verification, annual registration, and change of address. For all other changes allow electronic/on-line updates. Also:
    A. Clarify days – business, consecutive
    B. Address consequence/penalty for failure to update i.e. email address
    C. Specify Sheriff may make exception to process requirements if person is incapacitated
    D. Clearly define residence, temporarily domiciled and clarify number of days
    E. Specify secondary residence for registration purposes is permitted

12. Include an option for deregistration after a period of time, sufficient empirical evidence, data and other factors should be applied to *all* offenders, i.e. applied retroactively and subject to process and limitations suggested in 1(B). There is no option to change assigned Tier. Clearly articulate policy and specify impact of statutory revision(s) to current registrants.

13. Eliminate dual registration requirements for subsequent offenses – i.e. 2950.07(C) and specify the default registration period is to the most serious and/or longer period.

14. Specify that community notification occur at the time of the initial registration and then annually unless there is a change in address.

15. Failure to Register penalties: For first offense, violation of registration (2950.04, 2950.05, 2950.06) should be a F5 if the underlying offense was an F3, F4, or F5. Subsequent violations of registration offense should be an F4. Violation of registration should be a F3 if underlying offense was a F1 or F2. No violation of registration offense should include mandatory prison time.

16. Recommend and implement statewide forums for ongoing public education and prevention to include victim specific events and engagements. Such events should be funded through reinvesting and reallocating cost savings from implementing a more efficient, public safety minded, risk based registry for Tier 1 and 2 offenders. If JAG funding for victim programs is impacted, the legislature should ensure adequate, substitute funding for those programs from the State budget.

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March 17, 2016

The Honorable Bill Seitz
Senate Building
1 Capitol Square, 1st Floor
Columbus, Ohio 43215

Dear Senator Seitz,

Thank you for recently sharing draft legislation to amend sections 2953.31, 2953.32, 2953.321, 2953.33, 2953.36, 2953.51, 2953.52, and 2953.61 of the Revised Code, sealing of records. As you know, the Sentencing Commission created a Rights Restoration/Record Sealing Ad Hoc Committee to (1) collect available data on current practices under Ohio's existing statutes, and (2) identify and prioritize aspects of Ohio's existing statutory scheme that most need reform. That Ad Hoc Committee has reviewed the draft legislation, and I've attached a list of initial comments from Committee members for your consideration. Notably, the comments focus on issues of practical application rather than broader policy implications.

Additionally and importantly, the process of issue identification and data collection by the Ad Hoc Committee has reinforced concerns that it may be inefficient and/or ineffective to continue with piecemeal improvements to the existing statutory structure. The Committee's work, which is on-going, has illuminated the need to consider adopting a bolder approach to statutory reform in order to effectuate meaningful, realistic change.

As you know, Ohio and other states have long provided various means for former offenders to seal or expunge their criminal records. However, there is new urgency for strengthening and reforming such laws because: (1) expanded criminalization at the local, state and federal levels has dramatically increased the number of citizens saddled with criminal records, (2) expanded use of collateral sanctions at the local, state and federal levels has dramatically increased the impact and consequences of having even a minor criminal record , (3) technological advances have made it far easier and more common for official and non-official entities to store criminal records and make them readily accessible to various parties, and (4) empirical research and anecdotal evidence suggests that the burdens of even minor criminal history can be detrimental to former offenders obtaining employment and other services that are proven to reduce the likelihood of recidivism.

With these realities and concerns in mind, the Rights Restoration/Record Sealing Ad Hoc Committee is committed to exploring and drafting reform proposals which build and expand on efforts that "flip the norm" with respect to criminal records in Ohio: we are considering the possibility of proposing new laws and procedures that would provide, subject only to a few narrowly tailored exceptions, for presumptive or automatic sealing of nearly all criminal records after a certain period of law-abiding behavior. In other words, we are working to crafting a

recommendation to the General Assembly calling for repealing and replacing the existing record sealing statutory framework with a simplified, intelligible and purposeful statute grounded in evidence based policy and decision making.

The Ad Hoc Committee has identified three distinct subject matter areas for its work: (1) the administration and process for sealing and expungement; (2) expanded eligibility for relief through sealing and expungement, and (3) concerns for reformation including the executive branch clemency function and certificates of qualification for employment. We are diligently preparing a thorough and detailed analysis of these issues and are working toward the completion of a major draft document for the full Commission's consideration at its June 23, 2016 meeting.

Given the aforementioned, we respectfully ask you consider allowing us the time to develop broader written analysis and recommendations that will draw on national trends, peer-state developments and public policy advocacy to begin the process of proposing a revised 21st century approach for Ohio to these issues before further advancing the draft legislation. We believe we can provide such a product for the General Assembly's consideration by Fall 2016.

If you have questions or desire additional information, please contact me by email at sara.andrews@sc.ohio.gov or by phone at 614-387-9311. On behalf of the Sentencing Commission and the Rights Restoration/Record Sealing Ad Hoc Committee, we appreciate all you do and look forward to working with you.

Kind Regards,

Sara Andrews, Director

Comments regarding l_131_1927:

1) The meaning of this sentence in lines 45-48 is unclear: "A conviction of a person for a minor misdemeanor in this state or any other jurisdiction does not make the person an 'eligible offender' for purposes of that division."

2) Given that (J) defines an eligible minor misdemeanor offender, lines 55-58 could lead to unintended confusion.

3) Lines 169-179:
   a) Does an Ohio court have the authority to seal a record of conviction and all the attendant paperwork associated with the case where that conviction occurred in another state or federal court?
   b) Consider that the automatic sealing of the MM record upon time of conviction may have unintended consequence that MM cases are not prosecuted and may impact resource allocation.

4) Lines 201-205 indicate a prosecutor may not object to the granting of an application of sealing of a pardoned case. Since pardoning is, itself, an executive act and since the statute does not allow for the Court to not grant the sealing either, why not just amend the pardon statute to have sealing of the record be ordered upon pardoning? Is it constitutional to prohibit the prosecutor from filing an objection? Isn't the prosecutor obligated to file such an objection if, for instance, the application was fraudulent in any way?

5) Concern about the limitation upon the prosecutor from objecting to an application for sealing of an MM violation on all but a few procedural grounds. The prosecution is a party in interest in the case and has the right to represent the state and/or political subdivision in these matters by raising an objection to the granting of the sealing.

6) Lines 378-382 indicate that an order to seal official records of an MM does not affect the official records of any convictions other than the MM, but does not address the common occurrence of MM accompanying other charges at the time of filing.

7) Lines 375-376 allow for use of these sealed records for stated purposes but lines 351-354 require that all index references to the case that pertain to the MM be deleted - how are the records located if the index is deleted? Also, how to re-locate the non-MM offenses connected to the sealed MM case if that index is deleted??

8) Lines 469-492 suggest that a defendant is permitted to plead to a MM that is charged alongside other non-MM violations, and have it immediately sealed. Under current law, the person is precluded from seeking sealing due to the pending matters. This may lead to logistical problems and an opportunity to 'Judge shop' in multi-judge courts.

9) Lines 764-770 Can the prosecutor be prohibited from filing an objection and, for instance, if there is a dispute regarding whether or not there was a not guilty finding, isn't the prosecutor obligated to file an objection? There may be other reasons for a prosecutor to object, such as a pending co-defendant case which might argue against an immediate granting of an order to seal.

10) Lines 864-872 issue as noted previously, how to partially seal the record.

Fundamentals of Bail

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

NIC
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

Authors: Timothy R. Schnacke

August 2014

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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.

Timothy R. Schnacke

Executive Director

Center for Legal and Evidence-Based Practices

Acknowledgments

Many different people contributed to this paper in different ways, and it is not possible to list and thank them all by name. Nevertheless, a few entities and people warrant special mention. The first is the National Institute of Corrections, and especially Lori Eville and Katie Green, for conceiving the idea for the paper and allowing me the time to flesh it out. The NIC has been in the forefront of pretrial justice for many years, and I am honored to be able to add to their long list of helpful pretrial literature.

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, the 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 pretrial field? 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 (or those whom we feel should be bailable defendants) are detained, or (2) unbailable defendants (or those whom we feel should be unbailable defendants) 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 national 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

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[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 in 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

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[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 twenty 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

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[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

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[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

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[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 Supervision on Pretrial Outcomes* (Laura & John Arnold Found. 2013); Barry

Mahoney, Bruce D. Beaudin, John A. Carver, III, Daniel B. Ryan, & Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential* (NIJ 2001); Todd D. Minton, *Jail Inmates at Midyear 2012 – Statistical Tables* (BJS 2013); *National Symposium on Pretrial Justice: Summary Report of Proceedings* (PJI/BJA 2011); Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (JPI 2012); Mary T. Phillips, *Bail, Detention, and Non-Felony Case Outcomes, Research Brief Series No. 14* (NYCCJA 2007); Mary T. Phillips, *Pretrial Detention and Case Outcomes, Part 2, Felony Cases, Final Report* (NYCCJA 2008); *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process* (PJI/MacArthur Found. 2012); Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables* (BJS 2013); *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (Univ. of Mich. 2011) (1963); *Responses to Claims About Money Bail for Criminal Justice Decision Makers* (PJI 2010); Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, *The Third Generation of Bail Reform* (Univ. Den. L. Rev. online, 2011); Standards on Pretrial Release (NAPSA, 3rd ed. 2004); Bruce Western & Becky Pettit, *Collateral Costs: Incarceration's Effect on Economic Mobility* (The PEW Charitable Trusts 2010).

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."*
>
> *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's 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 (depending on their category), 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.

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[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

[16] *United States v. Barber*, 140 U.S. 164, 167 (1891).
[17] *United States v. Hudson*, 156 U.S. 277, 285 (1895).

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:

> 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

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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").

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 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?"*
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> *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 (or those whom we believe should be bailable defendants) and the release of unbailable defendants (or those whom we believe should 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 (or those whom society deemed should be bailable defendants) were expected to be released and unbailable defendants (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

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

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appellate briefs for decisions leading up to the Supreme Court's opinion in *Salerno*), and 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.

Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139 (1971-72); Gerald P. 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.

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[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 and an ends-means balancing analysis. 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 embodying what we now consider to be the whole of the American justice

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

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 Douglas, 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.

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[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 of 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 other 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 solve confounding issues 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).

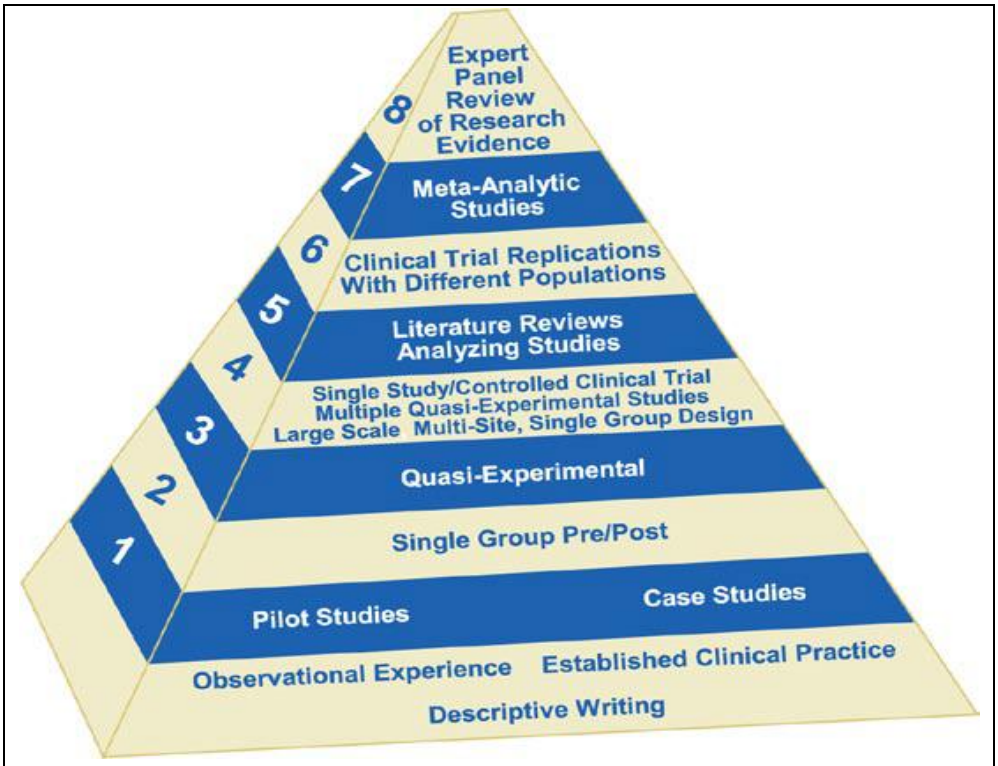
[61] *Brown v. Board of Education,* 347 U.S. 483 (1954).

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

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[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.

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[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."

Bureau of Justice Statistics

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.

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[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 decisions. 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]

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[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

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[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

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[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."*
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> *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/detain" 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.

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[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 danger and public safety 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 money bond 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]

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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 . . . .").

and *United States v. Salerno*.[78]

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."*
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> 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

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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] Fla. Const. art. I, § 14.
[85] Conn. Const. art. 1, § 8.
[86] Wis. Const. art. 1, § 8.

bail, as a process of conditional release prior to trial, includes many mechanisms – such as citation or "station house release" – that effectuate 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) (currently available electronically on the PJI website).

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 of reform effort – a top to bottom effort – is also happening in America, in states such as New York, New Jersey, Delaware, 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.

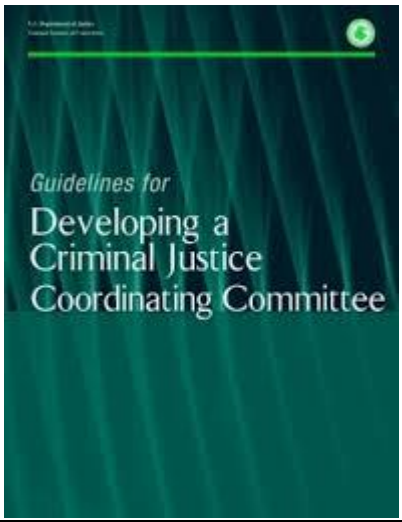
Everyone has a part to play in pretrial justice, and it means individually deciding to improve, learning what improvements are necessary, and then implementing legal and evidence-based practices to further the goals of bail. Nevertheless, while informed individual action is crucial, it is also only a 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 parameters 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 need only 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

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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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I am thankful to Cherise Fanno Burdeen and the National Association of Pretrial Services Agencies, and especially to Judges Gregg Donat (Tippecanoe County, Indiana) and Matt Osman (Mecklenburg County, North Carolina), who provided me with invaluable input on the draft. I am also extremely grateful to Spurgeon Kennedy, who has both inspired me and helped me down the stretch, and to Dan Cordova and the staff of the Colorado Supreme Court Law Library, who can seemingly answer any question, no matter how challenging.

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.

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[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

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[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

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[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.
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> (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

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[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

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[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

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[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

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[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.

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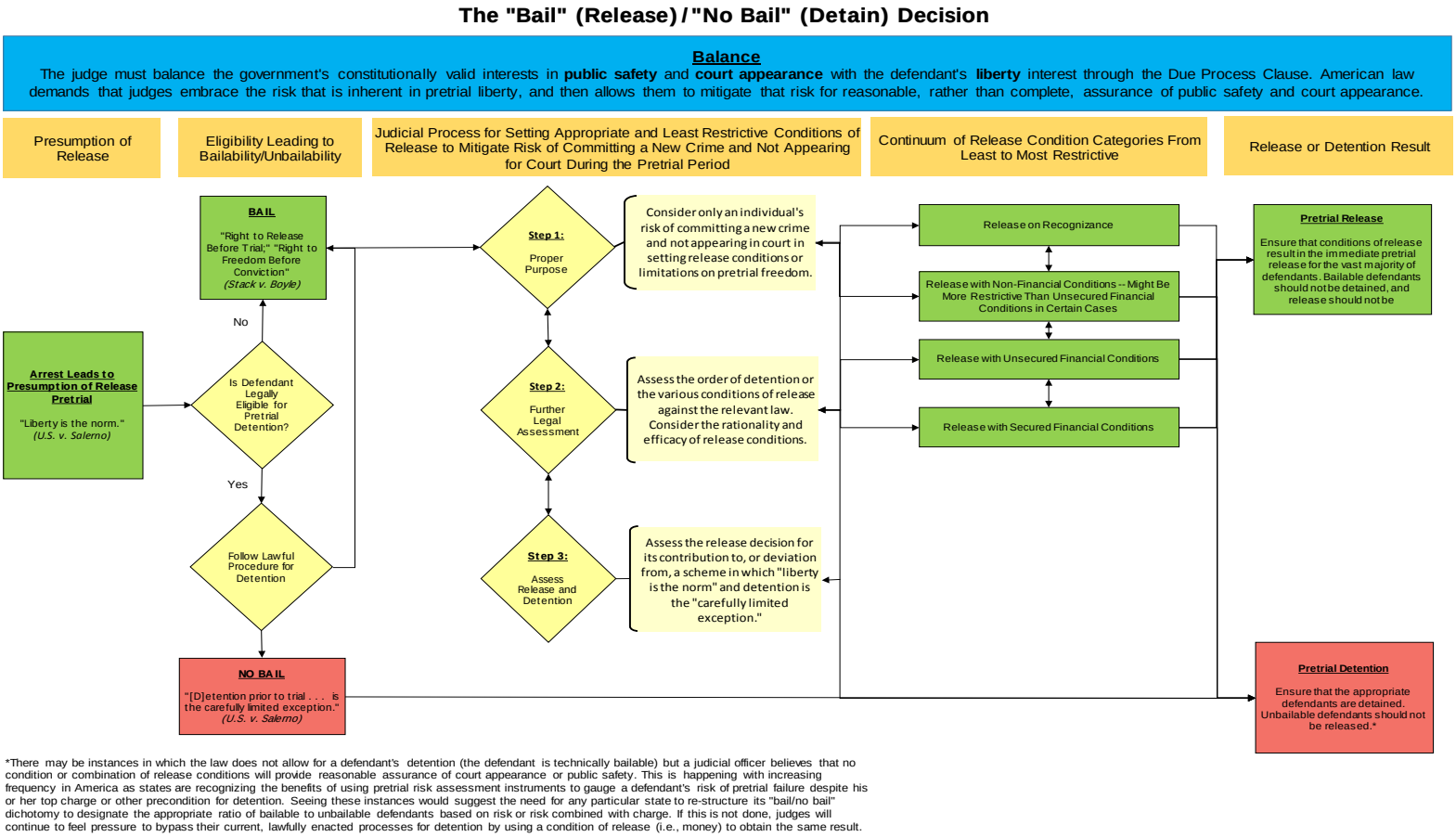
[140] Historically, the 1966 federal statute served as a national model during the first generation of bail reform and the 1971 Court Reform and Criminal Procedure Act for the District of Columbia, along with the 1984 Federal Bail Reform Act, served as models during the second generation of bail reform. 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.



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

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[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

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[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

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[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

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[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.

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Using Data to Improve Public Safety and Criminal Justice Outcomes

Proposal:

The Ohio Criminal Sentencing Commission through a partnership with the University of Cincinnati Institute of Crime Science will pursue the identification and illustration of criminal justice 'indicators' in a given county, region and statewide. For instance, criminal justice indicators may include crime reports, arrest data, court case filings, prison commitments, probation and parole supervision population, funding resources, vital statistics, drug abuse trends, employment rate and population size. The goal of the project generally is to identify indicators and overlay the various agency and local data sets in one place to evaluate what the data tells us.

Participants:

Criminal Sentencing Commission Director, Commission Vice-Chair and other select Commission Members, such as the General Assembly Members, the Department of Public Safety, a County Prosecutor, a Sheriff, a Municipal Judge, a Police/Law Enforcement Officer, the Department of Youth Services, the State Public Defender and the Department of Rehabilitation and Correction. Other suggested participants include the Attorney General, the Department of Mental Health & Addiction Services, the Department of Health, Office of Health Transformation, the Ohio Department of Job and Family Services, a representative of the Supreme Court of Ohio and the Governor's Office.

Anticipated Outcomes:

Improved public safety and health
Statewide connectivity, collaboration and information sharing
Resource leveraging and gap analysis
Informed funding decisions
Creation of real or near-real time local data exchanges of justice, health or other system data, to enable identification of multiple system participants to improve risk assessment, case management and service delivery
Development and sharing of best practices
Increased capacity for data driven solutions

Project Timeline:

March – May 2016: Solicit support for and commitment of participation in project, compile background information, gather data and prepare more robust project description, model.

June 7, 2016: Convene first meeting to include presentation of WEAVE dashboards created for Cincinnati Police Department and discussion of the data analytics center. Meeting is scheduled 10:00a – 12:00p at the Ohio Judicial Center, Room 102 – South Hearing Room 65 South Front Street Columbus, Ohio 43215.

June – July 2016: Develop in-depth action plan and project schedule to guide the group and reach agreed upon outcomes.

August 2016 – February 2017: Conduct analysis, develop prototype and prepare interim report.

March 2017: Present interim report.

Questions? Contact Sara Andrews by email at sara.andrews@sc.ohio.gov or call 614-387-9311

Data Repository Primer

Criminal Justice Data Sources

Database	Agency Overseeing	Statutory/Reg. Authority	Public Record	Whom Can Access	What is collected	Who Collects
Ohio Incident-Based Reporting System (OIBRS)	Office of Criminal Justice Services, Ohio Department of Public Safety	ORC 5502.62	Yes	Public Data can be obtained by request. Data for seven crime categories can be obtained through an interactive crime reports public website located at www.ocjs.ohio.gov and click on the OIBRS logo. Law enforcement agencies have additional access primarily for review and validation purposes.	An incident is defined as one or more offenses committed by the same offender, or group of offenders acting in concert, at the same time and place. OIBRS is able to collect 73 separate pieces of data surrounding an incident: offenses, arrests, victim/offender relationships, victim, offender, and arrestee characteristics, crime location, weapon involvement, and drug/alcohol involvement. The Office of Criminal Justice Services forwards the applicable data to the FBI's National Incident-Based Reporting System (NIBRS) program.	Participating law enforcement agencies

Registered Sex Offenders and Child Victim Offenders	Ohio Attorney General	ORC 2950.13	Yes	Ohio Attorney General Local law enforcement Media/Public	All of the registration, change of residence, school, institution of higher education, or place of employment address, and verification information the bureau receives pursuant to sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code regarding each person who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense or a child-victim oriented offense and each person who is or has been adjudicated a delinquent child for committing a sexually oriented offense or a child-victim oriented offense and is classified a juvenile offender registrant or is an out-of-state juvenile offender registrant based on that adjudication. Fingerprints of the person; a DNA specimen (by the arresting agency), as defined in section 109.573 of the Revised Code, from the person Whether the person has any outstanding arrest warrants.	Bureau of Criminal Investigation data Local SO's collect the sex offender registration information and enters it into the database which is provided by the AG's Office. BCI collects print cards, dispositions, Duties to Register forms, and other court related docs which are then filed in the offender pocket.

ODRC Inmate Prisoner Records and File	Ohio Department of Rehab and Correction	ORC 5120.21	No	Ohio Department of Rehab and Correction Ohio Attorney General Ohio courts Probation departments Ohio state licensing agencies Ohio Department of Youth Services	Record showing the name, residence, sex, age, nativity, occupation, condition, and date of entrance or commitment of every inmate in the several institutions governed by it. The record also shall include the date, cause, and terms of discharge and the condition of such person at the time of leaving, a record of all transfers from one institution to another, and, if such inmate is dead, the date and cause of death. These and other facts that the department requires shall be furnished by the managing officer of each institution within ten days after the commitment, entrance, death, or discharge of an inmate.	Ohio Department of Rehab and Correction
Computerized criminal history database	Attorney General/Superintendent of Bureau of Criminal Investigation	ORC 109.57, 109.572, 109.59, 109.60, 109.61	No	Ohio Attorney General Board of education of any school district Director of developmental disabilities County board of developmental disabilities	Descriptions, fingerprints and other information that may be pertinent of all persons who have been convicted of committing within this state a felony, any crime constituting a misdemeanor on the first offense and a felony on subsequent offenses, or any misdemeanor described in 109.572 of the	Person in charge of any county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, community-based correctional facility, halfway house, alternative residential facility, or state correctional institution Person in charge of any state institution having custody of a person suspected of

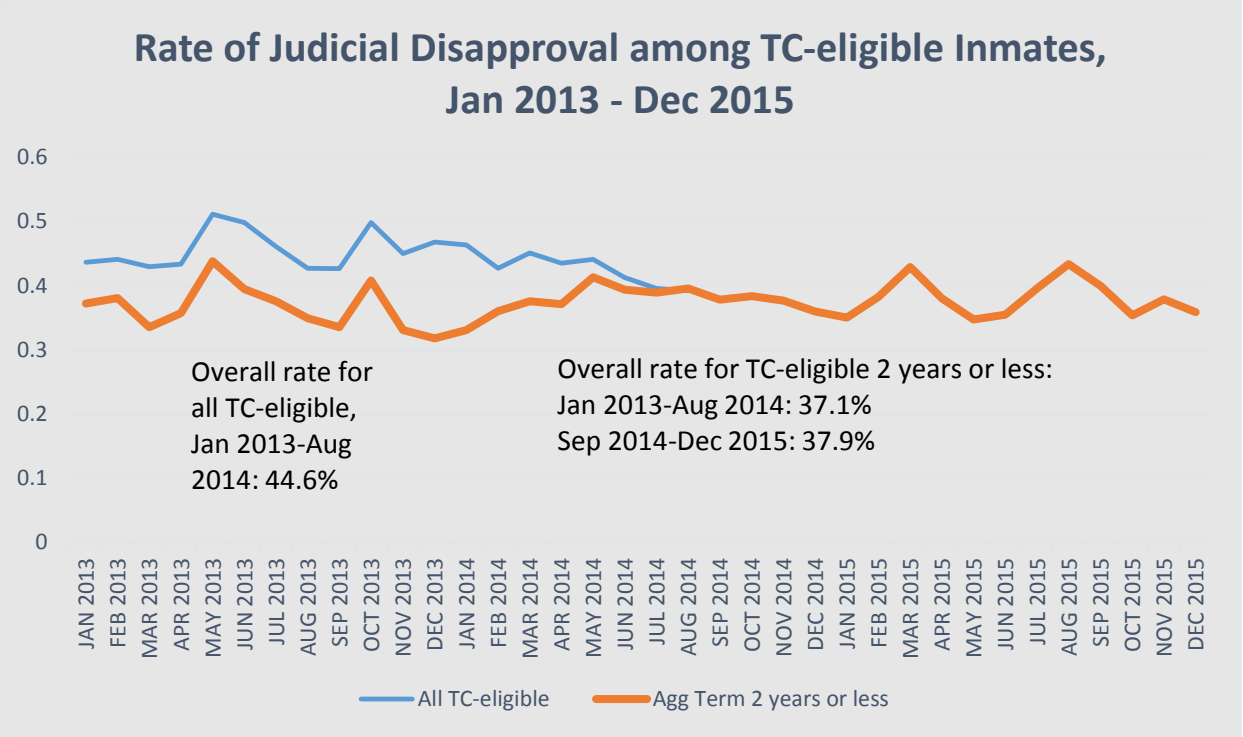
				Any provider or subcontractor as defined in section 5123.081 Chief administrator of any: chartered nonpublic school, a registered private provider that is not also a chartered nonpublic school, any home health agency, or any head start agency Chief administrator of or person operating any child day-care center, type A family day-care home, or type B family day-care home licensed under Chapter 5104. of the Revised Code Executive director of a public children services agency Private company described in section 3314.41, 3319.392, 3326.25, or 3328.20; or an employer described in division (J)(2) of section 3327.10 may request that the superintendent of the bureau investigate and determine, with respect to any individual who has applied for employment in any position after October 2, 1989, or any individual wishing to apply for employment with a board of education may request, with regard to the individual	Revised Code. All children under eighteen years of age who have been adjudicated delinquent children for committing within this state an act that would be a felony or an offense of violence if committed by an adult or who have been convicted of or pleaded guilty to committing within this state a felony or an offense of violence, and of all well-known and habitual criminals.	having committed a felony, any crime constituting a misdemeanor on the first offense and a felony on subsequent offenses, or any misdemeanor described in 109.572 of the Revised Code or having custody of a child under eighteen years of age with respect to whom there is probable cause to believe that the child may have committed an act that would be a felony or an offense of violence if committed by an adult.

Offender Search	Ohio Department of Rehab and Correction	ORC 5120.66	Yes	Public	Name, Date of Birth, Gender, Race, Admission Date, Institution of Incarceration, Offense Information and Sentencing Information for offenders who are currently incarcerated in an Ohio prison, currently under Department supervision, judicially released, or who died of natural causes while incarcerated.	Ohio Department of Rehab and Correction

Criminal Justice Information Systems

CJIS	Agency Overseeing	Statutory/Reg. Authority	Public Record	Whom Can Access	Databases Aggregated
Ohio law enforcement automated data system (LEADS)	Ohio law enforcement automated data system (LEADS)	ORC 5503.10	No	Law enforcement and criminal justice agencies Ohio Attorney General Department of Public Safety Ohio Department of Rehab and Correction Hazardous material files and data are available to fire departments and emergency management personnel Fatal crash data is available to the media	
Ohio Law Enforcement Gateway (OHLEG)	Ohio Attorney General	ORC 109.57(C)	No	All law enforcement agencies Ohio Attorney General State Medical Board Board of Nursing	
Ohio Courts Network	Supreme Court of Ohio		No	Judges Court Staff Clerks Probation Officers Jail/Sheriff	Ohio Court Case Data Warehouse Jail Booking Data Warehouse BCI Arrest Records BMV Arrest Records ODRC Inmates/Supervision

				Ohio Department of Rehab and Correction Ohio Attorney General Ohio Department of Education Ohio Board of Nursing Department of Youth Services Law Enforcement OHLEG DPS (Do Not Buy List)	DYS Reports AG Protection Orders


Rate of Judicial Disapproval among TC-eligible Inmates, Jan 2013 - Dec 2015
0.6
0.5
0.4
0.3
0.2
0.1
0
JAN 2013
FEB 2013
MAR 2013
APR 2013
MAY 2013
JUN 2013
JUL 2013
AUG 2013
SEP 2013
OCT 2013
NOV 2013
DEC 2013
JAN 2014
FEB 2014
MAR 2014
APR 2014
MAY 2014
JUN 2014
JUL 2014
AUG 2014
SEP 2014
OCT 2014
NOV 2014
DEC 2014
JAN 2015
FEB 2015
MAR 2015
APR 2015
MAY 2015
JUN 2015
JUL 2015
AUG 2015
SEP 2015
OCT 2015
NOV 2015
DEC 2015
Overall rate for all TC-eligible, Jan 2013-Aug 2014: 44.6%
Overall rate for TC-eligible 2 years or less:
Jan 2013-Aug 2014: 37.1%
Sep 2014-Dec 2015: 37.9%
All TC-eligible
Agg Term 2 years or less