The Supreme Court of Ohio

Task Force to Examine the Ohio Bail System

Materials for January 23, 2019

PROPOSED CRIMINAL RULE 46 ..... **1**

OHIO SENTENCING COMMISSION'S AD HOC COMMITTEE ON BAIL AND PRETRIAL SERVICES
2017 Report 5
2018 Addendum to Report 30

MODEL BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION **64**

CHANGING BAIL LAWS: MOVING FROM CHARGE TO "RISK:" GUIDANCE FOR JURISDICTIONS SEEKING TO CHANGE PRETRIAL RELEASE AND DETENTION LAWS **270**

WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING **329**

POLL RESULTS ON BAIL REFORM IN OHIO **351**

UNDERSTANDING SB10 ..... **352**

To the extent required by Article I, Section 10a of the Ohio Constitution or by the Revised Code, the trial court shall, upon request, provide the alleged victim the opportunity to be heard in any public proceeding in which a right of the alleged victim is implicated, including but not limited to public proceedings involving release, plea, sentencing, or disposition.

Proposed Staff Notes (2019 Amendment)

Crim.R 37-Victim's Opportunity to be Heard

Previously reserved, this new rule was added to comply with the 2017 amendment to Article I, Section 10a of the Ohio Constitution, also known as Marsy's Law.

RULE 46. ~~Bail~~ Pretrial Release and Detention

(A) Pretrial detention. A prosecutor may file a motion seeking pretrial detention of a defendant pursuant to the standards and procedures set forth in the Revised Code.

(B) Types and amounts of bail. Any person who is entitled to release shall be released upon one or more of the following types of bail in the amount set by the court:

(1) The personal recognizance of the accused or an unsecured bail bond;

(2) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. Ninety percent of the deposit shall be returned upon compliance with all conditions of the bond;

(3) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.

Unless the court orders the defendant detained under division (A) of this rule, the court shall release the defendant on the least restrictive conditions that, in the judgment of the court, will reasonably ensure the defendant's appearance in court, the protection of the safety of any person or the community, and that the defendant will not obstruct the criminal justice process. If the court orders monetary conditions of release, the court shall impose an amount and type which are least costly to the defendant while also sufficient to reasonably ensure the defendant's future appearance in court.

~~(B)~~(C) Conditions of bail. The court may impose any of the following conditions of bail:

(1) Place the person in the custody of a designated person or organization agreeing to supervise the person;

(2) Place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) Place the person under a house arrest, electronic monitoring, or work release program;

(4) Regulate or prohibit the person's contact with the victim;

(5) Regulate the person's contact with witnesses or others associated with the case upon proof of the likelihood that the person will threaten, harass, cause injury, or seek to intimidate those persons;

(6) Require ~~a person who is charged with an offense that is alcohol or drug related, and who appears to need treatment, to attend treatment while on bail~~ completion of a drug and/or alcohol assessment and compliance with treatment recommendations, for any person charged with an offense that is alcohol or drug related, or where alcohol or drug influence or addiction appears to be a contributing factor in the offense, and who appears based upon an evaluation, prior treatment history, or recent alcohol or drug use, to be in need of treatment;

(7) Require compliance with alternatives to pretrial detention, including but not limited to diversion programs, day reporting, or comparable alternatives, to ensure the person's appearance at future court proceedings;

(8) Any other constitutional condition considered reasonably necessary to ensure appearance or public safety.

~~(C)~~**(D)** **Factors.** In determining the types, amounts, and conditions of bail, the court shall consider all relevant information, including but not limited to:

(1) The nature and circumstances of the crime charged, and specifically whether the defendant used or had access to a weapon;

(2) The weight of the evidence against the defendant;

(3) The confirmation of the defendant's identity;

(4) The defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, jurisdiction of residence, record of convictions, record of appearance at court proceedings or of flight to avoid prosecution;

(5) Whether the defendant is on probation, a community control sanction, parole, post-release control, bail, or under a court protection order;

(6) An evaluation of the defendant's likelihood of appearance and risk to public safety, as determined by an objective risk-assessment tool recognized as reliable by statute or by the court, when reasonably available to the court. As soon as possible without causing unreasonable delay to the court's bail determination, this risk-assessment tool shall be employed by the court on its own initiative for any defendant not yet released on bail, either before or after the defendant's initial appearance.

~~(D)~~**(E)** **Appearance pursuant to summons.** When summons has been issued and the defendant has appeared pursuant to the summons, absent good cause, a recognizance bond shall be the preferred type of bail.

~~(E)~~(F) ~~**Amendments**~~ **Continuation of Bail.** ~~A court, at any time, may order additional or different types, amounts, or conditions of bail.~~ Unless otherwise ordered by the court pursuant to this subsection, bail shall continue until the return of a verdict or the entry of a guilty plea, and may continue thereafter pending sentence or disposition of the case on review. At any time, a court may eliminate or lessen any condition of bail that the court believes is no longer necessary to reasonably ensure the defendant's appearance in court, the protection of the safety of any person or the community, and that the defendant will not obstruct the criminal justice process.

~~(F)~~(G) **Information need not be admissible.** Information stated in or offered in connection with any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law. Statements or admissions of the defendant made at a bail proceeding or in the course of compliance with a condition of bail shall not be received as substantive evidence in the trial of the case.

~~(G)~~(H) **Bond schedule.**

(1) In order to expedite the prompt release of a defendant prior to initial appearance, ~~Each~~ each court shall establish a bail bond schedule covering all misdemeanors including traffic offenses, either specifically, by type, by potential penalty, or by some other reasonable method of classification. The court also may include requirements for release in consideration of divisions ~~(B)~~ (C) and ~~(C)(5)~~ (D)(5) of this rule. The sole purpose of a bail schedule is to allow for the consideration of release prior to the defendant's initial appearance.

(2) A bond schedule shall not be considered as "relevant information" under division (D) of this rule.

(3) When a person fails to post a bond established by a bail bond schedule, a judicial officer shall conduct a bail hearing no later than the second court day after that person has been arrested.

(4) Each municipal or county court shall, by rule, establish a method whereby a person may make bail by use of a credit card. No credit card transaction shall be permitted when a service charge is made against the court or clerk unless allowed by law.

(5) Each court shall review its bail bond schedule bi-annually by January 31 of each even numbered year, to ensure an appropriate bail bond schedule that does not result in the unnecessary detention of defendants due to inability to pay.

~~**(H) Continuation of bonds.** Unless otherwise ordered by the court pursuant to division (E) of this rule, or if application is made by the surety for discharge, the same bond shall continue until the return of a verdict or the acceptance of a guilty plea. In the discretion of the court, the same bond may also continue pending sentence or disposition of the case on review. Any provision of a bond or similar instrument that is contrary to this rule is void.~~

(I) Failure to appear; breach of conditions. Any person who fails to appear before any court as required is subject to the punishment provided by the law, and any bail given for the person's release may be forfeited. If there is a breach of condition of bail, the court may amend the bail.

(J) Justification of sureties. Every surety, except a corporate surety licensed as provided by law, shall justify by affidavit, and may be required to describe in the affidavit, the property that the surety proposes as security and the encumbrances on it, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged, and all of the surety's other liabilities. The surety shall provide other evidence of financial responsibility as the court or clerk may require. No bail bond shall be approved unless the surety or sureties appear, in the opinion of the court or clerk, to be financially responsible in at least the amount of the bond. No licensed attorney at law shall be a surety.

OHIO RULES OF EVIDENCE

RULE 615. Separation and Exclusion of Witnesses.

(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the "exclusion" or "separation" of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

(B) This rule does not authorize exclusion of any of the following persons from the hearing:

(1) a party who is a natural person;

(2) an officer or employee of a party that is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause;

(4) in a criminal proceeding, a victim of the charged offense to the extent that the victim's presence is authorized by <u>the Ohio Constitution or by</u> statute enacted by the General Assembly. As used in this rule, "victim" has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.

[Existing language unaffected by the amendments is omitted to conserve space]

OHIO
CRIMINAL SENTENCING COMMISSION

Ad Hoc Committee on Bail and Pretrial Services

Final Report & Recommendations
June 2017

TABLE OF CONTENTS

I. Executive Summary 1

II. Ad Hoc Committee Members 6

III. Background 7

A. History 7

B. Basics of Bail 7

C. Current Law 8

IV. Recommendations 9

A. Pretrial Risk Assessment 9

B. Pretrial Services 11

C. Alternatives to Pretrial Detention 13

D. Clerks of Court 15

E. Release Violations 16

F. Victims 17

G. Prosecutors 18

H. Counsel for Defendant 18

I. Bondsmen 19

J. Data Collection 20

K. Costs 22

V. Conclusion 23

APPENDICES

Appendix A: Reform Implementation Table 27

Appendix B: Ad Hoc Committee Survey Questions 29

Appendix C: Suggested Revisions to Crim.R. 4, Crim.R. 5, and Crim.R. 46 49

Appendix D: Survey Answers – Raw Data 61

Appendix E: Public Comments 259

I. Executive Summary

The system of bail was intended to ensure a defendant would appear in court and, eventually, ensure public safety by keeping those defendants who pose a substantial risk of committing crimes while awaiting trial in jail. The reality, however, is that those with money, notwithstanding their danger to the community, can purchase their freedom, while poor defendants remain in jail pending trial. Research shows that even short stays in jail before trial lead to an increased likelihood of missing school, job loss, family issues, increased desperation, and thus, an increased likelihood to reoffend.[1]

In 1968, the American Bar Association released criminal justice standards related to pretrial release and over the past several years many states have undertaken reviews of their pretrial systems and adopted various reforms. No less than 20 states have begun implementing reforms such as risk assessments for release determinations, citation in lieu of detention, and elimination of bond schedules *(Appendix A)*. In addition, there has been a rise in litigation arguing that pretrial detention violates the Due Process and Equal Protection Clauses of the United States Constitution. For example, in *Walker v. City of Calhoun*, pretrial detainees challenged the City of Calhoun's bail system, which mandated payment of a fixed amount without consideration of other factors, including risk of flight, risk of dangerousness, and financial resources.[2] The trial court invoked U.S. Supreme Court decisions[3], finding that the principle of those cases was especially applicable "where the individual being detained is a pretrial detainee who has not yet been found guilty of a crime."[4] The court found that the system violated the Equal Protection Clause since "incarceration of an individual because of the individual's inability to pay a fine or fee is impermissible."[5] The issue is currently under consideration by the Eleventh Circuit Court of Appeals, where the Justice Department has filed a brief in support of striking down the city's bail scheme.[6]

Nationally, pretrial services and bail have come under scrutiny in the past decade. The Conference of State Court Administrators (COSCA) issued a paper in 2013 supporting the ongoing work of the United States Department of Justice and the Pretrial Justice Institute to reform pretrial services.[7] The Conference of Chief Justices and the Conference of State Court Administrators has established a National Task Force on Fines, Fees and Bail Practices to address the ongoing impact these financial sanctions have on the economically disadvantaged in the United States.[8] Finally, the United States Department of Justice has funded bail reform initiatives

[1] Pretrial Justice Institution, www.pretrial.org/the-problem/, December 1, 2016.
[2] *Walker v. City of Calhoun, Georgia*, 2016 WL 361612, N.D. Georgia, January 28, 2016.
[3] *Griffin v. Illinois*, 351 U.S. 12 (1956); *Bearden v. Georgia*, 461 U.S. 660 (1983).
[4] *Walker*, *supra* at 11.
[5] *Id.*, citing *Tate v. Short*, 401 U.S. 395 (1971).
[6] Walker v. City of Calhoun, Georgia, 11 Cir. CA, No. 16-10521-HH.
[7] Arthur W. Peppin, "2012-2013 Policy Paper Evidence-Based Pretrial Release", COSCA http://cosca.ncsc.org/~/media/microsites/files/cosca/policy%20papers/evidence%20based%20pre-trial%20release%20-final.ashx
[8] "Top national state court leadership associations launch National Task Force on Fines, Fees and Bail Practices", National Center for State Courts, February 3, 2016, http://www.ncsc.org/Newsroom/News-Releases/2016/Task-Force-on-Fines-Fees-and-Bail-Practices.aspx?utm_source=iContact&utm_medium=email&utm_campaign=Communications&utm_content=0216+COSCA+Bulletin

and provided data to states and, in its consent decree with the city of Ferguson, ended the use of secured money bonds.[9]

The Council of State Governments Justice Center found that, in Pennsylvania, less than half of those with monetary bail succeed in posting it, even for misdemeanors.[10] A recent decision in the Southern District of Texas stated "under federal and state law, secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when, in those cases, due process safeguards the rights of the indigent accused."[11] The Connecticut Criminal Sentencing Commission issued a report and recommendations in February 2017 that recommended many reforms similar to those contained in this report.[12]

Recent events fuel the debate over the reform of bail and pretrial services. In New Jersey recent reports show increased criticism of bail reform implemented at the beginning of 2017. New Jersey virtually eliminated the use of cash bail and, under the new law, only detains those who pose the highest risk for flight or reoffending. Police and victims have begun to criticize the new law as resulting in a "revolving door" of defendants.[13] Suggestions have been made that tragedies, like those in Kirkersville, Ohio, where a gunman killed the police chief and two nursing-home employees, would become more frequent under bail reform.[14] But New Jersey's reforms went further than those recommended here, limiting judicial discretion in release and detain decisions,[15] and the gunman in Kirkersville was out of prison on judicial release post-conviction, not pretrial.

In Ohio, bail reform and pretrial services have been the subject of review in various individual jurisdictions. In Cuyahoga County, Administrative Judge John Russo formed a committee to review that county's bail system, examine local policies and procedures among jurisdictions within the county, and consider the costs of the system.[16] Lucas County is one of 20 jurisdictions to participate in the MacArthur Foundation Safety + Justice Challenge network intended to support "a network of competitively selected local jurisdictions committed to finding ways to safely reduce jail incarceration."[17] The local goal is to safely reduce jail population and address racial and ethnic disparities in the criminal justice system. Lucas County has implemented an administrative release program, which allows judges to administratively release inmates according to the risk they pose as determined by the Ohio Risk Assessment System Community Supervision Tool, to reduce the local jail population. Lucas County has also

[9] Attorney General Loretta E. Lynch, Remarks at the Eight Annual Judge Thomas A. Flannery Lecture, November 15, 2016, https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-eighth-annual-judge-thomas-flannery .
[10] "Justice Center Analysis of AOPC data", Council of State Governments Justice Center, 2017, p.6.
[11] *ODonnell v. Harris Cty., Texas*, Case 4:16-cv-01414, p. 6, April 28, 2017.
[12] Connecticut Sentencing Commission, "Report to the Governor and the General Assembly on Pretrial Release and Detention in Connecticut", February 2017. http://www.ct.gov/ctsc/lib/ctsc/Pretrial_Release_and_Detention_in_CT_2.6.2017.pdf
[13] Wallace, Sarah. "Nobody's Afraid to Commit Crimes: Cops, Victims Blast Overhaul of NJ Bail System". NBC New York, May 30, 2017. http://www.nbcnewyork.com/news/local/Bail-Reform-New-Jersey-Criminals-Streets-Law-Jail-Investigation-422965474.html
[14] Dayton Daily News, "Kirkersville murders: Judge who granted killer's early release admits 'mistakes'". May 16, 2017. http://www.daytondailynews.com/news/local/kirkersville-murders-judge-who-granted-killer-early-release-admits-mistakes/VHn7a13sjfSIwZ0nj9ijkK/
[15] Rice, Josie Duffy. "New Jersey passes new bail reform law, changing lives of poor defendants". Daily Kos. January 3, 2017. http://www.dailykos.com/story/2017/1/3/1616714/-New-Jersey-passes-new-bail-reform-law-changing-lives-of-poor-defendants
[16] "Impact 2016:Justice for All", cleveland.com, http://www.cleveland.com/metro/index.ssf/2016/05/cuyahoga_county_chief_judge_jo.html#incart_river_index_topics
[17] MacArthur Foundation, Safety + Justice Challenge, January 5, 2017, http://www.safetyandjusticechallenge.org/about-the-challenge/

implemented use of a risk assessment tool developed by the Laura and John Arnold Foundation ("Arnold tool") to provide public safety assessments to determine risk of failure to appear and new criminal activity. Stark County and the Cleveland Municipal Court are also beginning use of the Arnold tool. Summit County has developed an in-house risk assessment tool for pretrial determinations.

The Ohio Criminal Sentencing Commission, in an effort to ensure that Ohio is holding people for the right reasons prior to trial, formed an Ad Hoc Committee on Bail and Pretrial Services to determine the current situation in Ohio and to make recommendations that will maximize appropriate placement for defendants, protect the presumption of innocence, maximize appearance at court hearings, and maximize public safety. One of the primary purposes of pursuing reform of bail practices and pretrial services is to ensure that those that pose the greatest risk to public safety and failure to appear are detained while awaiting trial while maximizing release of pretrial detainees to effectively utilize jail resources. According to a study conducted by the Department of Rehabilitation and Correction (DRC), 35.4% of people in local jails are awaiting trial – meaning they have not been convicted of a crime.[18] They are either being held without bail or cannot afford bail. In most cases it is the latter.

The Ad Hoc Committee was comprised of commission members and others with a vested interest in the bail and pretrial services system. Judges, prosecutors, defense counsel, clerks, court administrators, law enforcement, jails, and bondsmen were all represented on the Ad Hoc Committee so that all sides of the issues could be considered in making recommendations. The Commission secured technical assistance from the National Institute of Corrections for assistance in defining the problem and identifying national trends and successful solutions. The National Institute of Corrections (NIC) is an agency within the U.S. Department of Justice, Federal Bureau of Prisons which provides training, technical assistance, information services, and policy/program development assistance to federal, state, and local corrections agencies while also providing leadership to influence correctional policies, practices, and operations nationwide. At the request of the Commission, the Institute agreed to provide technical expertise on pretrial service reform. Lori Eville, correctional program specialist at NIC and Tim Schnacke,[19] executive director of the Center for Legal and Evidence-Based Practices, made several visits to Ohio to discuss national trends, the experience of other jurisdictions undertaking pretrial and bail reform, and to offer their experiences and expertise.

The full Ad Hoc Committee met five times over the course of 11 months and formed work groups to tackle the various issues identified by members as priorities for discussion. The first task undertaken by the majority of work groups was to design and disseminate surveys to determine the current state of pretrial services in Ohio. Surveys were sent to clerks, jail administrators, prosecutors, and judges *(Appendix B)*. After analyzing the current state of pretrial services in Ohio, including presentations from Ohio counties currently undergoing reform efforts, and a review of

[18] Brian D. Martin, Brian R. Kowalski, & Sharon M. Schnelle, *Findings and Recommendations from a Statewide Outcome Evaluation of Ohio Jails*, (June 2012), available at http://www.drc.ohio.gov/web/ohiojailevaluation.pdf at 41.

[19] Tim Schnacke is author of two papers on pretrial services and bail reform that were instrumental in educating Ad Hoc committee members. "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform", NIC, September 2014 and "Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial", NIC, September 2014 provided needed background and foundational information for the committee.

national trends, work groups met and developed recommendations to present to the full Ad Hoc Committee, which then considered each recommendation and voted on whether it should be included in the recommendations to the Ohio Criminal Sentencing Commission. After initial release of draft recommendations the Commission opened a public comment period soliciting comments from criminal justice partners, stakeholders, and the general public. The comment period resulted in only four submitted comments. Two comments previously submitted by the bail bond industry were included and also considered *(Appendix E)*. A survey was sent to Ad Hoc Committee members to determine which, if any, of the public comment suggestions would be incorporated into the report prior to final approval by the Commission. Public comments are discussed throughout the report in appropriate sections.

The Ad Hoc Committee stresses that these recommendations should not be read or considered independently. Implementation of each recommendation is necessary to create a fair and effective bail system with robust pretrial services.[20] At the conclusion of the report, suggested language is provided for revisions to Crim.R. 4, Crim.R. 5, and Crim.R. 46 *(Appendix C)*. The Ad Hoc Committee did not fully discuss this proposed language, but wanted to provide the Supreme Court of Ohio a starting point from which to develop rule amendments in line with their recommendations.

Recommendations to reform and create a system of pretrial justice that maximizes appearance, release and appropriate placement, preserves public safety, protects the presumption of innocence, and achieves efficiencies and consistency in Ohio's pretrial system while decreasing the reliance on monetary bail as the primary release mechanism include:

1. **Establish a risk-based pretrial system, using an empirically based assessment tool, with a presumption of nonfinancial release and statutory preventative detention.** Setting monetary bail based only upon the level of offense, as most bond schedules do, negates the ability of the court to differentiate bail decisions based upon a defendant's risk for failure to appear or the risk to public safety. At a minimum, defendants detained in accordance with the bond schedule should have a bond review hearing within a reasonable time. Bond schedules should be eliminated. However, if they are utilized, the schedule should be based upon a defendant's risk for failure to appear or risk to public safety and should be consistent and uniform among counties and courts within counties.

[20] The recommendations should be implemented in any situation where bond is set. For example, in child support civil contempt motions bond is often set in the amount of the arrears to guarantee appearance. These amounts can be very high and are not based upon the defendant's risk for failure to appear.

2. **Implement a performance management (data collection) system to ensure a fair, effective and fiscally efficient process**. As in other areas of Ohio's criminal justice system, data regarding pretrial decisions, agencies, and outcomes is rarely collected. A dedicated, concerted effort to increase data collection and analysis for all facets of the bail and pretrial system in Ohio includes each jurisdiction mandated to collect appearance rates, safety rates, and concurrence rates (how often a judge accepts a pretrial service agency recommendation), development of a method to track the number of hearings on bond and information about violations that occur while defendants are out on bond, and information regarding the effectiveness/success of diversion programs.

3. **Maximize release through alternatives to pretrial detention that ensure appearance at court hearings while enhancing public safety.** Diversion options, such as prosecutorial diversion programs and day reporting, should be offered in every jurisdiction with eligibility criteria that takes into account pretrial assessments.

4. **Mandate the presence of counsel for the defendant at the initial appearance.** The practice is a hallmark of an effective pretrial system and importantly, the United States Supreme Court has found that a criminal defendant's initial appearance before a magistrate or judge, where the defendant learns the charge against him and his or her liberty is subject to restriction, marks the initiation of adversarial judicial proceedings.[21] This triggers the attachment of the Sixth Amendment right to counsel.[22]

5. **Require education and training of court personnel, including judges, clerks of court, prosecutors, defense counsel, and others with a vested interest in the pretrial process.** Without training and education, the individuals operating within the system will remain reluctant to embrace risk assessment and alternatives to monetary bail.

6. **Continued monitoring and reporting on pretrial services and bail in Ohio.** With the implementation of robust data collection and the onset of new practices under the recommendations in this report, the Ohio General Assembly should task the Ohio Criminal Sentencing Commission with periodic reporting on pretrial practices and operations to ensure continued progress.

[21] Rothergy v. Gillespie County, 554 U.S. 191, 213 (2008).
[22] Rothergy v. Gillespie County, 554 U.S. 191, 213 (2008).

II. Ad Hoc Committee Members*

Commission and Advisory Committee Members

Judge Ken Spanagel – Parma Municipal Court, Commission Member *(Co-Chair)*
Paul Dobson – Prosecutor, Wood County, Commission Member *(Co-Chair)*
Lara Baker-Morrish – Chief, Columbus City Attorney's Office
Judge Fritz Hany – Ottawa County Municipal Court
Chrystal Alexander – Victim Services, Department of Rehabilitation and Correction
Judge Nick Selvaggio – Champaign County Court of Common Pleas
Senator Cecil Thomas – Ohio Senate
Kari Bloom - Office of the Ohio Public Defender
James Lawrence – Oriana House

Additional Members

Judge Ronald Adrine – Cleveland Municipal Court
Judge Beth Cappelli – Fairborn Municipal Court
Julie Doepke – Hamilton County Adult Probation
Diana Feitl – Oriana House
Stephanie Hardman – Clerk, Mount Vernon Municipal Court
Sheriff Michael Heldman – Hancock County
Ryan Kidwell – Deputy, Hancock County Sheriff's Office
Michael Kochera – Court Administrator, Canton Municipal Court
John Leutz – County Commissioners Association of Ohio
Branden Meyer – Clerk, Fairfield County Court of Common Pleas
Charles Miller – President, Ohio Bail Agents Association
Marta Mudri – Ohio Judicial Conference
Michele Mumford – Clerk, Shelby County Court of Common Pleas
Dan Peterca – Ohio Association of Pretrial Service Agencies
Dave Phillips – Prosecutor, Union County
Judge Cynthia Rice – Eleventh District Court of Appeals
Tom Sauer – Hamilton County Pretrial Intervention Services
Susan Sweeney – Court Administrator, Summit County Court of Common Pleas
Penny Underwood – Clerk, Champaign County Court of Common Pleas
Josh Williams – Ohio Judicial Conference
Brenda Willis – Ohio Association of Pretrial Service Agencies

Sara Andrews – Director, Ohio Criminal Sentencing Commission
Jo Ellen Cline – Criminal Justice Counsel, Ohio Criminal Sentencing Commission
Lori Eville – Correctional Program Specialist, National Institute of Corrections
Tim Schnacke – Director, Center for Legal and Evidence-Based Practices

III. Background

A. History[23]

Bail, in its earliest form, was a personal surety system where an individual would vouch for the accused and agree to oversee the accused until trial. When colonists settled the New World, they brought their bail traditions with them. "Bail" equaled release with unsecured bonds and no profit or indemnification. But as society changed over time, reform of pretrial practices resulted in significant changes. Americans initially put even more emphasis on release and freedom, but in the 1920s, with crime on the rise and jails becoming crowded, alternatives were needed to the traditional system to reduce the unnecessary detention of bailable defendants. This resulted in the rise of secured money bonds and the commercial bail industry. Later, in the 1960s, another reform movement resulted in the consideration of public safety as a valid purpose to limit pretrial release. Currently, the national trend toward risk assessment of pretrial defendants to determine release responds to notions that secured money bonds allow release of high-risk defendants and detention of low-risk defendants based solely upon financial means.

B. Basics of Bail

"When a person is arrested, the court must determine whether the person will be unconditionally released pending trial, released subject to a condition or combination of conditions, or held in jail during the pretrial process."[24] In making its determination the court must consider if there is a significant risk that the defendant will not appear at future hearings or if the defendant will commit a serious crime during the pretrial period. Many pretrial detainees are low-risk individuals who are highly unlikely to commit another crime while awaiting trial and are very likely to return to court. Other pretrial detainees pose a moderate risk to reoffend or not return, which can generally be managed through effective monitoring and supervision. And, finally, there are pretrial detainees who pose a significant risk of committing new crimes or skipping court who should be detained pretrial. "Effectively balancing the presumption of innocence, the assignment of the least restrictive intervention for defendants, and the need to ensure community safety while minimizing defendant pretrial misconduct is the challenge afforded pretrial justice. Whether this balance is reached and how pretrial justice is administered has significant ramifications for both the defendant and the community. For the community at-large, the pretrial decision affects how limited jail space is allocated and how the risks of non-appearance and pretrial crime by released defendants are managed. The pretrial decision also affects defendants' abilities to assert their innocence, negotiate a disposition, and mitigate the severity of a sentence."[25] In some cases the court may find that the defendant cannot be released, or is non-bailable, and therefore, subject to pretrial detention. In the vast majority of cases, however, the court will determine that the defendant can be released pretrial, i.e., "bailable." The court has a variety of options in releasing the defendant pretrial including releasing the person on their own recognizance or a conditional release, which entails putting specific conditions on

[23] Tim Schnacke, "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform". National Institute of Corrections, September 2014, p. 19-37.
[24] "Moving Beyond Money: A Primer on Bail Reform", Criminal Justice Policy Program, Harvard University, October 2016, p. 5.
[25] Cynthia A. Mamalian, Ph.D., "State of the Science of Pretrial Risk Assessment". Pretrial Justice Institute, March 2011.

their release, including a secured or unsecured bond. Secured bail requires payment of money upfront to be released, while unsecured bail permits release without payment and only requires payment if the defendant does not comply with release conditions. Some courts allow the defendant to pay a percentage of the full bond amount to secure release. If the defendant lacks adequate funds or resources to pay the unsecured bond amount, a bail bond agent, or surety, can make the payment for the defendant.

C. Current Law

Recommendation:

1) *Eliminate duplication between the Ohio Revised Code and the Ohio Rules of Criminal Procedure regarding the amount, conditions, and forms of bail.*

Article 1, Section 9 of the Ohio Constitution provides:

> *"All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.*
>
> *The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the state of Ohio."*

Based upon this Constitution construct, the Ohio General Assembly has adopted several statutes regarding eligibility for bail,[26] and the Supreme Court of Ohio has adopted Rule 46 of the Ohio Rules of Criminal Procedure. The statutory framework and the rule are, in many ways, duplicative. Both address the form of bail and the factors to be considered in setting bail. This duplication should be addressed in light of the Modern Courts Amendment, which states that the rules of procedure adopted by the Court supersede any conflicting statutory enactment regarding procedural matters.[27] Clarity in the law will assist greatly in consistency in application.

The Supreme Court of Ohio has not explicitly defined "bail" as it appears in Article I, § 9 of the Ohio Constitution. However, the Court has used the term "bail" to refer to security for the release of an accused from jail in order to appear before the court or judge. The Supreme Court has interpreted "bail" as the physical release of an accused person from jail. However,

[26] R.C. §§ 2713.09-2713.29, 2935.15, 2937.22-2937.45, 2949.091, 2963.14
[27] Ohio Constitution, Article IV, §5(B).

most cases from the high court focus on the imposition of "excessive bail" and the financial aspects of bail.[28]

IV. Recommendations

A. Pretrial Risk Assessment

Recommendation:

1) *The General Assembly should mandate and fund the use of a validated, risk-assessment tool for pretrial release and detain decisions.*

2) *The Supreme Court of Ohio should amend Crim.R. 46 to include results of risk assessments as a factor to be considered in release and detain decisions.*

While there are many elements of an effective pretrial system, the one element that has been discussed repeatedly both in Ohio and around the country is the use of a validated risk assessment tool to assist in making release and detain recommendations or decisions.

According to the National Institute of Corrections (NIC), effective pretrial programs use validated pretrial risk assessment criteria to gauge an individual defendant's suitability for release or detention pending trial. A good risk assessment tool is empirically based—preferably using local research — to ensure that its factors are proven as the most predictive of future court appearance and re-arrest pending trial.[29] The Laura and John Arnold Foundation has developed a universal risk assessment tool which provides an objective assessment of a defendant's risk for committing a new crime, risk for committing violent crime, and risk of failing to appear.[30] Many states have begun using risk assessment to assist in pretrial decisions. Kentucky, North Carolina, Pennsylvania, Utah, Wisconsin, and Virginia all utilize some type of pretrial risk assessment.

Currently in Ohio, some jurisdictions are utilizing one tool in the Ohio Risk Assessment System (ORAS) for pretrial risk assessment and a few jurisdictions are utilizing other validated risk assessment tools.

Lucas County began utilizing the Arnold Foundation's "Public Safety Assessment" tool in January 2015 to inform release and detain decisions at first appearances. The county was under a federal court order that capped the number of jail inmates which resulted in defendants being released to adhere to the order. The "Arnold" tool provides separate indicators for risk of failure to appear and new criminal activity and utilizes common non-interview dependent factors that predict risk, which optimizes the existing human and financial resources needed to administer risk assessments. The assessment system was implemented in January 2015 and already data is

[28] *Locke v. Jenkins*, 50 Ohio St.3d 45 (1969); *Baker v. Troutman*, 50 Ohio St.3d 270 (1990); *Sylvester v. Neal*, 140 Ohio St.3d 47 (2014), *State v. Bevacqua,* 147 Ohio St. 20, (2011).
[29] "Pretrial Justice: How to Maximize Public Safety, Court Appearance and Release: Participant Guide", National Institute of Corrections, Internet Broadcast, September 8, 2016, p. 39.
[30] "Developing a National Model for Pretrial Risk Assessment". LJAF Research Summary, Arnold Foundation, November 2013.

showing a drop in the number of pretrial bookings. Prior to implementation of the risk assessment, 38.4 percent of all bookings were released due to the federal court order. After implementation of the risk assessment, only 4.3 percent of all bookings were released due to the federal court order. Cases disposed of at the first appearance have doubled since the implementation of the assessment tool. The data shows that after the first year of implementation, court appearance rates have improved, public safety rates have improved, and pretrial success rates have improved.[31]

Summit County utilizes a risk assessment tool developed in-house based upon a tool utilized in Virginia. Their tool has nine indicators and includes an interview with each defendant being screened. Recently, the Montgomery Court of Common Pleas and the Cleveland Municipal Court have also partnered with the Arnold Foundation on using the foundation's risk assessment tool.

The Ad Hoc Committee makes no recommendation on what validated risk assessment tool should be utilized. However, the committee recommends that every jurisdiction in Ohio be mandated to utilize a validated, risk-assessment tool to assist in release and detain decisions pretrial. To be clear, risk assessment tools utilized pretrial should inform the court's consideration of the release and detain decision, therefore, the assessment should be completed prior to the decision of whether to release or detain the defendant is made, and the assessment should never supplant the individual decision making of the judge. Finally, to ensure fundamental fairness in the pretrial process, the Ad Hoc Committee believes that risk assessment results should be available for review by the parties to the case.

Public comments were received from the Hamilton County Public Defender's Office and the Office of the Ohio Public Defender asking the Commission to further clarify the meaning of "validated risk assessment tool". No standard definition exists in any jurisdiction. According to the Pretrial Justice Institute, risk assessment tools are "developed by collecting and analyzing local data to determine which factors are predictive of pretrial success and to determine their appropriate weight."[32] Validation is a multi-step process that looks at local indicators and predictive weights.[33] It also was suggested that the Ohio Criminal Sentencing Commission develop a list of approved risk assessment tools. The Commission, with appropriate statutory authority, would take on this responsibility by working with university researchers and criminal justice partners to identify appropriate risk assessment instruments that could be locally validated for each jurisdiction.[34]

[31] VanNostrand, Marie, "Assessing the Impact of the Public Safety Assessment", presented by Michelle Butts, Lucas County Court of Common Pleas, September 2016.
[32] Pretrial Justice Institute, "Risk Assessment: Evidence-based pretrial decision-making" 2013. https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=512bc99f-0e9f-ce77-a2a4-ec4a27ff0c10&forceDialog=0. *See also*, Pretrial Justice Institute, "Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants", May 2015. https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=23a6016b-d4b3-cb63-f425-94f1ab78a912&forceDialog=0
[33] Id.
[34] Id.

The Office of the Ohio Public Defender requested that any assessment tool not include an interview with the defendant of Fifth and Sixth Amendment concerns. The Ad Hoc Committee did not recommend including this as a recommendation and the current Summit County assessment tool does include an interview component. However, jurisdictions adopting a risk assessment tool should be aware of these concerns.

The Office of the Ohio Public Defender also suggested that guidance be given by the Ad Hoc Committee on completing risk assessments, including how soon after arrest they should be given to the defendant. Because results from pretrial risk assessments are meant to inform, and not replace, a court's discretionary decision making, the assessment tool should be given to the defendant prior to their initial appearance before the court when the release and detain decision is made.

Finally, the Hamilton County Public Defender's Office suggested that the Ohio Administrative Code be clarified to ensure that risk assessment tools other than ORAS be permitted. It should be noted that the Ohio Risk Assessment System is comprised of a variety of risk assessment tools, one of which is relevant to pretrial risk assessment. The Commission agrees that the Ohio Administrative Code 5120-13-01 should be amended to delete ORAS as the "single validated risk assessment tool"[35] as it pertains to pretrial risk assessment.

B. Pretrial Services

Recommendations:

1) *The General Assembly should dedicate statewide funding and support to the pretrial function through the Supreme Court of Ohio, whether through a pretrial services agency or the existing probation function. The Supreme Court of Ohio should set minimum standards for the provision of pretrial services.*

2) *The Supreme Court of Ohio should amend Crim.R. 46 to indicate that if a defendant is eligible for release under the Ohio Constitution, and the trial court determines that the defendant should be released pretrial, the trial court should first consider nonfinancial release.*

NIC has developed a list of essential elements of an effective pretrial justice agency, which is essentially a roadmap on how to create a system of pretrial justice that will maximize appearance and public safety while also maximizing release and appropriate placement.[36] The Ad Hoc Committee looked at each of these elements in making its recommendations regarding reform of pretrial practices in Ohio.

First, NIC identifies that the guiding principle of pretrial release and detain decisions must be based upon risk. "A risk-based model proceeds from the presumption that pretrial defendants should be released."[37] According to the survey conducted by the Ad Hoc Committee,

[35] OAC 5120-13-01(B)
[36] "Pretrial Justice: How to Maximize Public Safety, Court Appearance and Release: Participant Guide", National Institute of Corrections, Internet Broadcast, September 8, 2016, p. 26.
[37] "Moving Beyond Money: A Primer on Bail Reform", Criminal Justice Policy Program, Harvard University, October 2016, p. 14.

most pretrial decisions are being made based upon the nature of the current offense, the defendant's prior record, and prior failures to appear in making release decisions *(Appendix D)*. The survey results indicate that courts are currently assessing risk at some level in making release decisions. However, NIC also recommends that there be a dedicated pretrial services agency or function within an existing agency that assesses pretrial risk, makes recommendations to the court, and allows for differential supervision of pretrial defendants.

While most survey respondents report having a pretrial department or an individual who handles pretrial *supervision*, most of these departments or individuals are not engaged in bail investigations. The Ad Hoc Committee recognizes that a robust pretrial agency or department will have a significant fiscal impact on budgets. However, the Commission views this investment in pretrial services as a shift of current funding from the costs of incarceration to the costs of pretrial services. These costs should be borne by the state with funding flowing from the General Assembly to the Supreme Court of Ohio, and the Court should set standards that will act as a basis for pretrial services based upon the recommendations contained in this report. It is imperative that dedicated funding and support exist around the pretrial function to allow these entities or individuals to give objective recommendations to the court on release and detain decisions. It is important to note that the Ad Hoc Committee does not recommend that every jurisdiction establish a new agency or department for pretrial services. Pretrial services are a 'function' and can be absorbed by existing probation departments (where most pretrial supervision is occurring currently in Ohio) or court personnel with minimal (although existent) need to "staff up". Jurisdictions should be left to determine what the pretrial function/agency looks like to meet their needs based upon objective data (crime rates, jail populations, how many pretrial releasees exist, etc.).

NIC has also identified a presumption of nonfinancial release and statutory preventative detention as essential parts of an effective system. This requires states and localities to stress the least restrictive conditions to ensure appearance and public safety with non-financial release always considered as the first option. In addition, this element requires a risk-based preventative detention option that affords defendants due process when the decision to detain them pretrial is made. In Ohio, with municipal courts required to adopt a bond schedule and some courts of common pleas adopting them as well, financial release is generally the first option considered. To combat this current proclivity for requiring money to secure release, the Ad Hoc Committee recommends that Crim.R. 46 be amended to indicate that if a defendant is eligible for release under the Ohio Constitution, and the trial court determines that the defendant should be released pretrial, the trial court should first consider nonfinancial release.

Public comment from the Buckeye Institute asked that this recommendation specify that cash bail is the least preferred condition of release and that is should only be used as a last resort to ensure the defendant's appearance and public safety. While the Commission believes the recommendation is clear, it bears repeating that the Supreme Court of Ohio should amend Crim.R. 46 so that nonfinancial release is considered by the judge before considering utilizing cash bail for release.

C. Alternatives to Pretrial Detention

Recommendations:

1) *Increase awareness and use of a continuum of alternatives to detention.*

2) *Law enforcement should increase use of cite and release for low-level, non-violent offenses.*

3) *Prosecutors should screen cases before initial appearance for charging decisions, diversion suitability, and other alternative disposition options.*

4) *Prosecutors and courts should increase the availability of diversion through expanded eligibility utilizing risk assessments.*

One of the primary purposes of pursuing reform of bail practices and pretrial services is to ensure that those who pose the greatest risk to public safety and failure to appear are detained while awaiting trial while maximizing release of pretrial detainees to effectively utilize jail resources. A survey conducted by the Ad Hoc Committee showed that most jails are not differentiating their pretrial detainees from others in their data. However, of those who did have statistics, many reported a significant portion of their daily population being pretrial.

In addition to maximizing release through valid risk assessment as discussed above, there are alternatives to pretrial detention that can maximize release while ensuring appearance at court hearings and public safety. The Ad Hoc Committee believes that local jurisdictions should be made more aware of the myriad of choices for alternatives to detention for pretrial defendants and, determining which of those alternatives are most suitable for their community, should begin to utilize those alternatives more often.

One such alternative is day reporting, which is not being used widely, if at all, in Ohio for pretrial defendants. The District of Columbia has instituted a day reporting center that provides a variety of services to defendants and community members. Boone County, Indiana, offers a day reporting program that encourages defendants to work by requiring community service (if they are not employed) until work is found. Providing services and supervision will allow more low- and moderate-risk defendants to be released pretrial, maintaining or encouraging their employment, while maximizing the likelihood of appearance and safety.

Electronic monitoring is used in many jurisdictions, primarily post-conviction, and usually through courts. Increased use for pretrial defendants will promote pretrial release from detention while safeguarding the community and ensuring the defendant appears in court.

An avenue not explored in detail by the Ad Hoc Committee during its research into Ohio's system are release options utilized by law enforcement following arrest. Release on the least restrictive means starts with law enforcement, which has the option to use citations or summonses in lieu of custodial arrests for low-level, non-violent offenses. Certainly Ohio law enforcement has the option to issue a citation to a low-level, non-violent defendant where there is

no reasonable cause to suggest defendants would be a risk to themselves or the community, or miss a court date.

Cite and release programs, which is effectively an arrest and release, enable law enforcement to release a defendant rather than requiring formal arrest and booking. Most often used in misdemeanor cases, Louisiana and Oregon permit citations for some felonies.[38] Crim.R. 4(A)(3) allows a law enforcement officer, in misdemeanor cases, to issue a summons instead of making an arrest when doing so seems reasonably calculated to ensure the defendant's appearance. Cite and release allows law enforcement to spend more time enforcing laws instead of booking defendants, and decreases the number of defendants detained in jails pretrial.

NIC also suggests that prosecutors screen criminal cases before the initial appearance for appropriate charging purposes and to allow for screening for prosecutorial diversion. As discussed further below, prosecutorial diversion programs exist in Ohio, but generally not pre-filing. Increased screening by prosecutors will encourage thinking about the defendant's suitability for diversion, intervention in lieu of conviction, or as potential candidates for specialized dockets. On the opposite side of the coin, having defense counsel engaged before initial appearance is another essential element identified for an effective system. In Ohio, according to survey respondents, defense counsel is appointed at the initial appearance of the defendant. This does not allow for counsel to represent their client during a critical stage in the case where their liberty is at issue.

Although not strictly an alternative to pretrial detention, another major practice that aids in the effective use of jail resources is diversion. The American Bar Association Criminal Justice Section Standard 10-1.5 encourages the development of diversion programs as a means to monitor defendants pretrial.[39] Diversion is widely used in Ohio both by prosecutors' offices and by courts. The program types vary by jurisdiction and include OVI diversion, license intervention, first defendant diversion, and theft diversion. Few communities are utilizing diversion pre-filing; charges are almost always filed and then the case is diverted. The National Association of Pretrial Services Agencies issued a report in 2009 based upon a national survey of pretrial diversion programs finding that over half of the respondent programs did not require any guilty plea as a condition of eligibility.[40] The Ad Hoc Committee recommends that diversion be offered in every jurisdiction with eligibility criteria that takes into account pretrial assessments that can help prosecutors and judges make diversion determinations.

Public comment from the Hamilton County Public Defender suggested the Commission stress the importance of training for attorneys and judges on detention alternatives. Training and education is a paramount addition to all the Commission's recommendations regarding bail and pretrial services. However, the importance of prosecutors, defense counsel, and judges knowing about alternatives to pretrial detention, how to access those alternatives, and when their use is

[38] Mark Perbix, "Unintended Consequences of Cite and Release Policies", Warrant and Disposition Management Project, BJA, June 2014.
[39] Criminal Justice Section Standards, American Bar Association (November 22, 2016) http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html
[40] " Pretrial Diversion in the 21st Century" , National Association of Pretrial Services Agencies (2009) https://netforumpro.com/public/temp/ClientImages/NAPSA/18262ec2-a77b-410c-ad9b-c6e8f74ddd5b.pdf

appropriate cannot be understated. Therefore, a concerted effort toward increased training, whether through the Ohio Judicial College or legal associations, is encouraged.

D. Clerks of Court

Recommendations:

1) *The General Assembly should amend the Ohio Revised Code to eliminate the use of bond schedules in Ohio.*

2) *In the alternative, if bond schedules continue to be utilized, courts should reduce reliance on bond schedules, bond review hearings should occur within 48 hours, and bond amounts should be consistent within counties. In addition, the Supreme Court should amend the Rules of Superintendence for the Courts of Ohio to require yearly review of bond schedules.*

3) *Clerks should require surety bail bond agents provide only the information required by the current Ohio Revised Code.*

In the administrative process for bonds and the payment of money bail, no entity is more important than the clerks of court. Clerks of court issue approvals for surety companies, handle bond payments (following bond schedules set by the court), and handle the administrative processing of payments. The clerks represented on the Ad Hoc Committee and surveyed by the committee feel strongly that their responsibilities in the bail process are merely implementing the will of the courts.

Under current law, municipal courts are required to adopt a bond schedule, and these bond schedules are generally available in the clerks' offices where payments are made.[41] Many Ad Hoc Committee members advocated for the complete elimination of bond schedules in Ohio. For others on the committee, however, elimination of the bond schedules seems fantastical. Therefore, although the majority of members believe that elimination of these schedules will create fundamental fairness in the criminal justice system and pretrial justice, committee members believe that, should they continue to be used or, until they are eliminated, changes in their use should be implemented. The American Bar Association Standards on Pretrial Release state that "financial conditions should be the result of an individualized decision" and "should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge."[42]

Bond schedules vary widely among jurisdictions and are a cause of consternation for both defendants and practitioners. The Ad Hoc Committee understands the usefulness of a bond schedule in processing low-level, non-violent defendants out of jail. However, setting monetary bail based only upon the level of offense, as most bond schedules do, negates the ability of the court to differentiate bail decisions based upon a defendant's risk for failure to appear or the risk to public safety. At a minimum, defendants detained in accordance with the bond schedule

[41] Crim.R.46(G)
[42] ABA Criminal Justice Section Standards 10-5-3(e).

should have a bond review hearing within 48 hours. The Ad Hoc Committee recommends bond schedules be consistent and uniform among counties and among courts within counties. In addition, the committee recommends requiring annual review of the bond schedule by the court.

Under current law, surety bail bond agents may be required by the court to register with the clerk.[43] The Ad Hoc Committee's survey found that a number of factors go into approval of sureties, and not all clerks' offices require the same information from bail bonds agents with some clerks requiring information additional to that required under the Revised Code.[44] To promote uniformity and clarity for bonding agencies, the Ad Hoc Committee recommends that clerks across Ohio only require what is required under the Ohio Revised Code: a copy of the agent's surety bail bond license; a copy of the agent's driver's license or state identification; a certified copy of the surety bail bond agent's POA from each insurer that the surety bail bond agent represents; and biennial renewal of the registration.

Public comments from the Buckeye Institute urged the Commission to recommend complete prohibition of bond schedules. The Ad Hoc Committee debated bond schedules at length during its original deliberations on recommendations. As noted above, several members of the Ad Hoc Committee promoted and advocated for a recommendation to mandate repeal of bond schedules. However, the majority of Ad Hoc Committee members expressed concerns over municipal court case processing and political realities that caused them to vote in favor of the current recommendation: Bond schedules should not be utilized, but if they are utilized, they should be based upon the defendant's risk of failure to appear or commit a crime while awaiting trial and not solely on the offense(s) charged.

E. Release Violations

Recommendations:

1) *Jurisdictions should implement a court policy and utilize a response grid or matrix to "technical violations."*

Under Ohio law, failure to appear after release is punishable as a fourth degree felony or a first degree misdemeanor.[45] In addition, Crim.R. 46 indicates that a breach of a condition of bail can result in an amendment to the bail.[46] The question the Ad Hoc Committee faced in its review is whether or not every violation of release conditions needs to go to the judge.

In probation, revocations for technical violations can be numerous and this can be the same problem in pretrial. A "technical violation" encompasses any violation of a condition that is not a re-arrest or a failure to appear. There is a continuum that must be analyzed to determine when a "technical violation" becomes something greater. Pretrial service agencies and departments should be given the opportunity to bring a defendant who has a technical pretrial

[43] R.C. 3905.87
[44] R.C. 3905.87(B)
[45] R.C. 2937.99
[46] Crim.R. 46(I)

violation into compliance. The agency or department personnel must be able use their best professional judgment within the parameters of a specific, articulated court policy to say that "this violation" is the tipping point where it is no longer technical. The agency or department must have the option to recommend a different condition of bail or to put a new plan before the judge upon a violation.

The Ad Hoc Committee acknowledges that there needs to be a balancing of bail revocations resulting from technical violations and revocations based upon re-arrest or failure to appear. Clearly, in the Ad Hoc Committee's opinion, if there is a re-arrest or failure to appear, the judge should receive notice of those violations, as generally happens today. One condition the committee discussed at length was 'no contact' orders. Because the committee recognized the potential for harm to victims if such an order is violated, the Ad Hoc Committee believes that a violation of a no contact order is never a "technical" violation.

In some jurisdictions a response grid or matrix has been developed for violations.[47] Approved by the court, a matrix makes it possible for responses to violations to be responsive to the defendant's situation and ensures the response is swift and impactful. The Ad Hoc Committee encourages jurisdictions to consider adoption of a response grid for violations and to consider graduated responses based upon the nature of the violation.

F. Victims

Recommendations:

1) *Ensure the alleged victim is notified of arraignment decisions as required by the Ohio Revised Code.*

2) *The General Assembly should amend Revised Code Chapter 2930. to ensure alleged victims are informed on how to contact any pretrial supervisory authority.*

An important constituency in the pretrial structure is the alleged victims of the crimes committed by the defendant. The Ad Hoc Committee believes that it is imperative that alleged victims be aware of release and detain decisions. Most states, including Ohio, have laws that specifically address alleged victims' interests related to pretrial release. [48] Forty-one states mandate notification of the pretrial release hearing and 19 of those states allow the alleged victims to participate in some manner.[49] In Ohio, alleged victims get notice of pretrial hearings and can appear if the alleged offense is an offense of violence and the alleged victim is eligible for a protection order. Notification generally is handled by the prosecutor's office and the Ad Hoc committee recognizes the need to ensure that notification about what happened at arraignment is necessary and, most importantly, if a "stay away order" has been issued. Alleged victims also

[47] Milwaukee County Behavior Response Guidelines (April 2014); Mesa (Co.) County Pretrial Services Response to Violations Guide; Ramsey (Mn.) County; Los Angles (Ca.) County.
[48] R.C. 2930.05(A)
[49] Amber Widgery, "Victims' Pretrial Release Rights and Protections", National Center for State Courts, May 12, 2015, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-victims-rights-and-protections.aspx.

need to be given information on how to contact any pretrial supervisory authority if necessary.

G. Prosecutors

Recommendations:

1) *A representative of the prosecutor's office should be required to appear on behalf of the state at every initial appearance.*

Under current Ohio law, a representative of the state is not required to appear at a defendant's initial appearance and, in some jurisdictions, the prosecuting attorney or their representative does not appear. This is especially true in jurisdictions where the prosecutor is "part time." The Ad Hoc Committee believes that the presence of a representative of the state at the initial hearing where pretrial release and detain decisions are made is as important as the presence of defense counsel (discussed below). The presence of the state at the initial hearing can aid in the early resolution of cases and can ensure that charges are correct and appropriate, any release conditions are commensurate with the offense charged.[50]

H. Counsel for Defendant

Recommendations:

1) *When a defendant is in custody or taken into custody, counsel should be provided at bail hearings unless the defendant knowingly and voluntarily waives counsel.*

2) *If a defendant is in custody or taken into custody and qualified pursuant to R.C. 120.05, counsel for the case should be appointed prior to the conclusion of the arraignment proceeding.*

As discussed earlier in this report, NIC has identified the presence of counsel for the defendant at the initial appearance as a hallmark of an effective pretrial system. When defendants are at risk of losing their freedom when at risk of being detained, counsel should be present. The U.S. Supreme Court has found that the criminal defendant's initial appearance before a magistrate or judge, where the defendant learns the charge against him or her and his or her liberty is subject to restriction, marks the initiation of adversarial judicial proceedings.[51] This triggers the attachment of the Sixth Amendment right to counsel and is not dependent upon whether a prosecutor is aware of, or involved in, the initial proceeding.[52] Three states require counsel to be present at a defendant's pretrial release decision.[53]

While the Ad Hoc Committee recognizes that many jurisdictions have counsel present at the initial hearing, the Constitutional right to counsel is so vital to the process that we would be

[50] National District Attorneys Association, "National Prosecution Standards, Third Edition", Standards 4-5.1 and 4-5.2, 2009, http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.
[51] *Rothergy v. Gillespie County*, 554 U.S. 191, 213 (2008).
[52] *Rothergy v. Gillespie County*, 554 U.S. 191, 194 (2008).
[53] Maryland, Connecticut, and New York. Sara Sapia, "Access to Counsel at Pretrial Release Proceedings" National Center for State Courts Pretrial Justice Center for Courts, November 2016.

remiss if we did not acknowledge that there are defendants who do not have any representation during bail determinations. An attorney must be provided at the initial bail hearing regardless whether the defendant has the ability to hire a private attorney or not. Indigent defendants must have an attorney appointed, but those defendants, not financially eligible for a public defender for their case, who may hire a private attorney, can still have the public defender or appointed counsel for the bail hearing, unless the defendant knowingly and voluntarily waives counsel.

Counsel for the case should be appointed prior to the conclusion of the arraignment proceeding. Most jurisdictions adhere to this practice, which promotes future appearances. The more information defendants have the more likely they are to return to court. Providing an attorney's name in the entry that defendants take with them will encourage them to contact their counsel, making it more likely they will return for future hearings. In addition, if the defendant has representation at arraignment, counsel assigned to the case will be better able to determine what factors were considered in the setting of bail, which is beneficial if that counsel is seeking an amendment to the bail amount.

Public comment from the Office of the Ohio Public Defender asked that this recommendation be reworded to stress that the defendant has a right to counsel at the initial hearing. Language in the body of recommendation was revised from the initial draft to indicate that counsel "must" be appointed. The same public comment suggested that a recommendation be included to allow an arrested person to knowingly, intelligently, and voluntarily waive their bond hearing. This suggestion received support by a majority of the Ad Hoc Committee members who responded. However, it was a very close vote (9 in favor, 7 opposed), so instead of a recommendation, the suggestion is noted here for policy makers in the General Assembly to consider as part of a package of reforms in bail and pretrial services.

I. Bondsmen

Recommendations:

1) *Continue to utilize bail bond surety agents, viewing them as another tool in the arsenal.*

2) *Continue utilizing bail bond surety agents in pretrial monitoring and supervision for their clients.*

The Ad Hoc Committee included bail bond surety agents in its membership because they currently exist as a major force in the pretrial system in Ohio. Both the Ohio Bail Bondsmen Association and the American Bail Coalition addressed the Ad Hoc Committee during its deliberations. According to the American Bail Coalition, there are approximately 600 licensed bail agents in Ohio.[54] Despite the recommendations above to decrease the usage of monetary bail and rely instead upon risk assessment, it is unlikely that monetary bail will be wholly replaced. The Ad Hoc Committee envisions a system in Ohio where the first instinct courts have regarding defendants pretrial is to release them on their own recognizance. But the Ad Hoc Committee

[54] Jeff Clayton, National Policy Director, American Bail Coalition, "Presentation to the Ad Hoc Committee on Bail and Pretrial Services of the Ohio Criminal Sentencing Committee", July 22, 2016.

recognizes that there are situations where monetary bail may be the best way to ensure a defendant's appearance or protect public safety. For this reason, bondsmen need to be viewed as another tool in the arsenal for release.

Despite the most effective risk assessment tools available, there will be defendants who are released and then fail to appear at their court dates. Bondsmen are in a position to assist in ensuring that those who fail to appear are found and brought before the court for a review of their violations. Under the current system, bond agents also can be involved in GPS monitoring and drug or alcohol testing. Courts generally would like to have as much information about the defendant appearing before them as possible. If a surety bond agent can provide insight into a defendant's history, the likelihood the defendant is to appear, or other information, the court should be able to utilize that information.

The Professional Bail Agents of the United States (PBUS) and the Ohio Bail Agents Association both submitted comments on the Ad Hoc Committee's recommendations prior to the public comment period. PBUS suggested a series of eligibility requirements for a personal recognizance bond that would limit the issuance of those bonds to a limited number of defendants. The Commission opted not to incorporate the PBUS changes into the initial draft released in March. The Ohio Bail Agents Association expressed concerns over failure to appear rates in those counties currently utilizing pretrial risk assessment and the costs associated with the Ad Hoc Committee's recommendations. The information provided by the Ohio Bail Agents Association was disseminated to all Commission members and is a part of this report in *Appendix E.*

J. Data Collection

Recommendations:

1) *The General Assembly and the Supreme Court of Ohio should Increase data collection and analysis for all facets of the bail and pretrial system in Ohio.*

2) *Specifically, local courts, or the most appropriate entity, should collect data on diversion outcomes to measure effectiveness of programs and develop a method to track the number of hearings on bond and information about violations that occur while defendants are out on bond.*

3) *The General Assembly should ensure appropriate resources for any required data collection regarding bail and pretrial services.*

Recent trends in criminal justice reform, including bail and pretrial service reform, call for the use of evidence-based practices. Evidence-based practices and decision making require a strategic and deliberate method of applying empirical knowledge and research-supported principles to justice system decisions.[55] In order to adequately determine the current state of pretrial services in Ohio and measure outcomes of any implemented reforms, the General Assembly and the Supreme Court of Ohio must require the collection of robust and useful data.

[55] National Institute of Corrections, Evidence Based Decision Making, January 23, 2017, http://info.nicic.gov/ebdm/.

NIC recognizes that performance management of the pretrial system is necessary to ensure effectiveness. As in other areas of Ohio's criminal justice system data regarding pretrial decisions, agencies, and outcomes is rarely collected. Fewer than 20 percent of respondents to the Ad Hoc survey collect data on failure-to-appear rates and even fewer collect data regarding arrests for crimes committed while on release pretrial. The Ad Hoc Committee recommends a dedicated and concerted effort to increase data collection and analysis for all facets of the bail and pretrial system in Ohio. At a minimum, the committee recommends that collection of appearance rates, safety rates, and concurrence rates (how often a judge accepts a pretrial service agency recommendation) be mandated for each jurisdiction. However, policy makers at both the General Assembly and the Supreme Court of Ohio should consider the more robust measurements advocated by NIC in its publication "Measuring What Matters".[56] In its work, NIC recommends the collection of the outcome measures mentioned above (appearance rates, safety rates, concurrence rates) and, in addition, the collection of performance rates, including universal screening and recommendation rates.[57] The recommended data points from NIC would vastly increase the knowledge policy makers have on the effectiveness of implemented reforms.

Additionally, the Ad Hoc Committee specifically recommends that data be collected regarding diversion programs and funding sources and data regarding diversion outcomes to measure the effectiveness of diversion programs. There is currently no existing clearinghouse of information on funding sources and information on diversion. Knowing success and failure rates of any diversion program is paramount in determining if the diversion programs are effective and if any risk assessment screening for diversion is effective.

Despite an increase in initial costs to begin collection of this data, whether through new systems or updates to case management systems, the Ad Hoc Committee strongly believes that these elements are the only true measure of the effectiveness of pretrial services. The Ad Hoc Committee acknowledges that data collection in a number of arenas too often falls on the clerks office. However, considering the dearth of data in the pretrial system the Ad Hoc Committee believes that clerks are going to have to be a part of a new emphasis on data collection. Specifically, the Ad Hoc Committee recommends the development of a method to track the number of hearings on bond and information about violations that occur while defendants are out on bond. The Ad Hoc Committee's survey showed that this data is not currently being collected, either by the court or the clerks. However, the Ad Hoc Committee recommends this information must be collected to ensure an effective system. Regardless of which entity, i.e., court, clerks of court, local law enforcement, prosecutors, etc., is deemed to be in the best position to collect data regarding bail and pretrial services, appropriate resources need to follow any data-collection requirements. The General Assembly must work with the Supreme Court of Ohio to determine an appropriate amount for updates to all case management systems or for development of a statewide collection capability.

Public comment from the Office of the Ohio Public Defender suggested that counties be directed to submit all bail assessment results and arraignment/release hearing dockets to an

[56] "Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field", National Institute of Corrections, August 2011, https://s3.amazonaws.com/static.nicic.gov/Library/025172.pdf.
[57] *Id.* at p. 5.

independent entity. In addition, the suggestion was made to make all data a public record, including ORAS data. The Ad Hoc Committee did not favorably approve this suggestion for inclusion in the recommendations. However, the committee was split fairly evenly, which the Commission felt was important to note for policymakers as they consider increased data collection in bail and pretrial services.

K. Costs

The Ad Hoc Committee is not naïve and understands that its recommendations have a cost. Research on existing pretrial programs shows wide discrepancies in costs dependent upon the nature of the programs. In Kentucky, for example, which operates a statewide pretrial system with 294 employees covering 120 counties, the 2012 budget was $11,820,000. According to their Annual Report, the cost of pretrial release per defendant was $11.74 while the cost for pretrial incarceration was $613.80 per defendant.[58] In Salt Lake (Utah) County, where pretrial services are administered and funded at the local level, the budget for case management this year was $1,477,722. Jail screening is funded separately and costs $932,578.[59]

Summit County's pretrial service program began utilizing a validated risk assessment tool in felony cases in 2006. Pretrial investigations are conducted in the county jail on all new felony bookings, including an interview with the defendant, and the risk assessment tool's report is generated within two days of incarceration. Pretrial staff are present in all arraignments to assist the court in bail decisions. An independent, non-profit community corrections agency (Oriana House) provides pretrial supervision services to the court. In 2016 the program supervised 1,562 clients with a 77 percent success rate. Costs for pretrial supervision were dependent upon the level of supervision. A minimum supervision level cost $1.32 per day per defendant, medium supervision cost $2.64 per day and maximum supervision cost $5.02 per day. The total cost of the pretrial supervision program in 2016 was $783,000. Summit County Jail's daily rate for 2016 was $133.25 per person, per day.[60]

Data collection costs would vary, dependent upon whether a court's case management system has the ability to currently track the data or if the system has to be modified to add database fields or codes. The Ad Hoc Committee is fully aware that implementation of these recommendations, particularly implementation of risk assessment systems, dedicated pretrial service staff, increased diversion opportunities, and increased data collection, will have fiscal implications for both the state and local governments.

It should be remembered, however, that the price of reform is offset by the potential savings in the cost of detention. The Pretrial Justice Institute recently estimated that American taxpayers spend about $38 million per day incarcerating pretrial defendants, which works out to about $14 billion annually.[61]

[58] Kentucky Pretrial Services; https://www.pretrial.org/download/infostop/Kentucky%20Pretrial%20Services%20History%20Facts%20and%20Stats.pdf
[59] Kele Griffone, Division Director, Salt Lake County Criminal Justice Services, December 1, 2016.
[60] All information was provided to the Ad Hoc Committee by Kerri Defibaugh, Summit County Pretrial Services Supervisor and Melissa Bartlett, OHI pretrial Services Coordinator, September 2016.
[61] "Pretrial Justice: How much does it cost", Pretrial Justice Institute, January 24, 2017.

V. Conclusion

<u>Recommendation:</u> The General Assembly should task the Ohio Criminal Sentencing Commission with creation of a committee for implementation and ongoing monitoring of the recommendations in this report.

The Ad Hoc Committee believes that implementation of these recommendations will, over time, result in cost savings to the justice system and result in a pretrial justice system that maintains due process and equal protection while ensuring public safety and court appearances. The work is not finished with the publication of this report. Historically, there have been many solid, forward-thinking recommendations put forth in various reports from a myriad of committees, task forces, and commissions that have never been implemented. For that reason, the Ad Hoc Committee recommends that the General Assembly amend the Ohio Revised Code to require the Ohio Criminal Sentencing Commission to form an ongoing committee tasked with facilitating implementation of these recommendations and monitoring progress and trends regarding bail and pretrial issues.

The Ad Hoc Committee believes that implementation of the recommendations contained herein will promote efficiencies and consistency in Ohio's pretrial system while decreasing the reliance on monetary bail as the primary release mechanism. Of vital importance, however, is education and training of court personnel, including judges and clerks of court, prosecutors, defense counsel, and others with a vested interest in the pretrial process. Without training and education, the individuals operating within the system will remain reluctant to embrace risk assessment and alternatives to monetary bail. The Ad Hoc Committee encourages ongoing monitoring, through data collection and analysis of the pretrial system in Ohio, and suggests that the Ohio Criminal Sentencing Commission be tasked with periodically reporting on pretrial practices and operations.

BAIL PRACTICES AND PRETRIAL SERVICES

ADDENDUM TO THE JUNE 2017 AD HOC COMMITTEE ON BAIL AND PRETRIAL SERVICES FINAL REPORT & RECOMMENDATIONS

OHIO
CRIMINAL SENTENCING COMMISSION

PREPARED BY, STAFF OF THE OHIO CRIMINAL SENTENCING COMMISSION | MARCH 2018

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Table of Contents

Executive Summary page 3

I. State by State Comparison page 6
Appendix A

II. Analysis and Recommendations for Legislative Provisions page 6
132nd General Assembly – Sub.HB439, SB274
General Provisions and Data Variables – Appendix B

III. Assessing Impact

A. Buckeye Institute Analysis page 6
Appendix C

B. Data Collection & Development page 7
1. Statewide centralized database page 8
Other states page 9
Potential Vendors page 10
2. Local Case Management Systems page 11

C. Pretrial Services page 12

D. Risk Assessment page 15

IV. Additional Information and Implementation Assessment: page 16
Grant application – Gap Analysis

V. Conclusion and Summary page 17

EXECUTIVE SUMMARY

In April of 2016, the Ohio Criminal Sentencing Commission (Commission), in an effort to affirm that Ohio is holding people for the right reasons prior to trial, sought technical assistance from the National Institute of Corrections and created an Ad Hoc Committee on Bail and Pretrial Services. The Ad Hoc Committee's goal was to ensure Ohio's bail system maximizes appropriate placement for defendants, protects the presumption of innocence, maximizes appearance at court hearings and maximizes public safety. The 34-member Ad Hoc Committee was comprised of a member of the Ohio Senate, Judges, Court Administrators, Prosecutors, Defense Attorneys, a Sheriff, a Jail Administrator, Pretrial Services personnel, Clerks of Courts, Victim Advocates and Bail Bondsmen.

The Ad Hoc Committee met for eleven months and created multiple smaller workgroups. The first task undertaken was to design and disseminate surveys to determine the current state of pretrial services in Ohio. Surveys were sent to clerks, jail administrators, prosecutors, and judges. After analyzing the current state of pretrial services in Ohio, including presentations from Ohio counties currently undergoing reform efforts, and a review of national trends, work groups met and developed recommendations to present to the full Ad Hoc Committee which then considered each recommendation and voted on whether or not they should be included in the Committee's recommendations to the Ohio Criminal Sentencing Commission.

In June 2017, the Commission unanimously favorably voted to accept the Final Report and Recommendations of the Ad Hoc Committee. The recommendations of the Ad Hoc Committee are designed to be holistic and focus on achieving consistency, fairness and efficiency in the pretrial system while decreasing the reliance on monetary bail. The recommendations also promote consistent and uniform practices that realize fundamental fairness and promote public safety among counties and courts within counties.

The Commission's study and work on bail practices and pretrial services inspired recently introduced legislation in the 132nd Ohio General Assembly, Sub.HB439 (Dever, Ginter) and SB274 (McColley). The proposed legislation embodies the spirit of bail practices and pretrial services reform and while not intended to be data-centric, the bills do reflect that data collection is an important part of reform. Understandably, the data related portions of the bills raise questions that include the cost of implementation, partially prompting this addendum to the Ad Hoc Committee's report.

The provisions in the legislation provide the underpinning for the development of a collaborative, reliable and unified criminal justice data system. Additionally, the data variables outlined in the bill present the opportunity to understand pretrial functions and, ideally, if and when, combined with other data collection efforts by the Commission, will link those early processes in the criminal justice system to processes that happen later in the system – in other words, the ability to follow a case all the way through the system using just one

data source. That kind of criminal justice data connectivity is of immeasurable value to Ohio citizens and policy-makers.

In the interest of continuing our work to promote efficiencies and consistency in Ohio's pretrial system while decreasing the reliance on monetary bail as the primary release mechanism, we have done our best to gather information from state partners to estimate cost for provisions in Sub.HB439 and SB274. We have also worked to compile available and relevant cost implementation estimates from other jurisdictions.

We trust that implementing recommendations made by the Commission's Ad Hoc Committee on Bail and Pretrial Services coupled with changes to Ohio law will, over time, result in cost savings to the justice system and result in a pretrial justice system that maintains due process and equal protection while ensuring public safety and court appearances. As cited in the final report and recommendations of the Ad Hoc Committee, *the price of reform is offset by the potential savings in the cost of detention. The Pretrial Justice Institute recently estimated that American taxpayers spend about $38 million per day incarcerating pretrial defendants, which works out to about $14 billion annually.*[1]

[1] "Pretrial Justice: How much does it cost", Pretrial Justice Institute, January 24, 2017

I. State by State Comparison – Appendix A

In 2016 when the Commission's Ad Hoc Committee on Bail and Pretrial Services (Ad Hoc Committee) began its work, no less than 20 states had started implementing reforms such as risk assessments for release determinations, citation in lieu of detention, and elimination of bond schedules. Today, that number continues to grow, as illustrated in Appendix A.

That momentum is well documented in publications and state tracking tools through organizations like the National Institute of Corrections[2], the Pretrial Justice Institute[3], the Center for Legal and Evidence Based Practices[4], and the National Conference of State Legislatures.[5] The majority of states enacting reforms adhere to the major theme of implementing individualized bail determinations based upon objective analysis of risk to public safety and risk of failure to appear, particularly for low-level, non-violent offenders.

II. Analysis and Recommendations for Legislative Provisions – Appendix B

132nd General Assembly – Sub.HB439, SB274

In order to assist in the successful implementation of the recommendations from the Ad Hoc Committee and, in consideration of the legislative proposals included in Sub.HB439 and SB274 Commission staff prepared Appendix B. The first chart describes the general provisions and the second is specific to the data variables included in the legislation. The charts are designed to offer analysis and what we trust is helpful background information and suggested recommendations. In general, the analysis supports the emphasis on the reform efforts that will, over time, result in cost savings to the justice system and a pretrial justice system that maintains due process and equal protection while ensuring public safety and court appearances.

III. Estimated Fiscal Impact Assessment

A. Buckeye Institute Information – Appendix C

The Buckeye Institute is an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states[6]. Daniel Dew is a legal fellow whose focus is criminal justice reform. He recently authored the report, "Money Bail" Making Ohio a More Dangerous Place to Live and continues to be an outspoken advocate for bail practices and pretrial services reform. Since he, and the Buckeye Institute, were examining the jail bed space cost savings of such reform, we agreed to coordinate our efforts, thus their findings are included in our report, Appendix C.

[2] https://nicic.gov/pretrial
[3] http://www.pretrial.org/
[4] http://www.clebp.org/
[5] http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-policy-state-laws-reports-and-resources.aspx
[6] https://www.buckeyeinstitute.org/

B. Data Collection & Development

States across the country are striving for better, more comprehensive criminal justice data to inform policy makers, budget decisions and increase connectivity and transparency among those in the field. As discussed in a recent editorial in the NY Times[7] by Amy Bach, executive director and president of Measures for Justice, …."*Missing data is at the core of a national crisis. The United States leads the industrialized world in incarceration. With nearly 5 percent of the planet's population and almost a quarter of its prison population, the country has invested a tremendous amount of money in the corrections system without the statistics necessary to tell us whether that money is actually reducing crime, improving fairness or lessening recidivism. State and federal spending on corrections has grown more than 300 percent over the past 20 years — becoming one of the fastest-growing line items in state budgets."*

Criminal justice data in Ohio is disparate, mismatched and complex. Local and state agency data systems lack connectivity and sharing agreements are underutilized. Currently, in Ohio, each court operates independently resulting in varying levels of data collection and submission. Through its work the Ad Hoc Committee learned that, with a few notable exceptions, most courts do not collect data on bail and pretrial services, and if they do, the data is not of the quality necessary to conduct an impactful analysis of pretrial justice at the local level. Thus, the recommendations in the Ad Hoc Committee report are designed to promote consistent and uniform practices that realize fundamental fairness and promote public safety among counties and courts within counties.

Continuing to advance criminal justice policy and legislation on limited circumstances and data does not further the administration of justice. The Ad Hoc Committee recommended a dedicated and concerted effort to increase data collection and analysis for all facets of the bail practices and pretrial system in Ohio. As mentioned in its report, in order to adequately determine the current state of bail practices and pretrial services in Ohio and measure outcomes of any implemented reforms, the General Assembly and the Supreme Court of Ohio must require the collection of robust and useful data. The provisions included in Sub.HB439 and SB274 reflect some of the data used to inform and evaluate past and current pretrial reform efforts[8] and provide the underpinning for the development of a collaborative, reliable and unified criminal justice data system.

Despite an increase in initial costs to begin data collection, whether through new systems or updates to case management systems, collecting data is the only true measure of the effectiveness of bail practices and pretrial services. The General Assembly must work with the Supreme Court of Ohio to determine cost for updates to all local case management systems or for development of a statewide collection capability.

[7] https://www.nytimes.com/2018/03/21/opinion/missing-criminal-justice-data.html
[8] http://www.ncsc.org/~/media/Microsites/Files/PJCC/Pretrial%20Justice%20Brief%208-Final.ashx

The Ad Hoc Committee was fully aware that implementation of its recommendations, particularly the implementation of risk assessment systems, dedicated pretrial service staff, increased diversion opportunities, and increased data collection, have fiscal implications that may be significant for both the state and local governments. Specific fiscal impact is difficult to assess as evidenced by Legislative Service Commission Fiscal Note & Local Impact Statement[9] dated March 20, 2018, that surmised costs of implementation are overall indeterminate and uncertain.

However, using local, state and national resources – publications, research and direct conversation with those engaged in court services, technology and information systems, risk assessment and pretrial justice reform, the information compiled in this report is our best attempt to identify cost impact of implementation, using the provisions as outlined in Sub.HB439 and SB274. Please note, the information gathering effort is ongoing and future updates may be provided.

1. Statewide Centralized Database

Sub.HB439 and SB274 require the collection and reporting of specified data from every court, other than a juvenile court; reporting of the gathered information to the General Assembly once every other year (beginning 2018); and the maintenance of a centralized database of information reported by the courts. There will be one-time and annual costs to develop and maintain a statewide platform/database and ongoing maintenance costs of the data platform. Of course, there are a myriad of options for the development of such a platform and information in this report is a sampling of possibilities – which are unable to be fully estimated until there is certainty in specific data points/variables identified for collection.

To estimate such costs, we benchmarked with other states, in-state partners and known vendors. Cost estimates were based upon the following deliverables:

- → Application Programming Interface (API);
- → Data Security (data is not public);
- → Ability to pull small amounts of data and/or large amounts of data;
- → Ability to aggregate data; ability to select to download along a variety of pieces of information (as well as download all information);
- → Ability to accept data from a variety of court management systems;
- → Ability to standardize minor incompatibility issues in variables;
- → Ability to download into Excel, SPSS and STATA

[9] https://www.legislature.ohio.gov/download?key=9107&format=pdf

Information from Other States

In an effort to investigate hard numbers that provide estimates of the cost of implementing a centralized database in Ohio, Commission staff contacted other state Sentencing Commissions and/or states regarding cost for implementation and associated ongoing cost of data collection. The following is not intended to be a comprehensive review and it is difficult to make a direct comparison to Ohio so, caution should be used when reviewing the information.

The **Arkansas Sentencing Commission** uses a centralized database but it isn't comparable to the deliverables noted above. The vendor, JFA Institute, cannot meet Ohio's specific needs.

The **Florida** legislature recently passed a bill (SB1392)[10] which awaits Governor Scott's signature. SB1392 requires criminal justice data collection and while this effort includes information broader than bail practices and pretrial services, those areas are included for data collection in the legislation. The Department of Law Enforcement is designated as the host agency for the centralized database and other state criminal justice agencies are required to submit data to the centralized database. In an effort to increase transparency, the bill also specifies that the data be made publicly available. The bill includes an appropriation of $1,750,000 for implementation for all parts of the data collection, reporting and housing of the data and making the data publicly available.

The **Pennsylvania Commission on Sentencing**[11] holds a criminal justice centralized database for some data in Pennsylvania. The Pennsylvania Commission on Sentencing currently (and historically) has collected data on imposed sentences. This data is housed in the Justice Network (JNET) system, which is an online system that houses data from their Commission and a variety of different criminal justice agencies within Pennsylvania. Their Commission shared with us that in 2001, the initial cost for the centralized database was $1,000,000 with an additional $125,000 each year for support. Each change to the system averages no less than $10,000.00.

New Jersey recently implemented bail practices and pretrial services reform. In 2014, the Regional Economic Studies Institute at Towson University conducted an estimate cost on this implementation.[12] Cost estimates to collect data on bail practices and pretrial services was included part of the report.[13] In New Jersey, a standalone pretrial software program was selected for use. The program has a cost per case entered into the system ($1.25 per case). As a result, the cost estimate to implement data collection for pretrial services was $377,180 annually.

[10] https://www.flsenate.gov/Session/Bill/2018/01392/?Tab=Analyses
[11] http://www.hominid.psu.edu/specialty_programs/pacs
[12] This study was funded by the American Bail Coalition.
[13] http://www.americanbailcoalition.org/wp-content/uploads/2016/06/new-jersey-pretrial-final-report.pdf

We have also reached out to several other states including Alaska, Alabama and Connecticut. The information from Alaska[14] was difficult to compare to Ohio and we are awaiting information from the other states. In summary, there is wide range of estimates and the information provided creates a framework to help guide and ground the discussion in Ohio as we move forward with respect to data collection on bail practices and pretrial services.

Potential Centralized Database Vendors

Commission staff also made contact with several vendors that specialize in data repositories. These conversations proved useful, as vendors that engage daily in these practices as part of their business know the in-and-outs of what is needed to make such a system functional for Ohio. The vendors included are those that returned our calls or emails and/or those known to work with criminal justice agencies. The information and estimates provided are constructed with the deliverables previously noted on page 8.

The **Ohio Department of Administrative Services**[15] has a Data & Analytics platform that allows data to be received and housed in a secure environment. It would meet Ohio's needs for a centralized database and allows for analyses and reporting of data. The construction, ongoing maintenance or upgrade of the centralized database is state funded (although it is not an unlimited source of funding). There would be costs to the local courts, however. It will cost courts whose vendors must add the data and create an API to this data platform, discussed in the Local Case Management Systems section below.

The **University of Cincinnati**, School of Criminal Justice[16], has an ongoing relationship with several criminal justice agencies in Ohio. They could meet Ohio's needs for a centralized database of this kind and the centralized database would allow for analyses and reporting of data as the bill requires and do so in a secure environment. To create this centralized database, estimated cost is $350,000 startup and at minimum $50,000 in annual maintenance – this cost does not include the cost for local court vendors to add the data and create an API to this data platform, discussed in the Local Case Management System section below.

Appriss[17] is a data and analytics company that allows data to be received and housed in a secure environment. It would easily meet the needs for a centralized database of this kind. Different from the other centralized database estimates, one of the core functions of Appriss is creating the connections between different agencies and a centralized database. As a result, unlike the other situations where the cost to build APIs to connect with the centralized database falls on the local court through their respective vendor, with Appriss, the cost is included on the centralized database side. Startup cost estimate is $250,000-$500,000 and annual maintenance and updates are estimated at $180,000-$300,000. It should be noted that Appriss is used

[14] http://www.akleg.gov/basis/Bill/Detail/29?Root=SB%20%2091
[15] http://www.das.ohio.gov/Divisions/Information-Technology
[16] http://cech.uc.edu/criminaljustice.html
[17] https://apprisssafety.com/

for criminal justice information systems nationwide, including the Interstate Compact for Adult Offender Supervision (ICAOS), VINE – a victim notification network and the Ohio Automated Rx Reporting System.

2. Local Case Management Systems

The data collection effort required in Sub.HB439 and SB274 and the associated costs with it will vary for local courts, dependent upon whether a court's case management system has the ability to track the data or if the system has to be modified to add database fields or codes. There is no one court management system (CMS) vendor for the more than 200[18] courts in Ohio, but several vendors work with the majority of them. CourtView Justice Solutions[19] is one of the larger vendors, working with approximately 50 Common Pleas and approximately 50 Municipal Courts in Ohio. Additionally, CourtView reports their system has the functionality for pretrial/bail variables (although it hasn't been formatted for all Ohio courts) and those variables are being used and data collected in other states for which they provide services. Henschen and Associates, Inc.[20] is likely the next most prevalent vendor for Ohio courts. Once a Court selects a CMS vendor, that CMS vendor and the court work together to build a CMS individualized system – often, a basic package and then the court can request "add ons".

Commission staff contacted Henschen, CivicaCMI and CourtView for general cost assessments for local courts. At the time of this writing, CourtView is the sole respondent. Please note, the information presented here is not to be used for contractually binding quotes and information may only be relevant to courts using this vendor.

CourtView reports the bail/pretrial services functionality does exist for Ohio courts using their court management system. The estimate provided is based upon implementation for a medium-sized court with medium volume, noting that a small court may be able to cut the time and cost in half. For the estimate, the standard hourly rate was used, which is often discounted for current customers. The time and cost to implement the Pretrial Services module includes project management, host environment validation, code configuration, training, and go-live support services. Travel cost is not included in the estimate because this can vary based upon location of the customer. The estimate of $18,700.00 includes the aforementioned services and is approximately 10 days of work, not necessarily 10 sequential days, to complete the work.

In addition, there is a base development cost which includes analysis, development and quality assurance tasks. Base development cost for implementing this bill includes capturing the data elements and creating a transition process (if needed) and is estimated to be $67,500. CourtView does note that some of the elements outlined in the bill are vague, so estimates are "worst case." Transmission requirements have not been

[18] This number derived from 88 courts of common pleas; 126 municipal courts; 21 county courts. It does not count county court areas separately and does not include divisions of municipal courts, i.e. housing, environmental.
[19] http://www.courtview.com
[20] http://www.henschen.com

clarified at this point (and will likely not be clarified until a database has been identified). As a result, estimates for this portion are based on the past experience of CourtView for the transmission requirement. They noted it is possible the estimate may decrease once the requirements are better defined, but also noted that additional time and costs may be necessary once the transmission requirements have been defined.

There aren't policies or standards for how much data and/or what data variables local courts enter into their respective CMS. The Supreme Court of Ohio operates a statewide information exchange system, the Ohio Courts Network (OCN)[21] and the CMS allows courts to collect variables specified by the OCN. However, the OCN was (is) not designed to aggregate data as it is a person-centered system. Additionally and importantly, collecting data is different from ensuring the data is entered accurately and in a standardized format. Currently, data that is collected is, most often, disparate, mismatched and not standardized – lessening its ability to contribute to an evidence informed public policy decision-making process or create a safer, fairer, and more cost-efficient criminal justice system.

Options for advancing the data collection effort as specified in Sub.HB439 and SB274 should include consideration of a phased in approach to allow jurisdictions that need more time to build the requirements into their CMS to do so. Although, not ideal and not recommended, it is also possible to rely on a simple spreadsheet in Excel to collect the data and send it until the CMS systems are updated. Those excel files can be encrypted and downloaded into a statistical analysis package for analysis and reporting. It's a clunky work around and a temporary solution that is cost-effective from a software perspective, but is labor intensive and increases the costs to an individual court to find some way to do the data entry and transmission.

Additional considerations beyond the CMS reporting and data collection also includes staff resources, time and training in the updated and, in some places, new CMS processes. It is difficult to quantify this cost aspect and it may be offset, in some respects, with the opportunity to streamline processes and increase efficiencies. Furthermore, later in this report we mention a potential grant opportunity that can and will assist, through a small case study, in identifying the issues and developing strategies to move forward on bail practices and pretrial services data collection efforts and importantly, recognizing the voice of and impact to local courts.

C. Pretrial Services

The Ad Hoc Committee recommendations regarding reform of pretrial practices in Ohio were guided by A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial Justice System and Agency from the National Institute of Corrections (NIC). The essential elements provide a roadmap to create a system of pretrial

[21] https://www.ohiocourts.gov/OCN/documents/New%20OCN%20Website%20PowerPoint.pdf

justice that maximizes appearance and public safety while also maximizing release and appropriate placement.[22] Of critical importance is acceptance of the guiding principle that pretrial release and detain decisions are based upon risk – a risk-based model proceeds from the presumption that pretrial defendants should be released. NIC also recommends a dedicated pretrial services agency or function within an existing agency is established to assesses pretrial risk, make recommendations to the court, and allow for differential supervision of pretrial defendants.

Around the country, there are entities that provide pretrial services with fewer than five pretrial staff and those with more than 30. Budgets range from less than $200,000 to as much as $10 million.[23] Like Ohio, some jurisdictions across the country have stand-alone pretrial services programs, while others absorb the functions of pretrial services into existing organizations. Kentucky and New Jersey have statewide pretrial services within the Administrative Office of the Courts; other locations include local or county government, probation, sheriff, non-profit or private agencies, and shared locations between multiple agencies. No placement is preferable or superior, as long as it can support the functions and professional standards of pretrial services and is independent of political or adversarial stakeholder offices.[24]

Accordingly, the Ad Hoc Committee did not recommend that every jurisdiction establish a new agency or department for pretrial services. Every jurisdiction is different in terms of the volume and type of cases, the timing and process for the initial bail hearing, the laws that govern pretrial release decision making, geography and demographics, technological capacity, the administrative locus of pretrial services functions, and many other factors.[25] Thus, the Ad Hoc Committee determined that jurisdictions should be left to determine what the pretrial function/agency looks like to meet their needs based upon objective data.

The Ad Hoc Committee recognized that a robust pretrial agency or department will have a significant fiscal impact on budgets and the Commission views this investment in pretrial services as a shift of current funding from the costs of incarceration to the costs of pretrial services. It is imperative that dedicated funding and support exist around the pretrial function to allow these entities or individuals to give objective recommendations to the court on release and detain decisions. National guidance offers that the first step in shaping a pretrial services budget is to contemplate the framework of a legal- and evidence-based pretrial justice system and the associated functions of pretrial services within that framework. The functions may include administering pretrial assessments, sharing assessment reports and recommendations, tracking cases pending adjudication, and reporting on pretrial outcomes, process, and volume. Each of these functions will have a

[22] "Pretrial Justice: How to Maximize Public Safety, Court Appearance and Release: Participant Guide", National Institute of Corrections, Internet Broadcast, September 8, 2016, p. 26.
[23] https://university.pretrial.org/viewdocument/pretrial-justice-and-the-state-cour-1
[24] *Id.* p. 6
[25] *Id.* p. 3

balance of costs associated with staff time, supporting technology, and infrastructure.[26] A high functioning pretrial services entity has the technology to support the accurate scoring of pretrial assessment, enhance supervision and case management, and track process and outcome data.

As noted in the Ad Hoc Committee report, Kentucky, in 2012, operated a statewide pretrial system with 294 employees covering 120 counties with a budget of $11,820,000. According to their Annual Report, the cost of pretrial release per defendant was $11.74 while the cost for pretrial incarceration was $613.80 per defendant.[27] In Salt Lake (Utah) County, where pretrial services are administered and funded at the local level, the budget for case management in 2016 was $1,477,722. Jail screening is funded separately and costs $932,578.59.[28]

Summit County's pretrial service program was also featured in the Ad Hoc Committee report, noting that they began utilizing a validated risk assessment tool in felony cases in 2006. Pretrial investigations are conducted in the county jail on all new felony bookings, including an interview with the defendant, and the risk assessment tool's report is generated within two days of incarceration. Pretrial staff are present in all arraignments to assist the court in bail decisions. An independent, non-profit community corrections agency (Oriana House) provides pretrial supervision services to the court. In 2016 the program supervised 1,562 clients with a 77 percent success rate. Costs for pretrial supervision were dependent upon the level of supervision. A minimum supervision level cost $1.32 per day per defendant, medium supervision cost $2.64 per day and maximum supervision cost $5.02 per day. The total cost of the pretrial supervision program in 2016 was $783,000. Summit County Jail's daily rate for 2016 was $133.25 per person, per day.[29]

Pretrial services are a central component of transitioning from a money-based system of release to a system that uses a myriad of non-financial conditions.[30] It is important to explore justice system cost avoidances and/or reinvestment strategies when considering costs associated with developing or enhancing pretrial services. Cost-benefit analyses in numerous jurisdictions have demonstrated that implementing legal and evidence-based pretrial policies can result in significant savings based on improvements in public safety, jail utilization, and court appearance rates. For example, daily pretrial supervision costs are a fraction—typically less than 10%—of the daily cost of pretrial detention.[31]

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[26] *Id.* p. 3
[27] Kentucky Pretrial Services; https://www.pretrial.org/download/infostop/Kentucky%20Pretrial%20Services%20History%20Facts%20and%20Stats.pdf
[28] Kele Griffone, Division Director, Salt Lake County Criminal Justice Services, December 1, 2016.
[29] All information was provided to the Ad Hoc Committee by Kerri Defibaugh, Summit County Pretrial Services Supervisor and Melissa Bartlett, OHIO pretrial Services Coordinator, September 2016.
[30] https://university.pretrial.org/viewdocument/pretrial-justice-and-the-state-cour-1 p. 8
[31] Pretrial Justice Institute, Pretrial Justice: How much does it cost? (2017) and Crime and Justice Institute, The Cost of Pretrial Justice, Public Welfare Foundation (2015).

C. Risk Assessment

According to the National Institute of Corrections, the use of a validated pretrial risk assessment criteria is imperative to gauge an individual defendant's suitability for release or detention pending trial. A good risk assessment tool is empirically based—preferably using local data — to ensure that its factors are proven as the most predictive of future court appearance and re-arrest pending trial.[32] Risk assessment tools utilized pretrial should inform the court's consideration of the release and detain decision, therefore, the assessment should be completed prior to the decision of whether to release or detain the defendant is made, and the assessment *should never supplant the individual decision making of the judge.*

The Ad Hoc Committee recommended every jurisdiction in Ohio should be mandated to utilize a validated risk-assessment tool to assist in release and detain decisions pretrial. However, it did not recommend one specific validated risk assessment tool. There is not a standard definition, in any jurisdiction, of "validated risk assessment tool". However, according to the Pretrial Justice Institute, risk assessment tools are "developed by collecting and analyzing local data to determine which factors are predictive of pretrial success and to determine their appropriate weight." Validation is a multi-step process that looks at local indicators and predictive weights. The validation process is usually performed by a university or professional vendor with expertise and for tools to remain valid and achieve intended outcomes (in this case, maximizing pretrial release), the process should occur at regular intervals.[33]

Currently, some jurisdictions are utilizing the Pretrial Assessment Tool (PAT) in the Ohio Risk Assessment System (ORAS)[34] and some jurisdictions are utilizing other validated risk assessment tools including the Laura and John Arnold Foundation's Public Safety Assessment (PSA) tool – both tools are available for no cost. There are other validated tools in use across the country and the Commission has prepared a compendium of known validated risk tools. One may note that in 2011, Revised Code Section 5120.114 was enacted as a part of a larger criminal justice legislative reform package (HB86)[35] focused on adult felony offenders and sentencing. It specifies the use of a single validated risk assessment tool selected by the Department of Rehabilitation and Correction (DRC). There is reason to deviate from this mandate and pursue statutory revision for several reasons including: the evolution and availability of validated, no cost, pretrial evidence informed risk assessment tools; the administration of pretrial services is outside the scope of the various divisions and institutions of the DRC, thus, selection of a validated risk assessment tool specific to pretrial services should be determined at the local

[32] "Pretrial Justice: How to Maximize Public Safety, Court Appearance and Release: Participant Guide", National Institute of Corrections, Internet Broadcast, September 8, 2016, p. 39.

[33] https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c8bd044e-0215-9ab6-c22e-b1a4de912044&forceDialog=0

[34] The number and/or a list of agencies and/or courts using the ORAS-PAT is unable to be produced per email communication with the Ohio Department of Rehabilitation and Correction.

[35] http://archives.legislature.state.oh.us/BillText129/129_HB_86_EN_N.html

level; and according to Dr. Edward Latessa[36] (the Principle Investigator for the creation and validation of ORAS[37]), if we know what tool a jurisdiction is using and have the data, common risk categories can be developed.

The Ad Hoc Committee report cited that Lucas County began utilizing the Arnold Foundation's PSA tool in January 2015 to inform release and detain decisions at first appearances. The county was under a federal court order that capped the number of jail inmates which resulted in defendants being released to adhere to the order. The "Arnold" tool provides separate indicators for risk of failure to appear and new criminal activity and utilizes common non-interview dependent factors that predict risk, which optimizes the existing human and financial resources needed to administer risk assessments. The assessment system was implemented in January 2015 and data presented in 2016 showed a drop in the number of pretrial bookings. Prior to implementation of the risk assessment, 38.4 percent of all bookings were released due to the federal court order. After implementation of the risk assessment, only 4.3 percent of all bookings were released due to the federal court order. Cases disposed of at the first appearance have doubled since the implementation of the assessment tool. The data shows that after the first year of implementation, court appearance rates have improved, public safety rates have improved, and pretrial success rates have improved.[38]

IV. Additional Cost and Implementation Assessment: Grant application – Gap Analysis

As previously noted, it is difficult to estimate cost, identify the issues and develop strategies to move forward on bail practices and pretrial services data collection required in Sub.HB439 and SB274 because criminal justice data in Ohio is housed in siloes, is incongruent and not standardized. Local and state agency data systems lack connectivity and sharing agreements are underutilized.

The Office of Criminal Justice Services (OCJS) in partnership with the Commission, has applied for federal funding[39] for a small case study to assess the impact on local courts for bail practices and pretrial services data collection. The project, if funded, will determine if the data on bail practices and pretrial services is readily available, estimate vendor costs and evaluate length of time for implementation for courts in the early stages of pretrial service programs participating in the study. A part of the grant application includes technology funds to work with the courts and their court management system vendor to cover costs (or a portion of) of adding identified data points to their current court management systems, if needed.

We know this small case study is not representative of all courts in Ohio, but it will help identify the issues and develop strategies to advance bail practices and pretrial services data collection efforts and

[36] http://cech.uc.edu/criminaljustice/employees.html?eid=latessej
[37] http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf
[38] VanNostrand, Marie, "Assessing the Impact of the Public Safety Assessment", presented by Michelle Butts, Lucas County Court of Common Pleas, September 2016.
[39] https://ojp.gov/funding/Explore/pdf/2018sjssacsol.pdf?ed2f26df2d9c416fbddddd2330a778c6=zvsbtvntvp-zvptbwbvp&mc_cid=2e4289a375&mc_eid=4653e3922a

importantly, recognize the voice of and impact to courts. The goal of the grant project will, hopefully, answer the following questions:

→ where do courts currently stand with regard to data collection on bail and pretrial services?
→ what are the challenges for courts for data collection on bail and pretrial services?
→ what infrastructure is needed for data collection on bail and pretrial services?
→ what are the challenges for implementation that can be identified to help inform others about the process?

As part of this case study, a smaller subset of courts that currently have pretrial service programs in place will be evaluated particularly for strategies that worked well during implementation, challenges they faced that could inform others, and any practices they have found effective. This will complement the gap analysis by providing information that may be helpful to other courts as they begin their own pretrial service programs.

The grant application was submitted on March 23, 2018. If awarded, the grant period begins October 2018 for one year. Funding may be available for an additional one or two year period and should we be awarded the initial funding, we intend to apply for the subsequent period to continue data collection gap analysis, implementation and training.

V. Conclusion and Summary

We are pleased that the Commission's study and work on bail practices and pretrial services inspired legislation in the 132nd Ohio General Assembly, Sub.HB439 (Dever, Ginter) and SB274 (McColley). Implementation of the Ad Hoc Committee recommendations will, over time, result in cost savings to the justice system and result in a pretrial justice system that maintains due process and equal protection while ensuring public safety and court appearances.

The recommendations of the Ad Hoc Committee endorsed by the Commission are designed to be holistic and focus on achieving consistency, fairness and efficiency in the pretrial system while decreasing the reliance on monetary bail. The recommendations also promote consistent and uniform practices that realize fundamental fairness and promote public safety among counties and courts within counties.

Criminal justice policy and legislation crafted without accurate data to illustrate the practical realities and functions of the system all too often results in public policy concocted on situational circumstances with far-reaching effects and unintended consequences. A foundation for robust data collection going forward for bail practices and pretrial services is essential to achieving meaningful reform efforts. Criminal justice data collection in a uniform, standardized way promotes public safety and public confidence by transforming disconnected, irregular systems into transparent, consumable information.

We again suggest, as recommended by the Ad Hoc Committee, that the General Assembly amend the Ohio Revised Code to require the Ohio Criminal Sentencing Commission to form an ongoing committee tasked with facilitating implementation of the recommendations and legislation and to monitor progress and trends

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regarding bail practices and pretrial services. The Ohio Criminal Sentencing Commission should also be tasked with data collection, analysis and periodic reporting on bail practices and pretrial services in Ohio. Information obtained from a meaningful data collection effort advances effective technologies and practices, identifies operational and program needs as well as efficiencies, promotes performance measurement and role definition and wisely spends tax resources. Public data are foundational to criminal justice reform—both as a guide to understand where the justice system can be improved and as a metric to assess reforms as they're being implemented.

Based upon scarce and difficult to obtain information, we have done our best to gather information regarding fiscal impact for implementation of the provisions in Sub.HB439 and SB274. As previously stated, this report reflects only a sampling of possibilities for estimated impact – which cannot be fully vetted until there is certainty in bail practices and pretrial services reform, including the identification of specific data points/variables for collection. Also please note, our effort to gather information is ongoing. Thus, when and if relevant, applicable information is received, future reports may be produced.

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APPENDIX A

STATE	BAIL REFORM EFFORTS
Alabama	Legislation Pending (SB 31). Presumption of release in municipal court. Bill has stalled. Per the Southern Poverty Law Center 78 cities had reformed their bail practices as of 12/17.[i]
Alaska	Reform legislation (SB 91) passed in 2016. Went into effect 1/1/18. Defendants graded on risk of FTA and to commit new offenses. Division of Corrections scores defendants and monitors release conditions.[ii]
Arizona	Rule changes by Supreme Court. Standardized assessment (PSA) used statewide.[iii]
California	Pending legislation (SB10) passed out of Senate and pending in Assembly.[iv]
Colorado	Reform took place in 2014. Recommended use of a risk assessment tool statewide. In March of 2018 their Supreme Court created a new commission to examine further reforms.[v]
Connecticut	Statewide pretrial services agency administers a risk assessment tool. Further reform legislation passed in 2017 including a presumption of non-financial release in most misdemeanor cases.[vi]
Delaware	Reform bill signed by governor in January 2018. Encourages use of risk assessment tool and presumption of release over cash bail.[vii]
District of Columbia	Robust pretrial services agency that uses risk assessments and graduated supervision levels. 92% of defendants released pretrial in 2015. 90% made all court appearances.[viii]
Florida	Large criminal justice reform package being considered by legislature. Bail reform efforts died in committee in 2018.[ix]
Georgia	Reform Legislation (SB407) has passed both houses and is in conference.[x]
Hawaii	Bail reform bills deferred to await a Pretrial Task Force report later this year.[xi]
Idaho	Bail reform bill introduced in legislature 2018. Legislature adjourned before passage. MacArthur Foundation grant rolling out pilot in Ada County (Boise).[xii]
Illinois	Commercial bail system has been outlawed. Bail reform act passed in 2017.[xiii]
Indiana	In 2016 the Indiana Supreme Court adopted changes to criminal rules encouraging use of pretrial risk assessments. Now working on implementation in pilot counties.[xiv]
Iowa	Department of Corrections operating a pilot program in 4 counties using risk assessment tools for bail.[xv]
Kentucky	Kentucky outlawed commercial bail in 1976. Law mandating usage of a risk assessment tool passed in 2011. Recently adopted court rules mandate immediate non-financial release for some low level crimes.[xvi]

APPENDIX A

STATE	BAIL REFORM EFFORTS
Louisiana	New Orleans operating a pilot program utilizing pretrial risk assessment tools.[xvii]
Maine	Expanded pretrial supervision funding in 2016 following a task force report.[xviii]
Maryland	Bail system overhauled through Judicial action, deprioritizing use of cash bail.[xix]
Massachusetts	Pending legislation (S.2371) in a conference committee.[xx]
Michigan	Senate Judiciary has formed task force on pretrial detention to start work on bail reform legislation.[xxi]
Minnesota	Reformed bail bond industry practices in 2016. Hennepin County (Minneapolis) has task force working toward bail reform.[xxii]
Mississippi	Legislation (HB720) died in Committee in 2018.[xxiii]
Missouri	Pending legislation in House (HB1335).[xxiv]
Montana	Reform passed in 2017. Required use of risk assessment tool in setting bail.[xxv]
Nebraska	Reforms passed in 2017.[xxvi]
Nevada	AB136 vetoed by Governor in 2017.[xxvii]
New Hampshire	Legislation pending (SB 556).[xxviii]
New Jersey	Massive reform of bail system in 2017 - N.J. Stat. §2A:162-17.[xxix]
New Mexico	Constitution amended in 2016. Lawmakers currently working on implementation.[xxx]
New York	Pending criminal justice reform legislation within budget bill contains substantial bail reform provisions.[xxxi]
North Carolina	Pilot program through McArthur Foundation in operating Mecklenburg County.[xxxii]
Ohio	Pending legislation.
Pennsylvania	The city of Philadelphia ended cash bail in 2018.[xxxiii]
Rhode Island	Justice Reinvestment passed in 2017, including using risk assessment within existing pre-trial services units.[xxxiv]

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APPENDIX A

STATE	BAIL REFORM EFFORTS
South Dakota	Risk assessment used statewide for juveniles. Pennington County (Rapid City) part of Safety and Justice Challenge through MacArthur foundation.[xxxv]
Tennessee	City of Nashville currently negotiating reforms for misdemeanors including use of risk assessment tool.[xxxvi]
Texas	Reform legislation in response to federal lawsuits from inmates failed to pass in 2017.[xxxvii]
Utah	The court system adopted a statewide risk assessment in 2017. They are working with legislature on implementation.[xxxviii]
Vermont	Legislation pending – H.728. Has passed House and awaits Senate approval.[xxxix]
Virginia	Risk assessment in use statewide.[xl]
Washington	Pretrial Reform Task Force formed in 2017.[xli]
West Virginia	HB 4511 passed House 02/18 and are pending in Senate.[xlii]

APPENDIX A

[i] https://www.splcenter.org/news/2016/12/06/splc-prompts-alabama-cities-reform-discriminatory-bail-practices
[ii] http://www.correct.state.ak.us/pretrial
[iii]https://www.dcourier.com/news/2017/nov/06/arizona-national-leader-pre-trial-justice-reform/
http://www.azcourts.gov/Portals/20/2016%20December%20Rules%20Agenda/R_16_0041.pdf
[iv] https://www.aclunc.org/article/california-money-bail-reform-act-2017
[v] http://www.ncsl.org/Documents/CJ/ColoradoPretrialRelease.pdf
http://lawweekcolorado.com/2018/03/rounding-reform-efforts/
[vi] http://www.ct.gov/ctsc/lib/ctsc/Pretrial_Release_and_Detention_in_CT_2.14.2017.pdf
[vii] https://www.delawareonline.com/story/news/politics/2018/01/16/delaware-senate-sends-bail-reform-bill-gov-carney/1037251001/
[viii] https://www.psa.gov/?q=data/performance_measures
[ix] https://www.pnj.com/story/news/2018/02/01/3-criminal-justice-reform-bills-advance-florida-legislature/1082801001/
[x] https://gov.georgia.gov/press-releases/2018-02-14/deal-introduces-criminal-justice-reform-legislation
[xi] http://www.staradvertiser.com/2018/01/31/hawaii-news/bail-reform-bill-shelved-1-day-before-aclu-report/
[xii] https://www.usnews.com/news/best-states/idaho/articles/2017-10-05/idaho-county-awarded-1m-grant-for-criminal-justice-reform
[xiii] http://www.chicagotribune.com/news/local/politics/ct-bruce-rauner-bail-bill-met-0610-20170609-story.html
[xiv] https://www.in.gov/ipdc/public/2745.htm
[xv] https://www.usnews.com/news/best-states/iowa/articles/2018-01-24/iowa-county-pilots-pretrial-tool-for-jail-release
[xvi] http://www.bgdailynews.com/news/kentucky-addressing-pretrial-detention-rates/article_cb358acb-154a-5676-a85a-22e8e56f86a6.html
[xvii] https://www.theatlantic.com/politics/archive/2017/10/new-orleans-great-bail-reform-experiment/544964/
[xviii] https://www.aclu.org/news/bill-start-fixing-maines-fine-and-bail-policies-becomes-law
[xix] http://www.baltimoresun.com/news/maryland/politics/bs-md-bail-reform-statistics-20180116-story.html
[xx] http://www.wbur.org/news/2018/03/23/massachusetts-compromise-criminal-justice-reform-bill
[xxi] http://council.legislature.mi.gov/Content/Files/cjpc/Minutes.Final_CJPC_August%202%202017.pdf
[xxii] https://www.hennepin.us/-/media/hennepinus/your-government/leadership/documents/ADI-Handout-October-2016.pdf?la=en
[xxiii] https://legiscan.com/MS/bill/HB720/2018
[xxiv] https://house.mo.gov/LegislationSP.aspx?q=HB1335&report=billsearch
[xxv] https://governor.mt.gov/Newsroom/governor-bullock-signs-bills-to-reform-montanas-criminal-justice-system
[xxvi] https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=31423
[xxvii] https://www.leg.state.nv.us/Session/79th2017/Reports/history.cfm?ID=289
[xxviii] https://legiscan.com/NH/text/SB556/id/1676765
[xxix] https://www.judiciary.state.nj.us/courts/criminal/reform.html
[xxx] https://nmcourts.gov/pretrial-release-and-detention-reform.aspx
[xxxi] https://www.ny.gov/programs/2017-criminal-justice-reform-act
[xxxii] http://www.safetyandjusticechallenge.org/challenge-site/mecklenburg-county/
[xxxiii] https://www.phillymag.com/news/2018/02/02/cash-bail-city-council-resolution/
[xxxiv] http://webserver.rilin.state.ri.us/BillText17/HouseText17/H5128A.htm
[xxxv] http://www.safetyandjusticechallenge.org/challenge-site/pennington-county/
[xxxvi] https://www.tennessean.com/story/news/2018/02/07/nashville-bail-reform-money-judges/317283002/
[xxxvii] https://legiscan.com/TX/bill/SB1338/2017
[xxxviii] https://www.sltrib.com/news/politics/2018/01/23/utah-chief-justice-praises-collaboration-between-courts-and-legislators-which-has-led-to-significant-judicial-system-reforms/
[xxxix] https://legislature.vermont.gov/bill/status/2018/H.728
[xl] https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/new-norm-pretrial-justice-commonwealth-virginia.pdf
[xli] https://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=12727
[xlii] http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=4511&year=2018&sessiontype=RS

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APPENDIX B – GENERAL PROVISIONS

Purposes included in Sub.HB 439-9 SB 274	*Considerations*	*OCSC Recommendations*
Reduction in use of monetary bail	The spirit of the bill is an emphasis on a presumption for nonmonetary release while considering risk to public safety and risk of failure to appear (FTA).	Reinsertion of original language in 2937.23 (A)(4) "shall not require monetary security as bail if the amount of the monetary security is designed to keep the accused detained." Add a presumption of nonfinancial release and/or provisions for statutory preemptive release or detention based on category of offense, as recommended in the Ad Hoc Committee Report. Insert language similar to Colorado §16-4-103 (4)(c): "The judge shall … consider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration"
Elimination of use of bail schedules	Bond should be determined based on risk of FTA and/or risk to public safety. In the limited circumstance where bail schedules are permitted they should be standardized across jurisdictions.	Sub.HB439 requires a hearing when a judge or magistrate is "readily available." It is recommended that this language be replaced with either a statutory time for a hearing to occur following bond being set by a schedule, e.g. "within 72 hours" or the Ad Hoc Committee report recommendation for the hearing to occur within a "reasonable" time.
Collected list of validated risk assessment tools by designated entity	List could be more of a "compendium" – a reference for courts to use in selecting a tool. Risk assessment tools will need to be re-validated at regular intervals with local data.[1]	The Commission recommends the language be changed to the creation of a "Compendium" of validated risk assessment tools. "Within one year of the effective date of this section, create a compendium of validated risks assessment tools for the purpose of setting bail under sections 2937.222 and 2937.23 of the Revised Code"
Monitoring/reporting on bail and Pretrial services process	Helps to achieve uniform, consistent bail processes. Helps to ensure those who pose the greatest risk to public safety and failure to appear are detained while awaiting trial while maximizing release of pretrial detainees to effectively utilize jail resources.	See data variable chart of current and proposed changes to data collection.

[1] https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c8bd044e-0215-9ab6-c22e-b1a4de912044&forceDialog=0

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APPENDIX B – GENERAL PROVISIONS

Purposes included in Sub.HB 439-9 SB 274	*Considerations*	*OCSC Recommendations*
Changes to Criminal Rules, Rules of Superintendence, and developments of model entries	In 2017, the Commission formally requested its recommendations specific to Court Rule be assigned to the relevant Supreme Court of Ohio Commission(s) for consideration and subsequent action. Accordingly, the recommendations, specific to Criminal Rule 46, were forwarded to the Commission on the Rules of Practice and Procedure for consideration, noting implementation cannot be until July 2019, at the earliest.	Changes to the Rules necessitate periods of public comment, and as such there may need to be an extension to the enactment period for the statute.

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APPENDIX B – DATA VARIABLES

Data collection is the only way to assess the effectiveness of bail practices and pretrial services in Ohio. Data collection and analysis contributes to informed practices that are consistent and uniform, helps realize fundamental fairness and promotes public safety among counties and courts within counties. In order to assist in the successful implementation of the recommendations from the Commission's Ad Hoc Committee on Bail and Pretrial Services[1] and in consideration of the legislative proposals included in Sub.HB439 and SB274, the Commission offers the following analysis and recommendations.[2]

Variable[3]	*Considerations*	*OCSC recommendations*
Whether the defendant caused physical harm to persons or property while released on bail or under pretrial supervision	As written, this information doesn't fully capture the concept of safety and we may be better served by replacing this measure. For example, the Measuring What Matters (NIC)[4] report suggests that safety can be understood through collection of data on the percentage of supervised defendants who are not charged with a new offense during the pretrial stage.	We recommend replacing this measure with the following: 1) **If a defendant is charged with a new offense while on pretrial supervision.**[5] Adding this measure captures new charges while on pretrial supervision, thus allowing an accurate determination of safety.
Whether the defendant failed to appear before the court as required after being released on bail or under pretrial supervision	As noted in the Commission's Ad Hoc Committee Report on Bail and Pretrial Services, "One of the primary purposes of pursuing reform of bail practices and pretrial services is to ensure that those who pose the greatest risk to public safety and failure to appear are detained while awaiting trial while maximizing	N/A

[1] https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/commReports/bailPretrialSvcs.pdf
[2] Specific to the data collection provisions, please note that a data dictionary defining all data variables will determine if a court captures the information within their current court management system. A data dictionary is critical to the implementation of data collection specific provisions.
[3] For all variables, standardization of information and data entry is necessary to ensure the required information is accurately collected and reported.
[4] https://www.pretrial.org/download/performance-measures/Measuring%20What%20Matters.pdf
[5] While the NIC report indicates reporting the percentage, to reduce burden on courts here it is simply asked if a new offense was committed during pretrial supervision; from this, percentage rates can be calculated during the analysis and reporting stage.

APPENDIX B – DATA VARIABLES

Variable[3]	*Considerations*	*OCSC recommendations*
	release of pretrial detainees to effectively utilize jail resources" (p. 13).[6] As a result, independent of risk assessment score, collecting failure to appear information on defendants is recommended. Additionally, as noted in the Ad Hoc Committee's report, under Ohio's current law, failure to appear after release is punishable as a fourth degree felony or a first degree misdemeanor.[7] Thus, that means capturing this information allows a better understanding of incidence, and potentially prevalence after a longer period.	
Whether the court accepted the recommendation of a pretrial service agency in setting bail	This variable is designed to measure if the pretrial assessment and recommendation to the court is performing as intended. However, this variable has limitations without information about how pretrial recommendations are formulated and/or information about the pretrial services agency and its operation.	We recommend replacing this measure and instead including the following measures on pretrial supervision: 1) **Does the pretrial recommendation align with the risk assessment guidance for release or detention.** 2) **Type of pretrial supervision.** 3) **The type of pretrial supervision termination**. In order to give context and increase the value of this information, data collection that focuses on pretrial services is recommended. This provides a better

[6] https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/commReports/bailPretrialSvcs.pdf
[7] R.C. 2937.99

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APPENDIX B – DATA VARIABLES

Variable[3]	*Considerations*	*OCSC recommendations*
		understanding of happens during this phase and contributes to reporting a Success Rate.[8]
The date of the defendant's arrest	This information is valuable because it can be used to calculate savings in jail space as well as understand patterns of use of or entry into jail. It also gives us the ability to better understand time until disposition as this marks the beginning of the process at entry into the jail.	N/A
The date of the defendant's final release if the defendant was found not guilty in the case, or the complaint, indictment, or information in the case was dismissed, or the sentence was suspended at the time of sentencing	This is valuable information to identify patterns for cases and provides the ability to follow a case through to disposition. It also clarifies the processes and factors that impact the time that it takes a case to move through the system. However, for a complete picture, information on release as a result of bail should also be reported.	We recommend clearly separating this concept into two different measures: 1) **Date of the defendant's release from jail as a result of setting and posting bail** (or indication of no release). 2) **Date of the defendant's release from jail as a result of not guilty, dismissed, suspended** (or indication of no release because of other pending cases). Adding a measure that captures when someone is released as a result of bail has several benefits. Tracking how many people are released as a result of bail may allow us to calculate savings on jail costs and space

[8] https://www.pretrial.org/download/performance-measures/Measuring%20What%20Matters.pdf

APPENDIX B – DATA VARIABLES

Variable[3]	*Considerations*	*OCSC recommendations*
		as well as help counties, courts and jails maintain this information.
The case number	To ensure that pretrial information is linked to the same case, case number is necessary. As one example, an individual who has more than one case in a court at the same time could potentially have all of that information merged together accidentally if case numbers are not included. Correct information can be connected to the right case if case number is provided.	N/A
The name of the court	This information is needed to help with reporting so that data can be sorted to the appropriate county or court type.	N/A
The name of the judge	This information is not necessary.	We recommend removing this measure.
The name of the offender	Acts as a secondary identifier to ensure the correct information about bail and pretrial is combined with the correct case.	N/A
All of the following for any offense that the offender is charged with committing:		
The name of the offense	This will allow us to better understand the types of offenses that come before judges and provides crime/offense trend and pattern identification.	N/A
The section of the Revised Code that specifies the offense	This will allow us to better understand and record the offenses as categorized in the Ohio Revised Code that come before judges to better tell the story for courts, counties and Ohio. It also provides crime/offense trend and pattern identification.	N/A

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APPENDIX B – DATA VARIABLES

Variable[3]	*Considerations*	*OCSC recommendations*
The degree of the offense	This information is needed to help with better sorting of offenses and so that data can be aggregated to meaningful levels for reporting.	N/A
The validated risk assessment tool used to set bail	The current bill/s do not require use of just one single risk assessment tool for pretrial evaluation. As a result, to understand the risk score assigned to an offender, knowledge of what tool what used for the assessment is vital.	N/A
The risk score assigned to the offender	Knowing risk score provides data about decisions regarding pretrial release and may provide additional information when compared to pretrial service recommendations or release decisions. Because risk scores may be linked to Appearance Rate calculations, this information should be collected to also flesh out and better understand patterns in Ohio tied to failure to appear numbers.	N/A
Release recommendations	Having information on the release recommendation from pretrial services allows a better understanding of the pretrial service processes, including Concurrence rates (using additional information from data recommendations in the bill).	In addition to release recommendations we recommend collecting: **1) Release decision of the judge including conditions of pretrial supervision.** **2) Opposition of prosecutor to release recommendation.** By adding a measure on the pretrial release decision we have information on overall patterns in courts, counties and in Ohio. This information (in combination with release recommendations) will also allow

APPENDIX B – DATA VARIABLES

Variable[3]	*Considerations*	*OCSC recommendations*
		for the calculation of a Concurrence Rate, which is recommended in the Measuring What Matters (NIC)[9] report. The information on prosecutor objection(s) provides an additional way to understand at least a portion of the decision-making process. For example, it may help to explain why a release decision is different from a release recommendation.
Monetary bail amount set	This information will allow uniformity in the money bail system and as a result is valuable to collect and understand as part of bail reform in Ohio.	We also recommend an additional measure on: **1) Bail/Bond status.** If the person was not able to obtain the required monetary amount for release, then we would want to be aware of this so that they are not counted in another category (for example, not having this information may impact jail length or release information and should be known). In addition, this status would work to better understand if uniformity in monetary bail is accomplishing its goal.
Whether a bail schedule was used	Such information allows Ohio to identify flow patterns in defendants. This can be used to determine "high	N/A

[9] https://www.pretrial.org/download/performance-measures/Measuring%20What%20Matters.pdf

APPENDIX B – DATA VARIABLES

Variable[3]	*Considerations*	*OCSC recommendations*
	traffic" times and patterns (for example, weekends and holidays) in combination with the provided arrest dates.	
Any other information the supreme court requests for the purposes described in section 2937.47 of the Revised Code	N/A	N/A

Appendix C- Buckeye Institute Analysis

THE BUCKEYE INSTITUTE

The Facts:
A Cost Savings Analysis of Bail Reform

Ohio's current cash bail system is in dire need of reform, it is an inefficient, expensive, unfair means of protecting communities that has proven no guarantee to stopping repeat offenders. As the debate over bail reform continues, The Buckeye Institute analyzed the estimated statewide cost savings that will result from a reduced jail population due to the use of verified risk-assessment tools.

Looking at Summit County, which uses verified risk-assessment tools to inform pretrial detention decisions, Buckeye found that Ohio will realize an annual cost savings of **$67,136,121** if it reforms its cash bail system and gives judges greater flexibility to use proven evidence-based, risk-assessment tools to assess the risk an individual poses to the community rather than relying on cash bail.

As seen in Table 1 in the methodology, The Buckeye Institute used data from official government sources to arrive at the statewide cost savings.

- Total inmates statewide, excluding Summit County: 18,858[1]
- Total inmates in Summit County (after they adopted risk-assessment tools): 667[2]
- Inmates awaiting sentencing statewide, excluding Summit County: 10,666[3]
- Inmates awaiting sentencing in Summit County (after they adopted risk-assessment tools): 457[4]
- Statewide average of the daily cost per inmate: $64.45[5]
- Total reduction of days in jail in Summit County, yearly total estimate: 60, 918[6]

Methodology: How the Savings Were Calculated

Cost savings calculations were arrived at using the following formula:

$$Savings_{OH}^{Year} = Inmates_{OH}^{Daily} \times Cost_{OH}^{Daily} \times 365 \times \%Reduc_{Summit} \times \left(\frac{\%Pretrial_{OH}}{\%Pretrial_{Summit}}\right)$$

[1] 2016 Jail Sentenced Status Data, Bureau of Adult Detention, Department of Rehabilitation and Correction, June 30, 2017, on file with author.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] **House Bill 439 of the 132nd General Assembly Fiscal Note & Local Impact Statement**, Ohio Legislative Service Commission, March 20, 2018.
[6] Jonathan Witmer-Rich, Jay Milano, Carmen Naso, and Mary Jane Trapp, Cuyahoga County ***Bail Task Force: Report and Recommendations***, March 16, 2018.

Buckeye looked at Ohio's total daily inmate population ($Inmates_{OH}^{Daily}$), multiplied by the average daily cost of each inmate ($Cost_{OH}^{Daily}$), multiplied by 365 days, multiplied by the proportional reduction experienced by Summit County ($\%Reduc_{Summit}$), multiplied by the ratio of Ohio's pretrial percentage to Summit County's $\left(\frac{\%Pretrial_{OH}}{\%Pretrial_{Summit}}\right)$.

Because the reform only affects bail eligible inmates who are awaiting sentencing, Buckeye estimated the reduction in inmate population statewide by comparing the proportion of pretrial inmates in Ohio statewide with that of Summit County.

Due to the absence of data indicating the numbers of pretrial inmates in Summit County who were eligible to be released on bail, Buckeye assumed that a similar proportion of pretrial inmates will be affected. Thus, the number indicates the savings if Ohio's pretrial inmate numbers are reduced in a similar proportion to Summit County's.

Based on this data and the assumptions outlined the savings are calculated:

Statewide Cost Savings

$$Savings_{OH}^{Year} = 18{,}858 \times \$64.45 \times 365 \times .20 \times \frac{.566}{.748} = \mathbf{\$67,136,121.25}$$

In order to properly estimate the proportion of pretrial inmates in Summit County *if they had not been released due to the reform*, the daily average for the reduction in jail days experienced by Summit County was calculated by dividing their reported yearly total for reduced jail days by 365.

$$Reduc_{Summit}^{Daily} = \frac{Reduc_{Summit}^{Year}}{365} = \frac{60{,}918}{365} = 166.9$$

The proportion of remaining pretrial inmates reported on a single day plus the daily average of the reduction they reported as being due to the reform were divided by the total inmates in Summit County on a single day after the reform, plus the daily average of the reported reduction. Adding the average daily reduction in jail days to the observed inmates on a single day allows us to estimate what the proportion of pretrial inmates would be if the reform had not occurred.

$$\%Pretrial_{Summit} = \frac{Pretrial_{Summit}^{Daily} + Reduc_{Summit}^{Daily}}{Inmates_{Summit}^{Daily} + Reduc_{Summit}^{Daily}} = \frac{457 + 166.9}{667 + 166.9} = .748 = 74.8\%$$

The proportional reduction in total inmates is found in a similar fashion: dividing the reported daily average reduction by the remaining inmates on a single day plus the daily average reduction.

$$\%Reduc_{Summit} = \frac{Reduc_{Summit}^{Daily}}{Inmates_{Summit}^{Daily} + Reduc_{Summit}^{Daily}} = \frac{166.9}{667 + 166.9} = .20 = 20\%$$

The proportion of pretrial inmates statewide was found by taking the proportion of inmates awaiting sentencing to total inmates. All statewide numbers exclude Summit County, as Summit County has already experienced the effects of bail reform.

$$\%Pretial_{OH} = \frac{Pretrial_{OH}^{Daily}}{Inmates_{OH}^{Daily}} = \frac{10{,}666}{18{,}858} = .566 = 56.6\%$$

To estimate the proportional reduction in inmates statewide, researchers assumed that a similar proportion of pretrial inmates would be released if a similar policy was implemented. This can be written thus:

$$\frac{\%Reduc_{OH}}{\%Pretrial_{OH}} = \frac{\%Reduc_{Summit}}{\%Pretrial_{Summit}}$$

Rearranged, this implies: $\%Reduc_{OH} = \%Reduc_{Summit} \times \frac{\%Pretrial_{OH}}{\%Pretrial_{Summit}}$, as it appears in Buckeye's formula.

This shows how many fewer inmates Ohio will have if the effect is equal to what Summit County experienced, adjusted by the ratio of Ohio's fraction of pretrial inmates to Summit County's. Because Ohio has a smaller fraction of pretrial inmates, the estimated reduction effect is proportionally smaller.

Table 1: Data Used to Calculate Cost Savings

Description of Data	Indicated in Equation As	Value
Total inmates statewide, excluding Summit County	$Inmates_{OH}^{Daily}$	18,858
Total inmates in Summit County (after they adopted risk-assessment tools)	$Inmates_{Summit}^{Daily}$	667
Inmates awaiting sentencing statewide, excluding Summit County	$Pretrial_{OH}^{Daily}$	10,666
Inmates awaiting sentencing in Summit County (after they adopted risk-assessment tools)	$Pretrial_{Summit}^{Daily}$	457
Statewide average of the daily cost per inmate	$Cost_{OH}^{Daily}$	$64.45
Total reduction of days in jail in Summit County, yearly total estimate	$Reduc_{Summit}^{Year}$	60,918

Sources: Department of Rehabilitation and Correction, Ohio
Legislative Service Commission, Cuyahoga County Bail Task Force

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CLEBP

Center for Legal and Evidence-Based Practices

"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention

Timothy R. Schnacke

4/18/2017

Table of Contents

Acknowledgments 7

Executive Summary 8

Preface 9

Introduction 10

Part I – General Questions and Answers 16

What is Bail? 16

What is the Right to Bail? 18

Why Do We Even Have A Right to Bail? 20

Do We Have to Take Risks and Expect Failures? 24

What Does the History of Bail Tell Us About Re-Drawing the Line Between Release and Detention? 26

Interference With Release/Detention Leads to Reform 26

Secured Money Bonds Interfere With Release/Detention 28

What Does the Law Tell Us About re-Drawing the Line Between Release and Detention? 30

How to Do Bail/Release 31

How to Do No Bail/Detention 33

A Particularly Acute Problem 34

Limited By Charge 35

Procedural Due Process 38

The Purpose of Bail and No Bail 39

What Do Ratios Have to Do With This? 41

What Else Do the Law and History of Bail Tell Us? 44

The Big Rule 44

The Big Change (The American Overlay) 46

America's Struggle With Unintentional Detention 48

America's Struggle With Intentional Detention 51

Lessons From the Detention Cases 61

The Big Fix 66

The D.C. Court Reform and Criminal Procedure Act 68

A Detention Eligibility Net and Further Limiting Process 72

The Bail Reform Act of 1984 74

A Detention Eligibility Net and Further Limiting Process 78

***United States v. Salerno* 81**

What Does the Pretrial Risk Research Tell Us About Re-Drawing the Line Between Pretrial Release and Detention? 87

What Do Actuarial Risk Assessment Instruments Tell Us? 89

How Actuarial Pretrial Risk Assessment Instruments Are Created 91

How Do the Risk Research and Actuarial Pretrial Risk Assessment Instruments Illuminate Flaws in the Current System? 96

What Do Actuarial Pretrial Risk Assessment Instruments Not Tell Us? 103

Individual Risk 104

Detail Concerning "Risk of What" 110

Protective Factors and What to Do With Risk 114

How Does Risk Research Interact With the Law When it Comes to Re-Drawing the Line Between Pretrial Release and Detention? 115

Initial Balancing Issues 115

Excessive Bail Generally 117

Due Process and Equal Protection Generally 118

Fair Notice 119

Can We Use An Actuarial Pretrial Risk Assessment Instrument Solely As Our Eligibility Net When We Re-Draw the Line Between Pretrial Release and Detention? 124

Will Future Actuarial Pretrial Risk Assessment Instruments Be Sufficient to Function as a Detention Eligibility Net? 126

What Do the National Standards Tell Us About Re-Drawing the Line Between Pretrial Release and Detention? 127

The Detention Eligibility Net 129

The Further Limiting Process 137

What Have the States Done Up Until Now to Re-Draw the Line Between Pretrial Release and Detention? 139

Do We Have to Eliminate Money at Bail Before We Re-Draw The Line Between Pretrial Release and Detention? 144

Will We Need To Make Sure We Have Some Resources – Like Pretrial Services Functions – To Make Everything Work? 145

Will We Have to Change Our Constitutions? 146

Will We Have to Change Our Statutes/Court Rules? 148

Will We Have to Change Our New Bail Guidelines/ Praxes/ Matrices? 149

Part II – If We Change, To What Do We Change? 153

Analysis Based on General Narrowing Principles 154

Analysis Based on Current Law 157

Excessive Bail 159

Equal Protection 161

Due Process 162

Test for Punishment 163

Test for General Substantive Due Process 165

Analysis Based on Threshold Requirements for Predictive Models 168

Precise Definitions 169

Prediction Validation 170

Procedural Safeguards 171

Part III – A "Model" Release and Detention Process 172

Articulating Generally Whom to Release and Whom to Detain 172

Articulating the Detention Eligibility Net 172

Articulating the Secondary Net 177

Can We Create a Different Net? 181

Articulating the "Further Narrowing Process" for Detention 182

Part IV – Holding Up the Model to the Three Analyses 185

The Model Held Up to General Narrowing Principles 185

The Model Held Up to the Law 186

The Model Held Up to the Threshold Requirements 187

The Model Applied to Difficult Hypotheticals 187

Part V – The Language of the Model 190

Relatively Brief Provision 191

More Detailed Provision 193

Under This Model, What Will Be Our Ratio of Released to Detained Defendants? 196

What Will My "Failures" Be Under This Model? 197

Part VI – Essential Elements of Bail Statutes or Court Rules 198

Conclusion 200

Appendix One 201

Appendix Two 202

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This topic is so complex that reasonable persons can (and do) disagree on many aspects, but each of the people listed above helped me enormously in coming to my own conclusions about the various issues. Moreover, despite the significant complexity involved in coming to any set of workable answers, each of these people also helped me greatly by constantly reminding me that all release and detention laws must reflect deeply held American notions of liberty and freedom in addition to natural concerns for safety and judicial administration. Any errors are my own.

Executive Summary

This paper is designed to help persons craft and justify language articulating who should be released and who should be eligible for detention in a purposeful in-or-out pretrial system through a study of the history of bail, the fundamental legal principles, the pretrial research, and the national standards on pretrial release and detention. It does so, in Part I, by providing the answers to a series of questions that every jurisdiction should be asking before embarking on the task of re-drawing the line between pretrial release and detention. These questions, based on the fundamentals of bail, range from elementary (i.e., "What is bail?") to somewhat complicated (i.e., "How has America traditionally defined 'flight' and how did it struggle with both unintentional and intentional detention for noncapital defendants?") to very practical (i.e., "Can we use the results of actuarial pretrial risk assessment instruments when determining our detention eligibility net?").

In Part II, the paper begins to answer the question, "If we change, to what do we change?" It then introduces three analyses that should be used to assess any proposed model for re-drawing the line between release and detention. In Part III, the paper proposes a "model" process – this author's attempt at purposefully re-drawing the line between release and detention – based on the history, the law, the pretrial research, and the national standards on release and detention, and then, in Part IV, the paper holds the proposed model up to the three analyses. In Part V, the paper operationalizes the concepts from the proposed model into sample templates designed to illustrate how a jurisdiction might phrase certain crucial elements contained in the model. And finally, once this re-drawing of the line between release and detention is done, Part VI of the paper articulates notions that should be a part of any state bail legal scheme in order to make the model provision work. The proposed model can be accepted or rejected by American jurisdictions. Nevertheless, any different model should be subjected to either the same or a more rigorous justification process as is provided in this paper.

This paper is likely useful to all persons seeking answers to questions surrounding pretrial justice today. But it should be especially useful to those persons who are taking pen to paper to re-write their laws to determine whom to release and whom to potentially detain pretrial – essentially, to re-draw the line between purposeful release and detention.

"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention

"'Preventive detention' is a phrase that could have been coined on Madison Avenue, and raises associations of rationality and impartiality and common sense and science."

Caleb Foote, Comments on Preventive Detention

Preface

For some time now, people in the national pretrial justice movement have been discussing the idea of writing a document instructing jurisdictions on changes to their laws during this generation of bail reform. During those discussions, I had thought that such a document would need to be incredibly detailed and comprehensive, full of extensive word-choice examples from current state laws to provide various alternatives in phrasing to reach some objective. I thought that America could wait for such a document, which would meticulously describe those choices, and parse and reflect on the various available alternatives. I was wrong for two reasons.

First, I was wrong because the bail reform movement is moving far too quickly to wait any longer for guidance. States are changing fundamental aspects of their release and detention laws, including their constitutional right to bail provisions. Additionally, states are making comprehensive changes to their statutes and court rules, and they are doing so rapidly, and, in many ways, somewhat in the dark.

Second, I was wrong for thinking that most of the current laws from which I would craft a "model" were legally defensible. The more I worked on this paper, the more I came to believe that our country's current bail laws suffer from numerous and often fatal flaws. Most release provisions fail to ensure release; most detention provisions are currently unjustified, do not necessarily reflect those whom society desires to detain, and fail when held up to the federal model reviewed by the United States Supreme Court in 1987. Indeed, the federal model itself is now likely unjustifiable and has largely failed to limit detention to constitutional levels. More importantly, most of the assumptions underlying our current bail laws have now been shown by the research to be faulty assumptions. Accordingly, this paper is

written to provide at least some initial guidance for jurisdictions seeking to make changes to their bail laws on a clean slate.

For several years, people like me have focused primarily on helping jurisdictions to change their policies and practices concerning pretrial release and detention. As jurisdictions began making those changes, however, they quickly learned that many of their existing laws actually hindered creating rational, fair, and transparent release and detention systems based on legal and evidence-based practices. Thus, not so very long ago, we added bail laws to the list of things that jurisdictions might need to change. Now that they are making those changes, this paper attempts to answer the inevitable question, "If we change, to what do we change?"

In no way should this paper be used as justification to slow down the national bail reform movement. Even though some of these concepts are complicated, they do not diminish the need for extensive pretrial justice reform work to appropriately release more defendants pretrial, to infuse research into the bail system, and to reduce or eliminate secured money bonds. States can do significant work long before that work begins to require answers to the questions posed in this paper. Bail reform exists on a continuum, which is advanced incrementally as states become more comfortable with more complicated concepts. At some point, however, states will be forced into the weeds, so to speak, of determining the details of a rational, fair, and transparent release and detention system. This paper is designed to cut through those weeds, and, hopefully, to accelerate completion of this generation of bail reform.

Introduction

In the movie, The Big Short, Michael Burry (who famously shorted the American subprime mortgage market in 2007 when he predicted that a housing bubble would burst), is talking to Lawrence Fields (his boss at the hedge fund), and tells Fields that he sees the housing bubble and its eventual crash. Fields says, "No one can see a bubble. That's what makes it a bubble." And Burry replies, "That's dumb, Lawrence. There's always markers." The same is true in bail reform. There are always markers showing the need for bail reform, and when these markers exist, bail reform becomes inevitable.

We are currently witnessing the inevitability of the so-called "third generation of bail reform" in America. And if you look at the previous two generations – indeed, if you look at all instances of bail reform over the centuries in both America and England – you will see that the same markers leading to changes in those eras are leading to changes we see today. Those markers, which include game-changing pretrial research, a meeting of minds over the need for reform, and, most importantly, interference with our underlying notions of both release and detention, tell us that bail reform is not merely some fleeting and quickly dissipating trend among just a few states. No, bail reform is unavoidable and will happen in every state in America. If it does not come from states desiring to change on their own, it will come from states being forced to change by the courts, which are increasingly requiring jurisdictions to follow fundamental legal principles and to justify their release and detention schemes.

The certainty of bail reform is made more consequential when one learns that the only way to move through this generation of reform (and, indeed, the only way to avoid future generations of reform) is to re-think and re-articulate answers to the three foundational questions concerning pretrial systems across America, which are "whom should we release," "whom should we detain," and "how should we do it?" Right now, most jurisdictions are releasing the wrong persons, and the essence of bail reform in this generation is a move to rational, fair, and transparent systems that purposefully put the right persons in the right places pretrial. To do that, jurisdictions must examine the very cornerstones of their bail laws – the foundational pillars that express who is eligible for release and who is eligible for detention. All states have such expressions, yet virtually all states have been ignoring those expressions for decades. Among other things, this generation of reform is forcing states to move from systems in which money determines release and detention randomly to systems in which judges make intentional and un-hindered release and detention decisions. To do this, the states must, in the first instance, set out clearly who should be released and who should be eligible for detention based on American notions of freedom and liberty.

So-called "model" bail laws are somewhat simple. Once a jurisdiction has decided whom to release and whom to detain, model laws simply make this happen by using legal and evidence-based practices to achieve the constitutionally valid purposes of bail (release) and no bail (detention). But re-drawing that initial line between release and detention – or, more

importantly, designing a fair and rational process that ultimately leads to particular lines being drawn – is deceptively complex. The process requires knowing something about the history of bail in both America and England, its fundamental legal principles, and the pretrial research, especially the research on risk and risk assessment. It requires understanding why we even have a thing called pretrial release to begin with, and it requires knowing both the positive and potentially negative consequences of attempting to replace our current charge-based systems with systems that identify defendants in varying degrees of risk based on actuarial pretrial risk assessment instruments. In this generation of bail reform, jurisdictions are tempted to completely replace their charge-based schemes with so-called risk based ones – to dump risk into their charge-based constitutions and statutes – but this paper explains why that temptation is overly simplistic.

For example, a positive consequence of moving toward a risk-based or risk-informed release and detention process is that it can bring us ever closer to knowing the answers to the two essential questions for determining whom to release and whom to detain: (1) "How risky is this person?"; and (2) "Risky for what?" These questions have been the two primary questions asked ever since a thing called bail or pretrial release was created. If you know that a person is high risk to commit any crime while on pretrial release, you can begin to purposefully respond to that risk. But that is only half of the inquiry, because that same person may be high risk for committing only a relatively low level offense, such as trespassing or loitering. Likewise, there is value in knowing that, although a person is labeled as "low" risk, his or her failure might lead (albeit perhaps rarely) to a violent crime. Actuarial pretrial risk assessment instruments are getting very good at telling us the answer to question number one, and are only now beginning to tell us the answer to question number two. In the future, the answers to both questions will only become clearer.

Nevertheless, a potentially negative consequence of using actuarial pretrial risk assessment instruments is that we can actually make things worse by essentially labeling all defendants as "risky," something that did not happen in the past without jumping over certain mental hurdles. In the past, defendants were charged with crimes, and American jurisdictions viewed those crimes as proxies for risk and based entire release and detention systems on assigning money to those charged crimes, which did not always result in the intended in-or-out placement. In a traditional money bail system based on charge, it was not so much the defendant who was risky, it was the

charge, and the charge determined the price to gain freedom. The system was based on certain flawed assumptions (such as that high levels of crimes equaled high levels of risk to commit the same or a similar offense while on bail), but those assumptions broadly kept judicial officials from thinking that all defendants are risky. Today, empirical risk assessment – one of the hallmarks of this generation of reform – places the emphasis on the defendant, and no defendant is immune from its label of risk. In this new world of risk assessment, one can literally go out on the streets of any city and show that 100 random pedestrians are all risky at varying levels – from extremely low to extremely high – before they have even been accused of committing any offense. This begs the question: since everybody is already risky, at what point do we begin assessing it? Where do we draw the line?

Labeling citizens as risky reminds us of Harvard Law Professor Laurence Tribe's articulated fear of allowing the government to incarcerate people for something they may or may not do in the future. Tribe wrote: "Throughout history, governments have been tempted to establish order by identifying and imprisoning in advance all likely troublemakers."[1] Quite simply, empirical risk assessment helps with identifying and smoothing the resulting detention of persons once they have caught the attention of the government for any reason. Moreover, according to Tribe, the potential harm generated by a system of detaining so-called risky individuals is exacerbated by the built-in bias toward ever more detention. "The pretrial misconduct of [released] persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease," he wrote. "But when the system detains persons who could safely have been released, its errors will be invisible."[2] In other words, "the degree to which judges wrongfully detain defendants is unknowable because their decisions are 'unfalsifiable.'"[3]Accordingly, despite America's gradual shift toward a more preventive justice system over the last several decades, fundamental American legal principles must be upheld as constant reminders to limit

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[1] Laurence H. Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell,* 56 Va. L. Rev. 371, 376 (1970) [hereinafter Tribe].
[2] *Id.* at 375.
[3] Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment,* 86 J. of Crim. L. and Criminology 415, 428 (1996) [hereinafter Fagan & Guggenheim] (quoting John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform,* 76 J. Crim. L. & Criminology 1, 28 (1985)) [hereinafter Goldkamp]; *see also* Harvard Law School Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform,* (2016) at 19 ("[I]f . . . almost all 'high risk' defendants are detained, it becomes impossible to test whether individuals who receive that designation actually have high rates of pretrial failure.") [hereinafter Harvard Law School *Primer*].

pretrial detention and to embrace the risk inherent in pretrial release, just as we have chosen to accept some risk of crime in the first instance by relying on the moral deterrence of clearly articulated laws to govern human behavior.

The move from a charge and money-based system to one informed by risk and using little or no money thus requires extensive safeguards designed to assure Americans that things will not be made worse through more purposeful practices that nonetheless lead to over-detention. These safeguards are best placed in our state constitutions – documents that, unlike statutes, "ought to state rules not for the passing hour, but principles for an expanding future."[4] But wherever they exist, it is imperative that they do, indeed, exist. At the very least, these safeguards, which are rooted in fundamental notions of American liberty, require any changes to our bail laws to have justification in the history, law, or research. They require us to create limits or floors, crimes for which pretrial detention is never allowed, and for which risk assessment is neither sought nor used. And they caution us to ensure that infusing the concept of actuarial risk does not diminish traditional legal principles creating and molding the right to release and requiring that pretrial liberty be "the norm."[5]

This document is designed to help jurisdictions craft language to determine who should be released and who should be eligible for detention so that traditional legal principles at bail are not eroded or erased. It does so in Part I by providing the answers to a series of questions that every jurisdiction should be asking before embarking on the task of re-drawing the line between release and detention. These questions, based on the history of bail, the law, the pretrial research, and the national standards on release and detention range from elementary (i.e., "What is bail?") to somewhat complicated (i.e., "How has America traditionally defined 'flight' and how did it struggle with both unintentional and intentional detention for noncapital defendants?") to very practical (i.e., "Can we use the results of actuarial pretrial risk assessment instruments when determining our detention eligibility net?").

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[4] Benjamin N. Cardozo, *The Nature of the Judicial Process*, at 83 (Yale Univ. Press 1949). Forty-one states have right to bail provisions in their constitutions. States without such constitutional provisions still attempt to articulate who should be released and who should be detained in their statutes, and these states should similarly understand a need to guard certain fundamental American principles of freedom and liberty from slow but significant erosion.

[5] *See 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.").

In Part II, the paper begins to answer the question, "If we change, to what do we change?" It then introduces three analyses that will be used to assess any proposed model for re-drawing the line between release and detention. In Part III, the paper proposes a "model" process – this author's attempt at purposefully re-drawing the line between release and detention – based on the history, the law, the pretrial research, and the national standards on release and detention, and then, in Part IV, the paper holds that proposed model up to the three analyses. In Part V, the paper operationalizes the concepts from the proposed model into sample templates designed to illustrate how a jurisdiction might phrase certain crucial elements contained in the model. And finally, once this re-drawing of the line between release and detention is done, Part VI of the paper articulates notions that should be a part of any state bail legal scheme in order to make the model provision work. The proposed model can be accepted or rejected by American jurisdictions. Nevertheless, any different model should be subjected to the same or a more rigorous justification process as is provided in this paper.

States reading this document will likely arrive at a few basic conclusions. First, the idea of simply moving from a charge-based to a risk-based system of release and detention is deceptively complex. Second, the history, the law, the research, and the national standards nonetheless point to an answer for how charge and risk can co-exist. Third, and most importantly, this answer is one that can make this the first generation of bail reform in America that ultimately succeeds. The solution is not easy, and requires certain pre-requisites (such as the elimination of money's ability to detain and some likely extremely minimal level of re-allocated resources). Nevertheless, it is a solution with the potential not only to complete this generation of reform, but also to largely eliminate the need for reform in the future.

Part I – General Questions and Answers Concerning Pretrial Release and Detention

What is Bail?

The principle motive for writing the National Institute of Corrections' document titled, *Fundamentals of Bail*, [6] was to arrive at an accurate definition of "bail" and to articulate a universally true purpose of bail. Knowing the proper definitions of terms and phrases at bail is fundamental to American bail reform, and yet, across America, states have struggled with varying definitions leading to improper statements of purpose. These variations and improper statements, in turn, have caused confusion within the national pretrial justice movement. This confusion can be erased, however, simply by studying the other fundamentals of bail – the history, the legal foundations, the pretrial research, and the national standards. Indeed, when one studies those other fundamentals, one quickly learns bail's true definition and purpose: bail is a process of conditional release and the purpose of bail is to provide a mechanism for release, just as "no bail" is a process of detention with a purpose to provide a mechanism for potential pretrial detention. The *Fundamentals* paper sums up its justification for defining bail as a process of release as follows:

> 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* and *Hudson v. Parker,* to *Stack v. Boyle* and *United States v. Salerno*.
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> Bail as a process of release accords not only with history and the law, but also with scholar's definitions (in 1793, Anthony Highmore defined bail as 'the means of giving liberty to a prisoner,' and in 1927, Arthur Beeley defined bail as the release of a person from custody), the federal government's usage

[6] *See* Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (NIC, 2014) [hereinafter NIC *Fundamentals*].

> (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's definition of bail as a 'process by which a person is released from custody.' 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'), Colorado (which defines bail as security like a pledge or a promise, which can include release without money), and Florida (which defines bail to include 'any and all forms of pretrial release') have enacted statutory definitions to recognize bail as something more than simply money. Moreover, some states, such as Alaska, Florida, Connecticut, and Wisconsin, have constitutions explicitly incorporating the word 'release' into their right to bail provisions.[7]

Most relevant to this paper, however, is that bail defined as a process of release is the only definition that allows jurisdictions to re-articulate their release and detention processes without confusion. As noted above, most of that confusion comes from the fact that many people (indeed, many courts and legislatures) define bail by one of its conditions – money. And although defining bail as money is understandable based on the fact that promising to pay money was the sole means of effectuating release with a goal of court appearance for nearly all of bail's 1,500 year history, bail is not money. Quite simply, money is a condition of bail with a different purpose.

Defining bail as money causes confusion especially when jurisdictions are confronted with bail's history (which tends to define it as release), the law (with multiple court cases, including U.S. Supreme Court cases, describing bail as a process or procedure of release), and even a state's own right to bail provision (when a state defines bail as money but nonetheless has a "right to bail" in its laws, it is inherently confusing to speak of reducing or eliminating money). Because understanding the history, the law, and the research is crucial to both understanding current law as well as to re-drawing the line between pretrial release and detention, it is important that jurisdictions understand that these three areas of knowledge point to a

[7] *Id.* at 113.

universally true definition of bail: once again, bail is a process of conditional release, and the purpose of bail – the reason we have it – is to provide a mechanism for conditional release. When people speak of eliminating money at bail, it in no way erodes one's right to bail; indeed, eliminating money at bail would actually give meaning to the right to release.

Jurisdictions should not be alarmed when their own laws define bail as money, but knowing how their definition differs from the legal and historical definition will only help them when they seek to improve their laws.[8] Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember that bail means release, and that pretrial release is embedded in our American system of justice.

What is the Right to Bail?

It follows, then, that the right to bail, whenever it is articulated, should be read to mean a right to release. This is true from a study of the history, as historical documents repeatedly refer to the right to bail as a right to release, and of the law, as even the United States Supreme Court has equated the "right to bail" with "the right to release before trial," and "the right to freedom before conviction."[9] This is difficult to understand today only because the right to actual release in America has been eroded to the point where people simply do not think it exists. Nevertheless, ever since the Norman Invasion, in both England and America, calling persons bailable always meant that they were to be released. Indeed, keeping a bailable defendant in jail interferes with one of our underlying notions of release, which, as alluded to previously, is a marker of bail reform.[10]

In the 1960s, the federal government (and possibly some states) began slowly to recognize the need for more precise terminology. The Act of 1789 spoke of "admitting" all defendants to bail except for those charged with capital offenses.[11] Later articulations of the right, as note by the Supreme

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[8] For example, after an approximately 18 month comprehensive study of "bail" and "no bail" in Colorado, legislators changed the statutory definition of bail, which had defined bail as an amount of money, to better reflect legal and historical principles of release and freedom.

[9] *Stack v. Boyle,* 342 U.S. 1, 4 (1951). Likewise, the Court in *United States v. Salerno* has noted that "liberty" – a state obtained only through release – is the essence of the right. *See* 481 U.S. 739, 755 (1987).

[10] *See generally,* NIC *Fundamentals, supra* note 6, *passim.*

[11] *See* The Judiciary Act of 1789 ("An Act to Establish the Judicial Courts of the United States"), 1 Stat. 73. The Judiciary Act provided a detailed organization of the federal judiciary that the constitution had sketched only in general terms. Section 33 of the Act read: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by

Court in *Stack v. Boyle,* still spoke of a noncapital defendant's right to be "admitted to bail" prior to conviction.[12] In 1966, however, the Bail Reform Act began a trend toward gradually using the word "release" when discussing the right involved,[13] and by 1984 Congress explained that it had replaced the word "bail" with "release" throughout the Bail Reform Act of that year to avoid what had become apparent confusion over the use of the term "bail" in a system of various modes of release, including release on recognizance or non-financial conditions.[14]

America's erosion of its understanding that bail is or should be release means that people often incorrectly state that the right to bail is a right only to have one's conditions set, a statement that merely reflects the poor state of bail practice in America today and that runs counter to the law and the history of bail. To articulate that only a certain group is eligible for detention, but then to allow for a sizeable number of defendants outside of that group to be detained in fact – whether intentionally or unintentionally because they cannot meet the conditions of release – is likely unlawful, and should at least be considered an egregious aberration to legal and historical notions surrounding pretrial release and detention.

For purposes of this paper, however, the reader should remember that we are discussing jurisdictions purposefully and justifiably re-articulating which defendants should be released and which should be detained. We are discussing jurisdictions reformulating that determination in a generation of reform interested in individual risk, and then enacting provisions to ensure the immediate effectuation of the purposeful decision primarily by using legal and evidence-based practices and by eliminating barriers to either release or lawful detention. Thus, even though it is important to equate bail with release when doing "bail reform" – and especially when consulting legal or historical documents to guide any reform efforts – it is best for jurisdictions to refrain from using the somewhat confusing terms "bail" and "no bail" and to simply refer to release and detention. As will be shown later, once a state has articulated its detention eligibility net, it is safe to then

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the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law."

[12] *See Stack v. Boyle,* 342 U.S. 1, 16-17 (1951).

[13] *See* Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat, 214 (1966) [hereinafter 1966 Act]. For example, in Section 5(a) the Act read, "The first sentence of section 3041 of title 18, United States Code, is amended by striking out "or bailed" and inserting in lieu thereof "or released as provided in chapter 207 of this title."

[14] S. Rep. No. 98-225, at 4 (1984).

say that the remainder of defendants (as well as many within the net) should enjoy a right to actual release. If done properly, the right to release pretrial can be made meaningful in America once again.

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember that the right to bail in America has always been intended to mean a right to actual release.

Why Do We Even Have A Right to Bail, or Release? What Keeps Us From Simply Detaining Everyone Prior to Trial?

The answer to this question comes partly from history and tradition, and partly from the law. Historically, even before the Statute of Westminster in 1275, persons facing criminal charges were separated out as either "bailable" or "unbailable" based on custom.[15] The Statute of Westminster codified that tradition, and expressly articulated that those defendants deemed "bailable" had to be released, just as those defendants deemed "unbailable" had to be detained. The reasons for release in those times were not necessarily the reasons we cite today. For example, release to personal sureties was often desirable in thirteenth century England due to the lack of adequate jails, and the process of suretyship was designed to continue to exert control over a defendant beyond incarceration. It was later in America that the right to release began finding its foundation on concepts of liberty and freedom.

In the centuries between 1275 and the 1700s, any efforts on the part of government officials to detain otherwise bailable defendants led to reform. For example, a stated purpose for the creation of habeas corpus in 1679 – often called the "Great Writ" in America to reflect its importance – was to provide a remedy to defendants who were "detained in Prison, in such cases where by Law they were bailable."[16] The Excessive Bail Clause, when enacted in England, was in response to judicial officials setting the financial condition in amounts leading to the de facto denial of bail, or release, as a way of avoiding the provisions of habeas corpus.[17]

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[15] *See generally* NIC *Fundamentals, supra* note 6, at 33-56.
[16] *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syr. L. Rev. 517, 528 n. 53 [hereinafter Carbone] (quoting The Habeas Corpus Act, 31 Car. 2, c. 2 (1679)).
[17] *See id.* at 528-28; William F. Duker, *The Right to Bail: A Historical Inquiry,* 42 Alb. L. Rev. 33, 66 (1977-78) [hereinafter Duker]; W. Holdsworth, A History of English Law, Vol. 9, 118-19 (1965) [hereinafter Holdsworth], found at https://archive.org/details/historyofenglish09holduoft.

The tradition of calling persons either "bailable" or "unbailable," and then making sure that bailable defendants obtained actual release, followed into the Colonies, and quickly became Americanized in three ways: (1) the purposes for release became more associated with liberty and freedom; (2) the right to release was gradually expanded to virtually all defendants; and (3) likely most importantly and discussed in greater detail later in this paper, the right was bestowed upon defendants before looking at any of the traditional English factors – such as the weight of the evidence or criminal history – used to determine bailablility in that country.[18]

In sum, having a mechanism for pretrial release in a justice system resembling our own was a part of English tradition for centuries. It was built upon and molded by other monumental jurisprudential phenomena and documents, such as the Magna Carta, habeas corpus, and due process, and it was adopted by America but expanded to better reflect purely American notions of criminal justice. Indeed, in a comprehensive article on the right to bail, author Matthew J. Hegreness uses both tradition (including America's long tradition, until only recently, of upholding the right to release) and the law to, among other things, argue the existence of a broad "consensus right to bail" that exists in both federal and state law even when unarticulated, and despite even significant recent erosion.[19]

The law, too, has grown to foster this tradition of pretrial release, to articulate it, and, until very recently, to protect it. Citing descriptions of the bail process from William Blackstone, whose Commentaries on the Laws of England influenced our Founding Fathers as well as the entire judicial system and legal community, author F.E. Devine wrote that denying the release of bailable defendants during the American colonial period was itself considered to be a crime.[20] Moreover, maintaining the process of bail as a mechanism of release was mentioned in Supreme Court opinions of the nineteenth and twentieth centuries, with perhaps the following as the best known expression of our continued protection of a right to release:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon

[18] *See* Carbone, *supra* note 16, at 529-548.
[19] *See* Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail,* 55 Ariz. L. Rev. 909 (2013).
[20] 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)).

> 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.[21]

In the 1895 case of *Coffin v. United States*, the United States Supreme Court wrote that the presumption of innocence – the principle that says, for the most part, that defendants do not have to prove their own innocence – is "axiomatic and elementary" to the administration of our criminal laws.[22] This language might be mere surplusage to the current discussion were it not for the fact that the Supreme Court has cited the presumption of innocence as a primary reason that we have a right to release to begin with. In *Stack v. Boyle*, the Court wrote:

> From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a noncapital 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.[23]

Although there is unwarranted confusion over the presumption of innocence at bail,[24] one concept should be clear: when it comes to the right to bail – i.e., the right to freedom before conviction – one reason that we even have it

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[21] *Stack v. Boyle,* 342 U.S. 1, 7-8 (1951) (Jackson, J. concurring).
[22] *Coffin v. United States,* 156 U.S. 432, 453 (1895).
[23] *Stack,* 342 U.S. at 4 (internal citations omitted).
[24] *See The Presumption of Innocence at Bail,* found at http://www.clebp.org/images/10-19-2016_presumption_of_innocence_and_bail.pdf.

is to maintain the presumption of innocence, a principle axiomatic and elementary to our system of justice. This notion is evident in Justice Rehnquist's opinion in *United States v. Salerno,* in which even while upholding a federal bail scheme allowing for increased detention of criminal defendants for the purpose of public safety in addition to court appearance, the Justice nonetheless wrote that "liberty" – a state necessarily obtained from actual release – is the American "norm."[25]

In *Coffin,* the Supreme Court wrote that it was precisely the fact that the presumption of innocence was so elementary and universal that instances of neglecting it in particular cases were rare.[26] The same is true of the right to bail or release, where we simply do not see states attempting intentionally to eliminate or limit the right to only a few cases (instead, the right has eroded primarily through "unintentional detention," discussed *infra*). It may be the law or tradition in other countries not to provide some mechanism for pretrial release, but not in America. Thus, the issue today is not whether we have the right, because clearly we do. The issues, instead, are twofold: (1) determining who, exactly, can and should be given a right to release within constitutional boundaries; and (2) once given, how to make sure that the right remains meaningful.

Jurisdictions should look at the right to bail or release as an offshoot of the American principle of allowing clearly articulated laws to govern free persons in a criminal justice system. Articulating those laws means that we leave it to persons to reject those laws at their peril, and yet to remain free from government interference so long as they are followed. Because persons charged with crimes maintain many, if not virtually all of their constitutional rights, the vast majority of these persons were (and are) meant to remain free until the law has formally adjudged their guilt.

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember that we have a right to bail or release because it is fundamental to other important American notions concerning liberty and freedom. We have the right due to tradition and history, but also due to the law. Unlike post-conviction release into the community through legal mechanisms such as probation, which states could eliminate altogether, a right to pretrial release in America can never be abolished.

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[25] *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.").
[26] *See Coffin,* 156 U.S. at 457-58.

Does Having A Right To Release Pretrial Mean That We Have to Take Risks and Expect Some Failures?

Though not easily understood by many, to be an American enjoying the presumption of innocence and the right to release before trial means that we must absorb some amount of risk and thus to expect some failure pretrial. The entire American criminal justice system is based, in large part, on taking risks. In America, rather than giving the government unlimited powers to protect the public, we have, instead, only allowed limited government intervention by using "the moral and deterrent effect of laws which define particular acts as criminal and which punish all who violate their proscriptions."[27] Allowing only limited government intervention inevitably means that American society takes risks each day and that we can most certainly expect failure. Nevertheless, we choose this system to maintain our basic American freedoms as articulated in our founding documents. This is important to remember: our fundamental notions of what it means to be Americans mean that in the substantive criminal law we have to take risks on people that can lead sometimes to even catastrophic failure. To enact a system designed to eliminate that risk would undoubtedly alter and erode our American identity.

The same is true in bail or pretrial release. While tracing the roots to the presumption of innocence from Greek and Roman times, the Supreme Court connected that principle to what is known as Blackstone's ratio, which is the maxim that "the law holds that it is better that ten guilty persons escape than that one innocent suffer."[28] This articulation of a ratio is a quintessential statement about accepting risk, and in the context of the criminal law it says that we must embrace the risk inherent in freedom, and that the government may not do things to people "just to make sure" that we capture all wrongdoers. And thus it is fitting that in his concurring opinion in *Stack v. Boyle* – the case articulating a right to release in order to uphold the presumption of innocence – Justice Douglas wrote:

> Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the

[27] Tribe, *supra* note 1, at 376.
[28] *Coffin v. United States*, 156 U.S. 432, 456 (1895) (quoting 2 Bl. Com. c. 27, margin p. 358); *see also* What Do Ratios Have to Do With This?, *infra.*

> 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.[29]

When he wrote this language, the only constitutionally valid purpose for limiting pretrial freedom was court appearance. Today, Justice Douglas would doubtless write that risk of new criminal activity, too, is a calculated risk taken at bail to protect our system of justice. Too often in this generation of bail reform we have focused on assessing and managing risk of flight and danger versus embracing the risk of release, and we have seen entities claiming that "risk assessment" will be the salvation to our pretrial crisis. But the fact is that we have had risk assessment ever since 400 A.D.; today's methods of assessing certain risks are simply superior to anything done previously.

Instead, the true solution to our pretrial crisis is to understand that risk is inherent in bail, and thus that we cannot, consistent with fundamental American principles, be risk averse. Risk assessment and management are important, but less so than the need to embrace the risk inherent in releasing people pretrial to begin with. For the same reasons that government agents do not roam the streets seeking to assess and detain those whom we think might violate some substantive criminal law, we also do not maintain a similar system within bail, but instead rely mostly on deterrence and the threat of sanctions so as not to unduly interfere with pretrial freedom.

Because pretrial release comes after an arrest, we may certainly limit freedom more than if no arrest occurred, but never to the point of complete assurance of public safety or court appearance. Thus, when re-drawing the line between pretrial release and detention, jurisdictions must remember to accept some level of risk as they craft any language articulating the right to release.

[29] *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

What Does the History of Bail Tell Us About Re-Drawing the Line Between Pretrial Release and Detention?

Interference With Release or Detention Leads to Bail Reform

The history of bail contains many lessons for those seeking to re-draw the line between pretrial release and detention in America. But perhaps the most important lesson is the historical principle, mentioned previously, that whenever something interferes with our notions of release or detention, bail reform happens. Thus, if we see "bailable" or releasable defendants – or even people who we think should be bailable or releasable – who are in jail, bail reform happens. Likewise, anytime we see unbailable or detainable defendants – or even people who we think should be unbailable or detainable – who are not in jail, bail reform happens. In sum, whenever we think that the wrong people are either in or out of jail pretrial, bail reform happens. Today, many Americans believe that there are people in jail who should not be in jail, and that there are at least some people outside of jail who, perhaps, should be inside. This is a classic recipe for bail reform. Indeed, it is arguably the first time since 1274 that both "bail" and "no bail" are viewed as simultaneously needing reform.

By looking at English bail in 1274, we can see the parallels.[30] In that year, King Edward I obtained information showing that persons who were customarily bailable were being held in jail while people who were customarily unbailable were being released (in both cases, in return for money to the custodian of the jail). That information led to the enactment of the Statute of Westminster of 1275, which delineated bailable and unbailable offenses, and which made it a crime for sheriffs to detain bailable defendants or to release unbailable ones. Over the centuries, there would occasionally be reforms designed to keep unbailable defendants in jail (or to add certain classes of defendants to the "no bail" process), but historically most reforms dealt with attempting to get bailable defendants out of jail. This notion, that bail reform happens whenever we see bailable defendants in jail, has led to such monumental jurisprudential improvements such as a right to release from unlawful confinement through habeas corpus, the prohibition of detention without a formal charge, and a right to non-excessive bail. And the

[30] *See generally,* NIC *Fundamentals, supra* note 6 and resources cited therein; *see also,* Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial* (NIC, 2014) [hereinafter NIC *Money*].

notion continues today, with court opinions, legislative changes, and executive actions all designed to foster the release of bailable defendants.

Nevertheless, bail reform today is happening to both bail and no bail, release and detention. Bailable defendants are currently being detained, and certain unbailable defendants whom we believe should be detained pretrial are being released. Moreover, the cause of this overall pretrial dilemma is the use of secured money bonds. In short, creating a layer requiring the payment of money up front as a prerequisite to release, without more, will automatically lead to the wrong people both staying in and getting out of jail. The answer to this dilemma, though, is not as simple as making sure bailable defendants are released and unbailable ones are detained, because in many cases our labels are wrong. Moreover, as will be shown later, the answer is also not as simple as using actuarial pretrial risk assessment instruments alone to release all "low risk" defendants and to detain all "high risk" ones. In fact, the answer lies somewhere in the middle.

Overall, many Americans currently believe that we have the wrong defendants in the wrong places, and this problem is made most evident through empirical risk assessment. Today in America, defendants who are assessed to be "low" and "medium" risk (and many who are called "high" risk) and who could safely be managed pretrial outside of secure detention are being held in jail, while some extremely high risk persons (including defendants who are actually high risk to commit a serious or violent crime but who nonetheless have scored low on an actuarial assessment), are being released. Bail reform in this instance, then, means delving deeply into our definitions and foundational principles to answer those three overriding questions – whom do we release, whom do we detain, and how do we do it? – so that we can, once again, make purposeful release and detention decisions based on the law and the research.

In sum, the history tells us that "bail" equals release and that "no bail" equals detention, and that if anything interferes with these two concepts, bail reform happens. In addition, the history tells us that the cause of this interference today is our use and misuse of secured money bail. This is monumentally important to remember, and so it requires a brief additional explanation.[31]

[31] *See generally id,* and sources and resources cited therein.

Secured Money Bonds Interfere With Release and Detention

Pretrial detention in England and America has always been done the same way – by keeping a defendant in jail. But pretrial release is dramatically different today, and especially in America. To make sure that bail equaled release in England, that country used the so-called "personal surety system," which relied on people to be willing to watch over a released defendant for no money and no promise of indemnification even in the event of a default. Indeed, money in the bail process was only found in what we call today the defendant's financial condition of release. That condition (in the form of property and then later, money) had been a part of English bail since roughly 400 A.D. Importantly, however, since 400 A.D., and until roughly the 1800s, that financial condition of release had only ever been what we call today an *unsecured* financial condition.[32]

An unsecured financial condition is like a debenture – secured by the general credit and not specific assets of the surety – that is promised to be paid only if the defendant fails to appear for court after release. Thus, after the Norman Invasion (when England's first jails were built) nobody was required to pay anything up front to obtain release from incarceration; one only had to promise to pay the money (or property) in the event of default. Accordingly, in England, once a defendant was determined to be bailable, personal sureties administering mostly unsecured bonds upheld the "bail equaling release" tradition by assuring that nothing hindered the defendant's release from jail.

Colonial America adopted the English bail system, and to make sure that bail equaled release it also adopted the use of personal sureties administering unsecured conditions on bonds. Thus, as in England, courts determined surety "sufficiency" 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 of the accused. Instead, the

[32] F.E. Devine, *supra* note 20, at 4; Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L.Q. 475, 497, 504-505 (1977) [hereinafter Lermack]. When reviewing old bail cases, one must remember to note fundamental differences between English and American cases, older and newer cases, and, importantly, civil and criminal cases. Civil bail cases often reviewed amounts relative to the underlying debt, which might be inflated in the cause of action and lead to a claim for maliciously "holding" the defendant to bail. Criminal bail cases follow the explanation of bail as explained in the body of the NIC *Fundamentals* paper, *supra* note 6, using personal sureties and unsecured bonds, and with amounts reviewed in terms of their effect on release. *See generally* Charles Petersdorff, *A Practical Treatise on the Law of Bail in Civil and Criminal Cases*, *passim* (Jos. Butterworth & Son, 1824).

sureties were held to a debt that would become due and payable only upon their inability to produce the accused. Because sureties were not allowed to profit or be indemnified against potential loss in America as well, bonding fees and collateral also did not stand in the way of release.

This model remained the primary means of effectuating the release of bailable defendants in both England and America until the mid-1800s, when both countries began gradually running out of personal sureties who were willing to take responsibility over defendants for no money. Historically speaking, this meant interference with bail as release, and thus some period of bail reform seeking a solution was inevitable. But while England (and other countries facing the same basic issue) found solutions that assured release without infusing profit and indemnification into the criminal pretrial process, America was unique in its decision to replace personal sureties with commercial ones. Worldwide, America and the Philippines stand alone among like countries in their decision to introduce profit into pretrial release. As author F.E. Devine 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."[33]

The change from personal to commercial sureties was designed to help get bailable defendants out of jail, but the new model also had one important unintended consequence, which was that it forever changed the essential nature of the financial condition of release. As noted previously, for centuries in England and America until the 1800s – that financial condition of release had always been what we call today an "unsecured" financial condition. Under this new model, however, the financial condition of release would mostly be what we call today a "secured" financial condition. A secured financial condition requires someone (typically a defendant or the defendant's family) to pay something as a condition precedent to release.[34]

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[33] Devine, *supra* note 20, 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.

[34] Secured bonds themselves add a barrier to release, but because commercial sureties can refuse to help a defendant "for good reasons, bad reasons, or no reasons," those sureties often add another deleterious layer to that barrier. Ronald Goldfarb, Ransom: *A Critique of the American Bail System* at 115 (NY Harper & Row, 1965).

And for the last 180 years, the interference caused by secured money bonds has been at the heart of virtually every problem experienced in American pretrial release and detention. Indeed, within only twenty years of the switch to commercial sureties, influential legal scholars began writing documents describing the deficiencies of the new model and calling for its reform.[35]

Secured money bonds interfere with bail as release by keeping lower, medium, and even some higher risk persons in jail for lack of money even though those persons could be safely managed outside of secure detention. It interferes with detention by allowing extremely high risk persons to buy their way out of jail when they are better suited for secure detention. Moreover, secured money bonds interfere with release and detention even when states have attempted to enact fair and transparent detention provisions based on risk. In many states, leaving money in the system allows a convenient (albeit unlawful) means of efficiently detaining defendants without the bother of a due process hearing.[36]

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember that the root cause of this and previous generations of reform – secured financial conditions – will undoubtedly interfere with even the best drawn line. The key to avoiding bail reform in the future is to create a transparent, legally justifiable, and purposeful in-or-out bail system, with nothing hindering the decision to release or detain. Accordingly, jurisdictions must consider eliminating the use of secured financial conditions along with re-articulating a purposeful pretrial release and detention process.

What Does the Law Tell Us About Re-Drawing the Line Between Pretrial Release and Detention?

Although we will look later at various elements of the law in a more detailed fashion, a broad look at American law can also tell us important things about re-drawing the line between pretrial release and detention. For the most part,

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[35] *See, e.g.*, Roscoe Pound & Felix Frankfurter, *Criminal Justice in Cleveland*, at 290 (The Cleveland Found., 1922) ("The real evil in the situation [is] the disreputable professional bondsmen, who make a business of exploiting the misfortunes of the poor."). Most reformers in that generation focused on commercial bail bondsmen as the main gatekeepers in the secured money bond model.

[36] The author knows firsthand that Colorado's preventive detention process is rarely, if ever used, due to the ease in which money detains. Collaborative meetings in Wisconsin (a state with no commercial bail bondsmen) have also revealed that, despite having a robust preventive detention process, money is still frequently used to detain.

America borrowed English bail law verbatim, using the Statute of Westminster, the English Bill of Rights, and even the Magna Carta in applying bail to the Colonies. As in England, calling someone "bailable" meant that he or she was expected to be released, just as calling that person "unbailable" meant that he or she was eligible to be detained. As noted previously, to make sure that bail equaled release, America also borrowed the idea of using personal sureties administering mostly unsecured bonds. The court cases in America reflected this "bail as release" notion until well into the 1800s.[37]

Indeed, the concept of "bail" as release and "no bail" as detention was articulated in the law throughout America's long struggle with both intentional and unintentional detention in the nineteenth and twentieth centuries (discussed in detail, *infra*).[38] Even today, state supreme courts asked to interpret certain constitutional bail provisions will occasionally equate a right to bail with a right to release before trial.[39] Accordingly, and very broadly, the law tells us two important things: (1) how to do "bail" and "no bail" so that bail equals release and that "no bail" is justified, narrowly limited, and fair, which, in turn, points states generally toward the line between release and detention; and (2) the very definition and purpose of bail in America, which only reinforces the historical definition, as discussed above.

How To Do "Bail" or Release

How to do bail (release) and no bail (detention) is somewhat simplified by the fact that we currently really only have two Supreme Court opinions to

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[37] *See generally,* NIC *Fundamentals, supra* note 6, and NIC *Money, supra* note 30, and sources cited therein. As will be discussed later, the idea that bail might not necessarily mean release began when America started running out of personal sureties, causing the unintentional detention of bailable defendants. Later, the Excessive Bail Clause was read by courts to allow unintentional detention, which then led to judges using the financial condition to detain intentionally, albeit without saying so.

[38] *See id; see also* notes 81-152, *infra,* and accompanying text.

[39] *See, e.g., State v. Brown,* 338 P.3d 1276, 1277 (2014) ("The Bill of Rights of the New Mexico Constitution guarantees that '[a]ll persons . . . before conviction' are entitled to be released from custody pending trial without being required to post excessive bail, subject to limited exceptions in which release may be denied in certain capital cases and for narrow categories of repeat offenders."); *State v. Briggs,* 666 N.W. 2d 573, 583 (Iowa 2003) ("However, if the accused shows that the bail determination absolutely bars his or her utilization of a surety of some form, a court is constitutionally bound to accommodate the accused's predicament."); State v Brooks, 604 N.W. 2d 345, 353 (Minn. 2000) ("If judges have unlimited discretion to specify the form of acceptable bail, they would, for example, be able to set bail payable only by real property. If the accused in such a case does not own any real property, he is in essence being denied bail when he may be able to provide adequate assurance by some other means. As a result, the accused's constitutional right is violated.").

guide us – one for release, and one for detention. The opinion in *Stack v. Boyle*[40] guides us through the release side of the equation. It does this by: (1) equating the right to bail with the "right to release before trial" and the "right to freedom before conviction;"[41] (2) telling us that this release is nonetheless conditional upon having "reasonable" and "adequate" assurance to further the legitimate purposes of bail (currently court appearance and, in virtually every state, public safety);[42] (3) warning of the need for standards to avoid arbitrary government action; [43] (4) requiring those standards to be applied to every individual being assessed through the bail process and not allowing those standards to be replaced with blanket conditions based on charge alone (a warning that throws considerable doubt on the use of traditional money bail schedules);[44] (5) expressly articulating that the "spirit of the procedure" of bail is to release people;[45] and (6) further noting that setting a financial condition of release with a purpose of detaining a defendant is "contrary to the whole policy and philosophy of bail."[46]

This last concept – the concept that it is improper to set a condition of bail to purposefully detain an otherwise bailable defendant – is important to highlight because it is misunderstood and often ignored today. The American bail system was set up to allow the federal government and the states to determine for themselves who is bailable and who is not, with certain fundamental legal principles providing boundaries so that the right to release is not unconstitutionally eroded. And, following this broad allowance, the federal government and the states have declared certain persons to be bailable and others to be potentially unbailable. Once that declaration is in place, it would be clearly unlawful for a judge to essentially skip that declaration and instead to purposefully detain a different set of defendants based on that judge's personal opinion of who should remain in jail.

The notion that "bail" may not be used to purposefully detain was commonly understood in America until well into the 1960s,[47] and that

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[40] 342 U.S. 1 (1951).
[41] *Id.* at 4.
[42] *Id*. at 4-5.
[43] *Id.* at 5.
[44] *Id.*
[45] *Id.* at 7-8
[46] *Id.* at 10.
[47] *See* Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, at 8 (DOJ/Vera Found., 1964) ("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

common understanding – its sheer obviousness at the time – likely kept courts from the need to declare it in opinions. Nevertheless, courts have occasionally come to that conclusion when parsing the necessary elements of excessive bail analysis.[48] And, occasionally, a state supreme court will announce (expressly or impliedly) that the unattainable amount alone is sufficient to show a purpose to detain.[49] Nevertheless, the practice remains because judicial officers and other bail setters have become wise to the idea that articulating no purpose for any particular condition – that is, setting bail without making a record as to exactly why it is being set – can essentially insulate those officials from appellate court findings of error.[50] The fundamental point is that setting bail to detain is unlawful, and it is only a matter of time before the appellate courts will correct what has become an unfortunate but common practice.

How To Do "No Bail" or Detention

If the United States Supreme Court's opinion in *Stack v. Boyle* guides us in matters of release, its opinion in *United States v. Salerno*[51] guides us in matters of detention. It does this by: (1) settling, at least for the time being, the debate as to whether the Eighth Amendment to the United States Constitution confers some federal right to bail thus affecting the states – it appears not to, even though the language of *Salerno* could be read to provide a basis for future decisions going either way;[52] (2) settling, once and for all,

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is now questionable."). Freed and Wald's document was used as the primary guiding source for the first generation of bail reform's National Symposium on Bail and Criminal Justice sponsored by Attorney General Robert Kennedy.

[48] *See Galen v. County of Los Angeles,* 477 F.3d 652 (9th Cir. 2007) ("The court may not set bail to achieve invalid interests.") (citing *Wagenmann v. Adams,* 829 F.2d 196, 213 (1st Cir.1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent an arrestee from posting bail)).

[49] *See, e.g., State v. Brown* 338 P.3d 1276, 1293 (2014) ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release.").

[50] In *State v. Anderson,* 127 A.3d 100, 125 (2015), the dissent argued, "The undeniable purpose and effect of the court's imposition of a high monetary bond was to ensure that the defendant would be detained." The majority, however, disagreed based on the lack of any record showing purposeful detention and found, instead, that "the defendant was not actually denied bail but, rather, was unable to post the bail that the trial court, in its discretion, properly set." *Id.* at 113. So long as judges do not make a record expressly articulating a purpose to detain, the law has evolved to make it relatively simple to do just that.

[51] *United States v. Salerno,* 481 U.S. 739 (1987).

[52] On the one hand, the Court quoted from *Carlson v. Landon,* 342 U.S. 524 (1952), which cited historical notions to provide support for Congress's ability to extend pretrial detention to noncapital cases. On the other hand, the Court said, "*Carlson v. Landon* was a civil case, and we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." *Id.* at 754. For the various arguments, *see* Wayne R. LaFave, Jerold H. Israel, Nancy J.

whether flight alone is the only permissible purpose for limiting pretrial freedom – it is not, and public safety is now equal to flight as a valid reason for conditioning or denying release; (3) articulating liberty as a fundamental interest, which should lead future court opinions applying *Salerno* to use strict or at least heightened scrutiny in pretrial detention cases;[53] (4) allowing pretrial detention despite substantive due process concerns that it imposes punishment before trial or is always excessive;[54] (5) allowing pretrial detention despite concerns that it is based on a prediction of risk of something a defendant may or may not do in the future.[55]

This last notion – that pretrial detention may be based on a prediction of something someone may or may not do in the future – was vigorously debated in America's second generation of bail reform. While bail has been in the business of prediction ever since something even resembling bail was created in 400 A.D., those debates in the 1970s and 1980s illustrated that detention based on prediction was something seen by many as practically un-American. And because the idea of detaining someone pretrial for something he or she may or may not actually do in the future is practically un-American, the Court in *Salerno* went out of its way to express the idea that liberty is the norm and detention must be "carefully limited."[56] To make sure that detention is carefully limited, the Court, in turn, emphasized three considerations that are arguably necessary in any detention scheme: (1) the need to articulate a particularly acute problem or justification for detention; (2) the need to limit detention by charge; and (3) the need for procedural due process.

A Particularly Acute Problem

First, pretrial detention should narrowly focus on some "particularly acute problem in which the government interests are overwhelming."[57] In the Bail Reform Act of 1984, it was the "alarming problem of crimes committed by

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King, & Orin S. Kerr, *Criminal Procedure* (4th ed., West Pub. Co. 2015) [hereinafter LaFave, et al.]. LaFave, in turn, points to *Hunt v. Roth,* 648 F.2d 1148 (8th Cir. 1981), which, though later vacated for mootness, noted that, "If a $1,000,000 bond set arbitrarily by legislative fiat [for defendants all facing the same charge] is excessive there is little logic to support the proposition that Congress could arbitrarily deny bail for any or all criminal charges whatsoever." *Id.* at 1160-61.

[53] *See. e.g., Lopez-Valenzuela v. Arpaio,* 770 F.3d 772 (9th Cir. 2014).

[54] *Salerno,* 481 U.S. at 746-51.

[55] *Id.* at 751.

[56] *Id.* at 755.

[57] *Id.* at 750.

persons on release,"[58] backed up by various research documents as noted in the legislative history to the Act. Compare this to a case in 2014, however, in which the Ninth Circuit Court of Appeals struck an Arizona "no bail" provision by holding the law up to *Salerno* and concluding that it was not "carefully limited," as *Salerno* instructs, in part because it did not address a particularly acute problem.[59]

Today, the problems we seek to address may be different, but they must be real. Thus, when re-drawing the line between release and detention, jurisdictions must clearly identify the issues that they seek to address, and they must remember that simply adding certain classes of defendants to the detention eligibility net without some research or findings showing those classes to warrant detention would likely run afoul of *Salerno's* requirement of some narrow but identifiable problem. Thus, for example, if risk of flight is not the problem in America that it once was, jurisdictions may have no legal basis for detaining persons for that purpose. Likewise, if social science research shows that "sex offenders" simply do not pose high risks for flight or danger during pretrial release, addressing some perceived problem by declaring all sex offenders potentially detainable might run afoul of *Salerno*. Even more generally, if pretrial risk is simply not the problem jurisdictions once thought it was before they had any empirical evidence (and used criminal charge as a proxy for risk), those jurisdictions must be honest in their determinations as to whether certain defendants need be detained at all.

Limited By Charge

Second, pretrial detention should be limited to some "specific category of extremely serious offenses," which includes persons found "far more likely to be responsible for dangerous acts in the community after arrest."[60] This goes to the detention eligibility net, which is discussed at length below, and which would now potentially include – if possible to demonstrate – charges justified through a showing of extreme risk of flight.[61] This standard, which

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[58] *Id.* at 742.
[59] *Lopez-Valenzuela,* 770 F. 3d 772, at 782-84 (2014).
[60] *Salerno,* 481 U.S. at 750.
[61] There is a tendency to think of "preventive detention" as only a response to public safety, but, in fact, preventive detention may be based on flight as well as public safety. *Salerno* spoke to the ability to detain based on danger because that was the issue on appeal and it was the novel question facing America. The Bail Reform Act of 1984, however, provided for preventive detention based on extreme risk of flight in addition to danger. Risk of flight was the historic reason for denying bail to capital defendants, and was gradually adopted in the second half of the twentieth century for noncapital offenses. In *Lopez-Valenzuela v. Arpaio,* Judge Fisher responded to the dissent's attempt to distinguish preventive detention based on

is based on criminal charge, may arguably be violated through provisions like those found in various state constitutions that allow detention for "any other crime,"[62] all felonies,[63] or even "violent offenses"[64] if those categories do not have some justification through empirical evidence or other legislative findings showing that defendants in those categories present higher risk.

In this generation of bail reform it is tempting to think that simply adding "risk-based" language into a detention eligibility net will solve this problem, but doing so raises its own issues. Again, this concept is discussed in more detail later, but for purposes of example, consider Missouri, which through its crime victim's rights provision, added the following language to its constitution: "Notwithstanding section 20 of article I of this Constitution [providing a right to bail for all except defendants charged with capital offenses], upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may impose special conditions which the defendant and surety must guarantee."[65] On its face, this provision raises excessive bail concerns due to the fact that it can be applied to literally every offense (using the blunt hammer of detention for, say, traffic or low level misdemeanor offenses) as well as concerns with vagueness and other aspects of due process. Moreover, this particular risk-based provision – like provisions basing the ability to detain on whether a person is "unmanageable" in that "no condition or combination of conditions will suffice" to manage the risk (a resource-based provision in addition to a risk-based one) is highly subjective, and the right to pretrial release is far too important to allow erosion through such subjective standards.

In a field gradually incorporating risk research and statistical assessment of risk into the bail determination, the justification jurisdictions use for determining future detention eligibility nets becomes crucial. Certainly, using actuarial pretrial risk assessment instruments is a more rational way to

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public safety versus flight (and thus to shift the analysis to one of excessive bail) and wrote, "[t]he Supreme Court has never recognized – or even suggested – that distinction." 770 F. 3d at 792, n. 16 (2014) (citing supporting cases). While the history illustrates a distinction between flight and public safety, and within public safety, danger to persons inside and outside of the criminal process, those distinctions have been largely erased under *Salerno.*

[62] *See, e.g.,* Utah Const. art. I, § 8.

[63] *See, e.g.,* Ohio Const. art. I, § 9.

[64] *See, e.g.,* S.C. Const. art. I, § 15.

[65] Mo. Const. art. I, § 32.

glean whether a defendant poses some extreme risk than by merely assuming high risk for serious charges. As mentioned previously, statistical risk assessment comes ever closer toward allowing us to answer two basic questions at bail: (1) "How risky is this defendant?" and (2) "Risky for what?" Nevertheless, before jurisdictions drop the concept of "risk" wholesale into their right to bail provisions, the law requires that they take a closer look at the risk research, which, in turn, adds some element of complexity.

This paper strives to reduce this complexity, but for sake of illustration before a more thorough examination of the issues, consider this example. *Salerno* approved of the Bail Reform Act's detention process, in part because it included detention provisions that were limited only to "extremely serious charges." Through risk research, however, we see that there might exist relatively "high" risk persons alleged to have committed *all* crimes, not just "extremely serious" ones. And because *Salerno* does not dictate absolute prerequisites to detention, jurisdictions might instead apply broad concepts from *Salerno,* such as the need to limit detention to some narrow eligibility net that is justified as relevant to addressing an acute problem, and apply those concepts to a risk-informed field. And yet, because we live in a free society and because risk inheres to the individual and not the crime, we must build in some safeguard through a floor below which no risk assessment is done and no detention is available. Right now, across America, people are walking the streets who would be deemed "low," "medium," and "high" risk, if only they were assessed. Accordingly, when one of those persons is arrested for a felony, should they be assessed for that risk? What about a misdemeanor? What about a traffic infraction? Should jurisdictions allow courts to use detention under such a subjective or resource-driven notion of whether conditions exist to manage risk, or should they provide meaningful limits in our laws to simply remove certain classes of defendants from detention eligibility? Understanding these complex scenarios means understanding that it is *Salerno's* broader concepts concerning "no bail" that must be followed when fashioning detention provisions that do not offend fundamental American notions of liberty and freedom.

Today we are seeing states change their constitutional right to bail or release provisions to account for risk. So far, they have replaced extremely narrow detention eligibility nets based on charge to extremely broad eligibility nets to better account for risk. Often, these nets are coupled with a further limiting process that expresses the idea that detention can be used only when

no condition or combination of conditions suffice to provide reasonable assurance of public safety and court appearance, a subjective determination that limits the right to bail based on existing jurisdictional resources. As we will see later in this paper, crafting purely risk-based detention eligibility nets raises many legal issues, especially when those nets have seemingly no meaningful limits enacted through their implementing statutes or rules. The fundamental point is that *Salerno* broadly instructs that detention must be extremely limited in some justifiable way. In the 1980s, the limit was charge-based and justified through certain underlying assumptions concerning criminal charge, which are now being rightfully questioned. Today, justifications might be different, but they must nonetheless exist.

Procedural Due Process

Third, detention may only be used after the government provides certain fundamental procedural due process protections. In *Salerno,* the Court noted that the government must first demonstrate probable cause that the arrestee committed the crime.[66] Next, the Court emphasized the Bail Reform Act's inclusion of a "full blown adversary hearing," at which the government must prove by clear and convincing evidence that no conditions of release can manage the documented risk.[67] This individualized determination of risk served as an additional limitation on pretrial detention, as some persons falling within the eligibility net would no doubt be deemed to pose *manageable* risks after assessing their individual characteristics and situations. The hearing itself allowed defendants to have counsel, cross-examine witnesses, testify and proffer evidence, and rely upon clearly articulated standards used to guide judicial officers in the bail decision (including standards designed to direct the judicial officer's focus toward "the nature and seriousness of the danger posed" by release) as well as a requirement for written findings of fact and immediate appellate review.[68]

Taken together, *Salerno's* prerequisites for a proper detention process include a narrow eligibility net – justified by the law or the research – and a process designed to further narrow the class of defendants held without bail.

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[66] *Salerno*, 481 U.S. at 751.
[67] *Id.* at 750. Well known criminal law and procedure scholar, Wayne LaFave, considers both the finding of probable cause and the necessary proof of the lack of sufficient conditions to be part of the substantive (as opposed to procedural) due process analysis. LaFave et al., *supra* note 52, § 12.3(f), at 82. LaFave suggests that many of the state preventive detention provisions today would not pass muster when held up to *Salerno* for a variety of reasons. *See id.* at 55-68, 82.
[68] *Salerno*, 481 U.S. at 743, 751-52.

In short, *Salerno* instructs that detention is lawful, but it must be justified, carefully limited, and fair. Today in America, however, we see pretrial detention that is careless, largely unlimited, and unfair. It is careless because judges often set financial conditions without even knowing whether a defendant will be released or detained, making detention essentially random. It is unlimited because we see detention for all classes of defendants, from low to high risk, and from accused murderers to accused shoplifters. And it is unfair because it is based on money.

The Purpose of Bail and No Bail

Stack and *Salerno* also sum up the very purposes of bail and no bail, which follow the history of bail, discussed above. The overall purpose of bail (a process of conditional release) can be summarized as attempting simultaneously to: (1) maximize release – the law favors, if not demands the release of bailable defendants and detention should be a narrow exception to the norm; (2) maximize court appearance – the law allows jurisdictions to limit pretrial freedom for this purpose; and (3) maximize public safety – in virtually every state and the federal system, the law also allows jurisdictions to limit pretrial freedom for this purpose as well.[69] In short, as noted above, the law informs us that the purpose of bail is to provide a mechanism for conditional release, just as the purpose of "no bail" is to provide for a mechanism for potential detention.

These three purposes are competing purposes, and thus they form a balance that must be weighed when considering anything related to the release or detention of defendants pretrial. Moreover, because it is a balance, persons should never consider one purpose in isolation (indeed, the law and the history suggest that release is likely paramount to court appearance and public safety). Thus, for example, if a legislature desires to pass a bail bill focusing entirely on public safety, the American public must force the debate to include the effects of the bill on court appearance and release. As another example, if a jail policy results in releasing a vast number of defendants with no consideration of the effects on public safety and court appearance, the American public must question and analyze that policy pursuant to the balance. And as a final example, even if someone were to

[69] The overall purposes of both bail *and no bail* would be to (1) maximize the appropriate placement of defendants pretrial (the law allows states and Congress to determine bail eligibility, subject to broad fundamental legal boundaries), while simultaneously (2) maximizing court appearance and (3) public safety.

produce unbiased and unflawed research showing that commercial surety bonds have some effect on court appearance, the American public and criminal justice leaders must assess whether to continue using surety bonds based on how those bonds hold up to the other two purposes; if they have no effect on public safety and they significantly hinder release, then the balance would suggest that America should cease using them. In addition to spelling out broad fundamental legal principles, such as due process and equal protection, the law tells people to do this type of weighing in the bail process. Too often, however, people do not.

Despite *Stack* and *Salerno* providing us with guidance on how to do release and detention, the opinions in those cases unfortunately never expressly defined "flight" or "danger to the community." Thus, the Court left it to American jurisdictions to glean such a definition from parsing the language of the detention eligibility net, the various limiting processes, and, indeed, the facts of various detention cases that formed the basis for pretrial detention to begin with. As noted by one bail scholar, "The Court suggested that Congress enacted the statute to reduce 'the alarming problem of crimes committed by persons on release,' yet the court failed to consider whether the statute was meant to deprive liberty to prevent any crime or only serious crimes."[70]

Nevertheless, any lack of meaningfully guiding definitions is likely due to the fact that we simply had no real research to back any up. Only recently have we begun to examine exactly how risky persons actually are, and, more importantly, the likely result of that risk. Drafters of the Bail Reform Act perhaps did the best they could by making certain assumptions – for example, an assumption that if a person arrested for a "serious" crime committed another crime while on release, that crime would likely be the sort that we, as a community, would feel the need to avoid through detention. As we will see later, pretrial research is beginning to provide the answers needed to adequately re-draw the line between release and detention by providing empirical evidence about risk, and, in the process, the nuances of dangerousness and flight.

This should not detract from the fact that *Stack* and *Salerno* together still provide valuable lessons on how to do bail and no bail – pretrial release and

[70] Abhi Raghunathan, *"Nothing Else But Mad": The Hidden Costs of Preventive Detention*, 100 Geo. L. J. 967, 976 (2012).

detention. As in other areas of the law concerning bail, however, America has largely ignored those lessons. Even the federal government – the object of analysis by the Court in *Salerno* – has allowed the federal statute to lead to over-detention through a widening of the detention eligibility net and rebuttable presumptions in ways the Court might not approve today.[71]

Indeed, courts are now beginning to hold up various bail provisions to *Salerno* and find them unconstitutional.[72] Moreover, at least one high court has issued an opinion dramatically changing the way bail is done in an entire state.[73] Finally, federal courts have begun issuing opinions in which they are saying that America's predominant method of detaining defendants by using money likely violates the Equal Protection Clause of the United States Constitution.[74] These cases likely reflect the beginning of a wave of litigation designed to bring America's bail practices more in line with fundamental American legal principles, which, at their core, require the government to adequately justify its processes and to apply them fairly to all persons.

Accordingly, when re-drawing or re-articulating the line between release and detention, jurisdictions must remember to return to the basics underlying these legal principles, to read and understand the lessons from the primary bail cases, to remain mindful of the tripartite balance of lawful purposes, and to select new demarcations only when they are adequately justified.

What Do Ratios Have to Do With This?

When thinking about the law's guidance for re-drawing the line between release and detention, it is natural to think of the idea of some ratio of released to detained persons. Indeed, even before the Statute of Westminster in England, the fact that bail and no bail comprised the entirety of the

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[71] Compare 18 U.S.C. § 3142 (e) (1984) with 18 U.S.C. § 3142 (e) (2016). The bigger issue in the federal system appears not to be the law, but instead application of the law leading to unexplainable and potentially unconstitutional detention rates. A recent article in the Detroit News reported that nationwide 57.4 percent of federal defendants are detained pretrial, essentially making detention, rather than release, the "norm" in the federal system. Jennifer Chambers, *At Federal Court in Michigan, Most Go Free Until Trial*, (Jan. 17, 2016), found at http://www.detroitnews.com/story/news/politics/2016/01/17/release-detention/78950732/.

[72] *See, e.g., Lopez-Valenzuela v. Arpaio*, 770 F. 3d 772 (2014); *Simpson v. Miller,* 387 P. 3d 1270 (Ariz. 2017).

[73] *See State v. Brown,* 338 P.3d 1276 (2014).

[74] *See, e.g., Pierce* v. *City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015) (adopting a settlement agreeing to a new bail policy and declaring that, under the Equal Protection Clause, no defendant can be held in custody based solely on inability to post a monetary bond).

dichotomy meant that every release and detention system would result in a ratio. Moreover, people often point to "Blackstone's Ratio" – the notion, made famous by Sir William Blackstone and as mentioned above that, "It is better that ten guilty persons escape than that one innocent suffer"[75] (as well as the Supreme Court's reference to that ratio in explaining the presumption of innocence in *United States v. Coffin*[76]) – to argue that the percentage of persons released through a tolerance of false negatives to false positives should lead to roughly detaining 10% of the total. This argument is bolstered by the fact that America's singular "model" bail jurisdiction, the District of Columbia, which uses an in-or-out release and detention system with virtually no money bonds, and which is uniformly praised by all criminal justice actors within the District, just happens to release defendants in the 90th percentile while maintaining high court appearance and public safety rates. Others, who equate Blackstone's ratio with the "beyond a reasonable doubt" standard of proof at trial, argue that a "clear and convincing evidence" burden for detaining someone at bail might point toward an even larger acceptable percentage of detained defendants. And still others use the history and the law to argue that the detention rate should be far smaller. All these arguments seem facially reasonable.

However, anyone desiring to use any ratio as instruction for re-drawing the line between release and detention should realize three important things. First, Blackstone's ratio – described as 10:1 – is merely his reformulation of numerous prior ratios articulated by numerous authors, which range from 1:1 to 1000:1, some of which were also cited by the Supreme Court in *Coffin*.[77] Thus, there is historical support for both enlarging and reducing detention based on the use of ratios.

Second, the idea of articulating a ratio concerns our tolerance with false negatives to false positives, which are not always easy to prove. At bail, encountering false negatives entails releasing persons predicted to succeed (the negative being a prediction that the person will not be violent or flee) but who fail, and encountering false positives entails detaining persons predicted to fail but who would have succeeded (like a false alarm). Using Blackstone's ratio, we might say that it is better to release ten false negatives than to detain one false positive. Unfortunately, unlike a trial where guilt and

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[75] William Blackstone, *Commentaries on the Laws of England*, Book 4, ch. 27 (Oxford 1765-1769).
[76] *Coffin v. United States,* 156 U.S. 432, 456 (1895).
[77] *See generally*, Alexander Volokh, *nGuilty Men*, 146 U. Penn. L. Rev. 173 (1997).

innocence are ultimately determined, there is no way to determine that a detained defendant would have misbehaved if he was, in fact, let out of jail.

Moreover, when we use actuarial pretrial risk assessment instruments in the bail determination, those instruments only tell us that a particular person "looks like" another group of similar individuals who succeeded or failed at certain rates. They cannot predict individual risk. Finally, these same instruments are illustrating that even the highest risk defendants still succeed 50-70 percent of the time. Lower and medium risk defendants, as a group, often succeed at extremely high rates, often in the 80th and 90th percentiles. Given all this, a ratio like Blackstone's, by itself, does not always fit well with reality. Indeed, the lack of precision in measuring risk likely means that the number of higher risk persons we release should be vastly larger than the number of higher risk persons we detain, simply because in America doubts about risk at bail should be settled in favor of release, not detention.

Third, as noted by Laurence Tribe, "The very enterprise of formulating a tolerable ratio of false convictions to false acquittals, puts an explicit price on the innocent man's liberty and defeats the concept of a human person as an entity with claims that cannot be extinguished, however great the payoff to society."[78] To Tribe, deliberately punishing a person when we have *doubts* about his guilt is not only wrong, but "morally and constitutionally reprehensible."[79] The same should be true in bail, an area of the law where preventive detention looks substantially similar to, if not indistinguishable from, punishment.

While some, including this author, cite to Blackstone's Ratio to caution jurisdictions against adopting a false belief that "one crime is one crime too many" in bail, Blackstone's Ratio suggests a different way to think about crime and bail: that one person wrongly detained is one person too many. Accordingly, we must ensure that whatever process we adopt to allow for detention painstakingly avoids this result, and we must remember that while some ratio might be useful as a starting point in bail reform, it is the system that we put in place that will ultimately determine it. As noted by Tribe, "the final balance sheet obviously matters, but the *process* by which it is achieved matters more."[80] The current money bail system, it is clear, has a process that leads to the current ratio in an unjust and arguably unconstitutional

[78] Tribe, *supra* note 1, at 387.
[79] *See id*. at 375-86.
[80] *Id.* at 387.

fashion. To the extent that any future system uses the history, the law, the research, and the national standards to: (1) embrace the risk of release; (2) significantly limit detention by creating narrow detention eligibility nets as well as other limiting processes that also include due process hearings; and (3) move American culture toward a culture of pretrial liberty and freedom, we should not be surprised if the actual number of released defendants grows higher than expected.

Thus, when re-drawing the line between pretrial release and detention, jurisdictions must remember that they should not necessarily aim toward a particular ratio of released to detained defendants, but rather let that ratio evolve through the creation of a rational and transparent process of narrow detention nets and limiting processes following the law and traditional American notions of freedom and liberty.

What Else Do the Law and History of Bail Tell Us?

The law and the history of bail are intertwined, with historical events providing the justification for new laws, and new laws, in turn, leading to historical events. Not surprisingly, then, the law underlying bail and certain historical events intertwined with that law tell us other important things necessary to consider when re-drawing the line between pretrial release and detention. Those things include, perhaps most importantly, America's slow struggle with the limits of intentional and unintentional detention. The story of that struggle begins, once again, in England in 1275.

The Big Rule

As noted previously, ever since the Norman invasion, those administering a system of bail have been concerned with putting people in the right places. In 1275, the Statute of Westminster helped officials do this in England by setting out three criteria bail setters were to weigh to determine bailability: (1) the nature of the offense; (2) the probability of conviction; and (3) criminal history (or "ill fame" of the defendant, including whether he tried to escape).[81] Importantly, these three elements determined bailability before the monetary condition (the only condition in use at the time) was set. As noted previously, once defendants were deemed bailable, they had to be released,

[81] *See* Carbone, *supra* note 16, at 524-25, n. 38

and thus England used a system of personal sureties and unsecured financial conditions to assure that defendants were, in fact, released.

England's notions of both unintentional and intentional detention were thus fairly straightforward. If bailable, few, if any, defendants were kept in jail unintentionally. On extremely rare occasions, defendants might not be able to find sureties, and if the official also could not persuade persons to perform as sureties in the case, the defendant would be jailed "unintentionally" – that is, ordered released, but detained based on the inability to meet a condition (not so much inability to pay as inability to find anyone willing to be responsible for the defendant). Again, however, this was exceedingly rare, especially given the relative lack of mobility of persons, and the various social groups that allowed English bail setters to assign sureties in any particular case. Nevertheless, unintentional detention did happen, albeit very infrequently.

Intentional detention of bailable defendants, on the other hand, was forbidden. Indeed, as noted previously, various attempts by English officials to intentionally detain bailable defendants (as opposed to unbailable ones) led to eras of bail reform and the creation of grand jurisprudential mechanisms – such as habeas corpus – that we take for granted today. This notion included trying to intentionally detain defendants through the use of unattainable financial conditions. Bail scholars have written little on the origins of the Excessive Bail Clause in England except to note that it was enacted as a reform due to bail setters using money to intentionally detain bailable defendants.[82] Whether officials were simply setting the unsecured amount so high as to dissuade all sureties from performing the surety duty, requiring the defendant to promise an amount all knew was unattainable to him, or, while less likely and rarely in any event, attempting to charge an amount up front in secured form is not entirely known.[83] In any event, the general rule in England was the same: bail set to intentionally detain a bailable defendant was unlawful, and bail leading to the unintentional detention of bailable defendants was incredibly rare. This made it possible for England to adhere to what this author refers to as the "Big Rule:"

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[82] *See* Carbone, *supra* note 16, at 528; Duker, *supra* note 17, at 61-66.

[83] For example, Holdsworth's account of the history states that "judges did their best to evade [habeas corpus] by requiring prisoners, entitled to bail, to find security in such excessive sums of money that they were unable to furnish it." Holdsworth, *supra* note 17, at 118-19. Other sources are largely silent on this point, except to say that the traditional practice was only to require promises to pay financial conditions. Nevertheless, it appears that officials could also use their ability to "justify" a surety (or even the defendant) for sufficiency to keep defendants in jail even while using unsecured financial conditions.

because bail is release and no bail is detention, bailable defendants must be released and unbailable defendants must be detained. Indeed, this rule is so big that anything that interferes with it causes bail reform to happen.

The Big Change (The American Overlay)

When America was formed, it embraced England's bail rules and administered pretrial release and detention in virtually the same way. Unbailable defendants were detained, and bailable defendants – through the use of personal sureties and unsecured bonds – were released. Exceptions to the rules were rare; as in England, most defendants found sureties and it was unusual for a person to have literally no one willing to provide the surety service.[84] Moreover, as in England, virtually all defendants were released on recognizance, requiring only that the defendant or surety promise to pay the financial condition only upon default.[85] Nevertheless, over time 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.[86]

On the other hand, 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

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[84] *See* Paul Lermack, *supra* note 32, at 505 ("Although the amount of bail required was very large in cash terms and a default could ruin the guarantor, few defendants had trouble finding sureties.").

[85] Devine, *supra* note 20, at 5. *See also* Lermack, *supra* note 32, 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."); Charles Petersdorff, A Practical Treatise on the Law of Bail in Civil and Criminal Proceedings, 509-519 (describing the nature of the recognizance as a debt owed to the court, forfeitable and payable upon the defendant not returning to trial) (London, Jos. Butterworth & Son 1824). This did not mean that abuses did not occur. Occasionally, historians would note abuses by officials who would declare certain sureties, including the defendant himself, to be "insufficient" in that the officials believed they would not be able to produce the unsecured amount in the event of default. Petersdorff warns that "extreme caution should be observed, that under pretense of demanding sufficient sureties the magistrate does not require bail to such amount as is equivalent to the absolute refusal of bail, and in its consequences, leads to a protracted imprisonment." *Id.* at 512. Nevertheless in the famous case of John Peter Zenger for libel against the Governor of New York, it appears the court unlawfully set bail to detain Zenger either by requiring a secured amount ten times more than Zenger's sworn worth, or the same amount in unsecured form knowing that Zenger did not have it and thus would not "ask any to become [his] bail" for lack of enough counter surety. *See The Tryal of John Peter Zenger, of New York, Printer,* at 4,5 (J. Wilford/London 1738), found at http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/History_Tryal-John-Peter-Zenger.pdf. Zenger was detained for the duration of this trial, but was ultimately found not guilty.

[86] *See* Carbone, *supra* note 16, at 529-30.

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."[87] This ultimately meant that persons were declared "bailable" in America prior to assessing any "risk" beyond that solely associated with the charge.

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 by 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 between 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 assuming that those determinations would not interfere with bailability (or release) itself.

Thus, even before some of England's later reforms, in 1641 Massachusetts passed its Body of Liberties, creating an unequivocal right to bail for noncapital 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.'"[88] 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."[89] The Pennsylvania law was quickly copied, and as America grew "the Pennsylvania provision became the model for almost every state constitution adopted after 1776."[90] The Continental

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[87] Hermine Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139, 1162 (1971-72) [hereinafter Meyer].

[88] Carbone, *supra* note 16, at 531 (quoting 5 American Charters 3061, F. Thorpe ed. (1909)) (internal footnotes omitted).

[89] *Id.* at 531-32 (internal footnotes omitted).

[90] *Id.* at 532.

Congress, too, apparently copied the Pennsylvania language when it adopted the Northwest Territory Ordinance of 1787.[91]

This was, indeed, a big change. England determined bailability by looking at the individualizing risk factors in addition to charge. Then, once deemed bailable, defendants were expected to be released. America simply labeled large classes of defendants "bailable" and then told judicial officials that the individualizing risk factors could only be used to adjust the monetary condition of release. And this change – what this author calls the "American Overlay" to English bail – combined with the gradual decline of the death penalty,[92] meant that virtually every defendant was considered to be "bailable." This is what America wanted – a very broad right to bail, so broad that even capital defendants might find release if the evidence were slight. Coupled with the "Big Rule" (discussed above), which forbade the detention of bailable defendants, the American Overlay to English bail law meant that virtually every defendant was meant to be released prior to trial. As in England, there were likely rare instances of unintentional detention when defendants were literally unknown to the communities in which they were accused, but the system simply did not allow for the intentional detention of bailable defendants.

Such a broad system of release works only so long as defendants return to court in acceptable numbers, which apparently happened during the colonial period.[93] Gradually, however, America experienced a series of remarkable events that led to more than 150 years of struggle with both unintentional and intentional detention.

America's Struggle With Unintentional Detention[94]

The first event leading to America's struggle with unintentional detention (bailable defendants ordered released but unable to obtain release for whatever reason) was the slow decline and eventual disappearance of

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[91] Meyer, *supra* note 87, at 1163-64 (citing 1 Stat. 13).
[92] *See* Carbone, *supra* note 16, at 534-35.
[93] Lermack reported that the forfeiture rates in Colonial Pennsylvania were "high" (from 8-12% of all cases coming to trial), but "never so high as to cause the system to break down altogether." Lermak, *supra* note 32, at 507. In addition to the rate being only subjectively "high," it should be noted that the forfeiture rate included civil and criminal forfeiture as well as bail for witnesses, a practice since abandoned in America. Moreover, at that time "bail jumping" was not a crime in Pennsylvania, and the courts' contempt power over defendants failing to appear was rarely used. *Id.* at 509.
[94] The states likely had their own struggles with both unintentional and intentional detention, but this paper only explores the phenomenon in the federal system.

personal sureties willing to take responsibility of defendants for no money. This, in turn, caused unacceptable friction with the "Big Rule" requiring the actual release of bailable defendants. There are many reasons for this, but the effect both in England and America was the same: without personal sureties willing to take responsibility over defendants, bailable defendants remained in jail, a condition that historically required correction. Thus, in England, Parliament passed laws allowing judges to release defendants with no sureties. America, on the other hand, made it legal to both profit and be indemnified at bail, essentially allowing the commercial surety system to operate in this country starting in about 1900. Unfortunately, and as noted previously, this changed how judicial officers set bail, from using mostly unsecured to mostly secured financial conditions, a change that only exacerbated the detention problem.[95]

It was during the decline of personal sureties in America that judges also began experimenting with expanding the allowances for defendants to "self-pay" the financial condition. And it was during this experimentation that judges began quickly to realize that very few defendants could personally afford financial conditions of bond in even modest amounts.

It is precisely at this time that the Excessive Bail Clause could have been used to declare any unattainable financial condition to be unlawful – indeed, such a declaration would clearly follow from a reading of the history and the law. Instead, however, to stem the tide of constitutional claims in the tumultuous period of declining personal sureties (and before formally ushering in the commercial surety system), judges created a line of cases holding, essentially, that the financial condition of a bail bond is not necessarily excessive simply because a defendant cannot pay it.[96] This line of cases provided an expeditious solution to the immediate problem, and proved equally effective at stemming constitutional claims when the commercial surety system also failed to solve the issue of unintentional detention of bailable defendants. Unfortunately, however, this meant that unintentional detention – a condition only very rarely tolerated in England and America until this time – would now be tolerated in much greater numbers and, indeed, given legal justification. In short, so long as a judge

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[95] Indeed, by the 1920s various bail scholars began calling for its reform. *See, e.g.,* Roscoe Pound & Felix Frankfurter (Eds.), *Criminal Justice in Cleveland* (Cleveland Found. 1922); Arthur L. Beeley, *The Bail System in Chicago*, at 160 (Univ. of Chicago Press, 1927).

[96] For a discussion of what has been termed by this author as the "unfortunate line of cases," *see* NIC *Money, supra* note 30, at notes 73-82 and accompanying text.

did not make a record to purposefully detain, detention due to the inability to meet a condition (so-called unintentional detention) was lawful, and considered to be simply an unfortunate byproduct of a system of conditional release.

The United States Supreme Court's 1951 opinion in *Stack v. Boyle* did little to help the matter. While the Court in that case did equate the right to bail with a "right to release before trial," and while, in his concurring opinion, Justice Jackson expanded on this notion to say that setting bail to assure the defendants remained in jail "is contrary to the whole policy and philosophy of bail,"[97] the Court stopped short of saying that unattainable amounts might violate the constitution. Instead, it disposed of the case by merely holding that bail was not "fixed by proper methods" when the trial court set the financial conditions primarily based on the charge and otherwise failed to follow or allow any evidence concerning the Federal Rules' individualizing standards for each defendant.[98] At the time *Stack* was decided, the only proper purpose for limiting pretrial freedom was court appearance, and the only condition being used to achieve court appearance was money. And though the Court wrote that "bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [i.e., court appearance]" would be deemed excessive, the Court did not define flight, did not say what might be "reasonable," and did not in any way indicate intolerance for the historical aberration of unintentional detention. Even today, in courts across America, judges are allowed simply to declare an amount to be reasonable, and so long as they do not expressly say that the amount is designed to detain an otherwise bailable defendant, the resulting "unintentional" detention is incorrectly accepted as part of a rational justice system.

Unintentional detention of bailable defendants led to the first generation of American bail reform in the twentieth century, and the Bail Reform Act of 1966[99] (and state statutes modeled after the Act) tried to reduce unintentional detention by focusing on alternatives to the traditional money bail system. The Act did so 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

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[97] *Stack v. Boyle,* 342 U.S. 1, 4, 10 (1951).
[98] *Id*. at 6,7.
[99] *See* 1966 Act, *supra* note 13. Among other things, the Bail Reform Act of 1966 also began changing the nomenclature surrounding bail by beginning to focus on the word "release" instead of "bail," a change that was fully realized in the Bail Reform Act of 1984, and that has endured in the federal system and many states.

ties to help assure court appearance. In 1968, the American Bar Association Standards on Pretrial Release[100] made numerous recommendations designed to reduce or eliminate the unintentional detention of bailable defendants. Unfortunately, to date no American state has incorporated the full panoply of laws, policies, and practices first articulated by these documents.

Today, we are more concerned with the unintentional detention of so-called "low" and "medium risk" defendants. Unfortunately, that detention is made worse by our clinging to a system that uses money to *intentionally* detain so-called "high risk" defendants. Nevertheless, it is precisely our allowance of unintentional detention that has led to this cyclical abuse. By permitting unintentional detention based on such a loose standard as what a particular judge feels is "reasonable assurance," intentional detention using the bail process by setting an unattainable money condition – considered unlawful for centuries – is now quite easily achieved.[101] So long as the judge does not mention his intent to detain, bond amounts in the millions of dollars can be justified as providing reasonable assurance of court appearance and survive appellate scrutiny. The ability to easily detain using money, in turn, obviates any need to create a rational and fair system of moneyless preventive detention based on risk. And as long as money remains in use for high risk persons, it tends to bleed into cases in which defendants can be managed safely outside of secure detention. This is a cycle that must be broken.

Accordingly, when re-drawing the line between release and detention, criminal justice leaders must be willing to fix a system that so easily allows the unintentional detention of bailable defendants.

America's Struggle With Intentional Detention

As noted previously, America greatly expanded the right to bail to virtually all defendants not facing capital offenses, and also reduced the charges for which the death penalty might apply. It is fairly well settled among bail scholars that "capital crimes" exceptions to release were placed in federal

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

[101] The practice of using money to intentionally detain a bailable defendant by merely acting as though it is unintentional had become so apparent and prevalent by 1986 that, in its amicus brief in *United States v. Salerno,* the National Association of Criminal Defense Lawyers wrote that preventive detention was unnecessary because excessive bail had been historically tolerated to "incapacitate the rabidly dangerous." *See* Brief for National Association of Criminal Defense Lawyers at 8, *United States v. Salerno*, 481 U.S. 739 (1987).

and state laws based on the assumption that defendants facing death were more likely to flee than those facing less serious punishment.[102] Thus, America was used to the concept of intentional detention of capital defendants for risk of flight, but not for anyone else or for any other reason besides flight. America's struggle with intentional detention started when the country began seeing unacceptable numbers of noncapital defendants absconding after release, and reached an apex when America began seeing unacceptable numbers of defendants committing crimes while on bail.

Initially, the problem of flight was easily managed by judges simply setting unattainable secured money bonds while making no record of purposeful intent to detain; since unintentional detention was lawful, judges could simply make a record saying that the amount seemed "reasonable," and appellate courts would typically uphold the decision by assuming the detention was unintentional.[103] The problem became acute, however, when judges saw defendants absconding despite their best efforts to keep those defendants in jail. This is seen in cases throughout the latter half of the twentieth century, which reveal a slow erosion of the rule against intentional detention of otherwise "bailable" defendants – ultimately both for flight and public safety – leading up to the Bail Reform Act of 1984.

That erosion began with cases articulating the ability of judges to detain released defendants once a trial had begun to protect the judicial process.[104] For example, in *United States v. Bentvena,*[105] the Second Circuit Court of Appeals reviewed the district court's decision to remand nine defendants who were perceived to be disrupting an ongoing trial. In its opinion, the Second Circuit recited a defendant's "absolute" right to bail justified by the presumption of innocence as well as the need for unhampered preparation of a defense, but then stated: "Once the trial begins, the right to bail is necessarily circumscribed by other pressing considerations," such as potential delay, the possibility of interfering with witnesses, and the investment of public funds "that demand that precautions be taken to ensure that the proceedings go forward and terminate with all possible dispatch consistent with due process."[106]

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[102] *See*, *e.g.,* Tribe, *supra* note 1, at 377-79, 397, 400-02.
[103] Or, in a more nuanced argument, that the decision to release was intentional, but the actual release was neither intentional nor unintentional, as it was up to the defendant to secure the required sureties.
[104] These cases are different from those in which a defendant is remanded after conviction or in which the defendant is detained as punishment through a judge's contempt power.
[105] 288 F.2d 442 (1961).
[106] *Id.* at 444.

Drawing a distinction between a right to bail *before* trial with a right *during* trial, the Second Circuit held that "the district court possessed an inherent authority to remand the defendants into custody during trial in the exercise of sound discretion."[107] Even though this power should be used "with circumspection," the court explained, here the trial court did not abuse its discretion given frequent delays, several lost jurors, and the judge's inability to distinguish various individuals among a total of nineteen defendants, all of which presented a danger that "the trial might be disrupted and never concluded."[108]

One week later, in *Fernandez v. United States,* United States Supreme Court Justice Harlan reviewed the bail determinations of four of the nineteen defendants from *Bentvena,* above. In upholding the district court's denial of bail of those four, Justice Harlan wrote: "District courts have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trail and the fair administration of justice."[109] Nevertheless, Justice Harlan cautioned, while not requiring the same degree of particularization necessary for initially admitting a defendant to bail before trial, a remand during trial must not "be ordered on an undiscriminating wholesale basis," and must be based on some showing of improper defendant conduct or other circumstances overcoming a presumptive right of release.[110]

Approximately one year later, Justice Douglas, sitting as Circuit Justice, was faced with a similar intentional denial of bail. In that case, *Carbo v. United States,* the district court had denied the defendant's request for bail pending appeal due to a "strong likelihood of flight and of further threats and even harm to the Government's witnesses."[111] The Ninth Circuit Court of Appeals rejected the district court's rationale of protecting witnesses, and, because the trial had concluded, reasoned that denial of bail pending appeal was also improper when based on the need to avoid disrupting a trial (as in *Bentvena,* above). Nevertheless, the Ninth Circuit agreed with the district court that bail might be denied pending appeal for purposes of flight.[112]

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[107] *Id.* at 445.
[108] *Id.* at 445-46.
[109] *Fernandez v. United States*, 81 S. Ct. 642, 644 (1961).
[110] *Id.* at 644, 645.
[111] *Carbo v. United States*, 82 S. Ct. 662, 664 (1962).
[112] *See Carbo v United States*, 302 F.2d 456 (9th Cir. 1962).

On review, Justice Douglas upheld the denial of bail based on risk of flight, but wrestled somewhat with the notion of intentionally denying bail for the purpose of protecting witnesses. Nevertheless, Justice Douglas concluded: "In my view the safety of witnesses, should a new trial be ordered, has relevancy to the bail issue. Keeping a defendant in custody during the trial 'to render fruitless' any attempt to interfere with witnesses or jurors may, in the extreme or unusual case, justify denial of bail."[113]

Rounding out these opinions, the Supreme Court wrote in the 1967 per curiam opinion in *Bitter v. United States* as follows:

> [A] trial judge has indisputably broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the defendant to custody. But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial.[114]

Variations of the statements found in these cases were articulated by later courts seeking to deny bail both during trial and after conviction. Altogether, they formed a jurisprudential rationale for a general rule that courts have inherent authority to remand defendants once a trial has begun to protect witnesses or the disruption of the administration of justice, including through flight, but only in extreme or extraordinary circumstances. As will be seen later in this paper, this general rule would ultimately be used to help justify *pretrial* detention in both the D.C. law of 1970 and the Bail Reform Act of 1984.

Passage of the 1966 Bail Reform Act likely only added further complexity to the struggle with intentional detention. As mentioned previously, the Bail Reform Act of 1966 attempted to reduce unintentional or "needless" detention,[115] but it did not eliminate it. As noted in a contemporaneous

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[113] *Carbo,* 82 S. Ct. at 668 (footnote and citations omitted).
[114] *Bitter v. United States,* 389 U.S. 15, 16 (1967).
[115] *See* 1966 Act, *supra* note 13 ("The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not be needlessly detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends or justice nor the public interest.").

publication by two of the pioneers of the first generation of bail reform, Patricia Wald and Daniel Freed,

> In two major respects, the [1966] Act falls short of completely revising the old bail system: it does not authorize courts to consider danger to the community in setting conditions of pretrial release in noncapital cases; and, while it subordinates, it fails to eliminate money as a condition which can cause the detention of persons unable to raise it.[116]

Indeed, not eliminating money as a condition of release practically guaranteed the continuation of unintentional detention of bailable defendants. However, the bigger issue facing courts in the next twenty years would be the fact that the 1966 Act did not speak directly to *intentional* detention. The Act itself required the release of noncapital defendants on personal recognizance or an unsecured bond unless "such a release will not reasonably assure the appearance of the person as required."[117] When that determination was made, the Act then required judicial officers to impose the "first of the following" conditions of release (expressly delineating the legal concept of least restrictive conditions), which were then listed in order of their perceived restrictiveness.[118] Nevertheless, the Act did not specify precisely what judicial officers should do when *no* condition or combination of conditions would suffice to reasonably assure court appearance. Looking at the provisions as a whole, Wald and Freed concluded as follows:

> On balance it appears that the act neither authorizes pretrial detention nor guarantees that it will not occur. The ambiguity reflects recognition by many members of Congress that there was a need for detention [for risk of flight] in certain serious cases but no practical way yet to solve the constitutional and drafting problems in authorizing it.[119]

The authors concluded that it would thus be left to appellate courts to provide the proper boundaries.

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[116] Patricia M. Wald & Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer,* 42 ABA J., 940-45 (Oct. 1966) [hereinafter Wald & Freed].
[117] 1966 Act, *supra* note 13, § 3146 (a).
[118] For example, the first condition was to "place the person in the custody of a designated person or organization agreeing to supervise him," and the fourth was to "require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof." *Id.* at § 3146 (A) (1), (4).
[119] Wald & Freed, *supra* note 116, at 944.

Because the 1966 Act also did not address public safety at bail, intentional detention of bailable defendants could occur after the Act through two methods. First, believing that the defendant posed an unacceptable risk for flight or dangerousness, a judicial official might set an unattainably high money bond designed to detain that person. If set for reasons of public safety – at the time an unconstitutional purpose for limiting pretrial freedom – the judge would be forced to couch the release order only in terms of court appearance, and to refrain from any record discussing public safety. The notion of setting a high money bail to protect the community (called setting-bail for a "sub rosa" or secret purpose) was discussed but not resolved during the first generation of bail reform in the 1960s,[120] and was ultimately a major catalyst leading to the Bail Reform Act of 1984.

Second, a judicial official, believing that the defendant posed the same high risk for flight or dangerousness, might simply say that there were no conditions or combination of conditions under the Act that would manage the risk, and thus order the defendant purposefully detained with no conditions whatsoever. Technically, ordering intentional detention based on dangerousness would also be sub rosa, and thus unlawful as having an improper purpose, and so many of the court cases decided in the wake of the 1966 Act were worded only in terms of flight.

In sum, the Bail Reform Act of 1966 did not eliminate unintentional detention and did nothing to provide boundaries for intentional detention. More fundamentally, though, throughout history there has been both "bail," or release, and "no bail," or detention, and both are intertwined. To adequately address either one, jurisdictions likely must address both. Accordingly, by not addressing detention, the Bail Reform Act of 1966 could never fully fix release, and thus the law left enormous gaps in American bail practice.

These gaps are seen through various court opinions grappling with the concept of outright detention (with no ability to gain release) versus detention using high money bail as well as with concepts of acceptable risk.

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[120] The issue of "setting high bail to prevent pre-trial release" was discussed in a separate chapter of the Interim Report of the 1964 National Conference on Bail and Criminal Justice, but the issue raised more questions (including the question of what, exactly, preventive detention was) than answers. *See National Conference on Bail and Criminal Justice, Proceedings and Interim Report*, at 149-220 (Wash. D.C., Apr. 1965).

For example, in *United States v. Leathers,* the D.C. Circuit Court of Appeals noted the "dramatic increase" in bail appeals by persons being held on unattainable financial conditions, and recognized "the anomaly" of trial judges' trying but failing to adhere to the 1966 Act.[121] Defendant Leathers, who was being held on a $1,000 bond, sought a new hearing for the trial court to consider fashioning nonfinancial conditions as an alternative to the unattainable money condition. In granting that hearing, the appellate court wrote: "The authors of the [1966] Act were fully aware that the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all. Conditions which are impossible to meet are not to be permitted to serve as a thinly veiled cloak for preventive detention."[122]

Nevertheless, later that year the same court upheld a trial court's order to intentionally detain – without conditions – a defendant who the court believed was a danger to government witnesses. In *United States v. Gilbert,* the D.C. Circuit Court of Appeals focused not on the 1966 Act, but instead upon the trial court's common law authority to intentionally detain, noting that "[a] trial court has the inherent power to revoke a defendant's bail during the trial if necessary to insure orderly trial processes."[123] While the court acknowledged the right to pretrial release under the 1966 Act, it nonetheless wrote:

> In Carbo v. United States, Circuit Justice Douglas acknowledged that this inherent power may even extend to custody in advance of trial when the court's own processes are jeopardized by threats against a government witness. He took the view that this inherent power should be exercised, however, only in an 'extreme or unusual case.'
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> ***
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> We are satisfied that courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial. Yet this power should be exercised with great care and only after a hearing which affords the defendant an ample opportunity to refute the charges that if released he might threaten or cause to be threatened a potential

[121] *United States v. Leathers,* 412 F.2d 169, 170 (1969).
[122] *Id.* at 171.
[123] *United States v. Gilbert,* 425 F.2d 490, 491 (D.C. Cir. 1969).

> witness or otherwise unlawfully interfere with the criminal process.[124]

Further illustrating the struggle over intentional detention, in *Gavino v. MacMahon* the Second Circuit Court of appeals cited to *Carbo,* but refused to follow Justice Douglas's suggestion that a judge's inherent power to detain might extend to defendants before the trial had even begun.[125] The *Gavino* panel wrote:

> The Bail Reform Act, like its predecessor, guarantees that in a noncapital case the defendant will have the pretrial right to release on bail except in extreme and unusual circumstances, e.g., where threats to a government witness would jeopardize the court's own processes. Although the trial judge is accorded discretionary power during trial to revoke bail where such drastic relief is essential to insure the orderly progress of an on-going trial, such power must be 'exercised with circumspection,' and does not extend to revocation of bail before trial, which is the situation confronted here.[126]

In the 1971 case of *United States v. Smith,* the Eighth Circuit Court of Appeals attempted to harmonize the 1966 Act with instances in which bail was nonetheless being denied. Citing *Carbo* (the case hinting at inherent authority to detain pretrial), the Eighth Circuit focused on specific appellate provisions tending to show that Congress did not intend release under the Act to be absolute. The *Smith* panel wrote as follows:

> Rule 9 [of the Federal Rules of Appellate Procedure] recognizes that bail may be refused under appropriate circumstances by authorizing an appeal from either a refusal of bail or from conditions imposed that prove onerous to the defendant. The district court in such cases must state in writing the reasons for refusing bail or for imposing conditions of release. The right to bail is thus not absolute but decisionally recognized and

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[124] *Id.* at 491-92 (internal citations omitted) This was a significant extension of *Carbo,* in which Justice Douglas was clear that his perceived threat to witnesses was due, in large part, to the likelihood of a new trial being ordered and thus the defendant knowing the adverse testimony likely to be given. *See Carbo,* 82 S. Ct. at 668.

[125] *Gavino v. MacMahon*, 499 F.2d 1191, 1195 (1974) (internal citations omitted).

[126] *Id.* (internal citations omitted) (quoting *Bentvena,* 288 F.2d at 445).

> statutorily approved as being generally available in noncapital cases subject to denial in exceptional cases and subject to the imposition of reasonable conditions of release. Bail may be denied in the exceptional case.[127]

Cases from the Sixth Circuit, too, illustrated that court's internal struggle with release and detention under the 1966 Act. In *United States v. Wind,* a panel of the Sixth Circuit Court of Appeals wrote: "Since Congress did not intend to address the problem of pretrial detention without bond in the Bail Reform Act of 1966, the existence of extrastatutory powers to detain persons prior to trial may be considered."[128] Citing *Fernandez, Bentvena,* and *Carbo,* discussed above, the court noted a judge's inherent right to revoke bail during the course of a trial, and then, following Justice Douglas's suggestion in *Carbo*, wrote:

> We are satisfied that courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial. Yet this power should be exercised with great care and only after a hearing which affords the defendant an ample opportunity to refute the charges that if released he might threaten or cause to be threatened a potential witness or otherwise unlawfully interfere with the criminal prosecution.[129]

The Court noted discrepancies between the D.C. Circuit's holdings in *Leathers* and *Gilbert,* but followed *Gilbert* as that case dealt with denial of bail rather than detention due to the unattainable amount.[130] Just one year later, however, another panel of the Sixth Circuit vacated a district court's denial of bail for a defendant charged with threatening the life of President Ford. In that case, *United States v. Bigelow,* the panel cited to both *Wind* and *Gilbert,* but declined to detain in the instant case because the defendant had not threatened witnesses or otherwise taken steps to obstruct the trial.[131]

Finally, in the 1978 case of *United States v. Abrahams,*[132] a panel of the First Circuit Court of Appeals reviewed each of these prior cases to rule on an

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[127] *United States v. Smith,* 444 F.2d 61, 62 (8th Cir. 1971).
[128] *United States v. Wind*, 527 F.2d 672, 674 (6th Cir. 1975).
[129] *Id.* at 675.
[130] *Id.*
[131] *United States v. Bigelow,* 544 F.2d 904, 907-08 (1976).
[132] *United States v. Abrahams*, 575 F.2d 3 (1st Cir. 1978).

order denying bail altogether under the 1966 Act. After discussing the various cases, the panel found most instructive the reasoning from *Smith,* above, which concluded that the 1966 Act recognized the potential for denial of bail due to the inclusion of an appellate procedure to review those denials. Additionally, the panel quoted approvingly the following language from a federal district court opinion, which, the panel wrote, "here fits almost exactly" the present case:

> While the statute, § 3146 (a), does not say this in so many words, it has been thought generally that there are cases in which no workable set of conditions can supply the requisite reasonable assurance of appearance for trial. To state, the extreme case, which is not a hypothetical, the strong presumption favoring release may disappear for a defendant charged with a grave offense, with powerful evidence against him, who lacks family ties or employment or resources or any roots in the community, and is possessed of a poor record for fidelity to court engagements. Such a defendant may have to stay in jail pending a trial to be brought on with utmost possible speed.[133]

The various courts' ongoing struggle with release and detention pursuant to the 1966 Act is probably best illustrated by *United States v. Melville,*[134] the result of which resembles the untenable "dance" around money as a detaining mechanism that exists even today. In *Melville,* four defendants were charged with conspiring to detonate a number of bombs in New York City. A bail commissioner ordered their release on bonds with financial conditions ranging between $100,000 and $300,000, none of which the defendants could meet. Looking at various defendant characteristics, the district court reviewing the Commissioner's decision wrote: "it is overwhelmingly likely that none of them can approach anything close to the amount of bail prescribed for his release."[135] Moreover, the court wrote,

> [I]t is apparent that in this instance, as in many others familiar to all of us, the statement of the astronomical numbers is not meant to be literally significant. It is a mildly cynical but wholly undeceptive fiction, meaning to everyone 'no bail.'

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[133] *Id.* at 8 (quoting *United States v. Melville*, 306 F. Supp. 124, 127 (S.D.N.Y. 1969).
[134] *United States v. Melville*, 306 F. Supp. 124 (S.D.N.Y. 1969).
[135] *Id* at 127-28.

> There is, on the evidence adduced, no possibility that any of these defendants will achieve release by posting bond in anything like the amount which has been set.[136]

Despite this language, and even while taking notice of amounts that the defendants themselves said were attainable, the district court nonetheless set new financial conditions, considerably less than the $100,000 to $300,000 previously set, but still between two to ten times more than what each defendant said he could meet.

Across America we still see distressing opinions such as this, with one judge concluding one amount to be reasonable, with another judge concluding that amount to be unreasonable and sometimes settling on a second amount, and with both amounts being beyond what the defendant said he could pay. Unfortunately, both unattainable amounts are equally arbitrary and yet equally effective in detaining the defendant pretrial. The only difference is that the second amount is given the illusion of legal legitimacy through the gloss of an appellate opinion. The overall effect of both opinions, however, illustrates a kind of illegitimacy that erodes our core perceptions of justice.

Lessons From the Detention Cases

The various detention cases decided both before and after the 1966 Act (described above) illustrate three things. First, they represent a gradual chipping away at the historical notion that intentionally denying release to "bailable" defendants is unlawful. For centuries, attempts to detain bailable defendants before trial on purpose have led to bail reform to cure what was considered to be a violation of the Big Rule: bailable defendants must be released. These cases gradually eroded that Rule, to the point where even bailable defendants under a release-oriented statute like the Bail Reform Act of 1966 might still be detained on purpose.

Second, the cases illustrate that the notion of detaining noncapital defendants prior to trial for anything, let alone flight, was far from settled, with seemingly discordant opinions even within circuits. During debates and associated cases concerning preventive detention under both the D.C. Court Reform Act and the Bail Reform Act of 1984, however, various supporters of preventive detention repeatedly wrote that *pretrial* detention for protecting witnesses and jurors – or even to respond to risk of flight for

[136] *Id.* at 127.

noncapital defendants – was somehow already decidedly woven into the fabric of American criminal justice.[137] The citation to *Carbo* in many of those writings is especially noteworthy simply because *Carbo,* through an opinion issued by a single Justice sitting as Circuit Justice, merely *suggested* the propriety of applying common law detention notions to defendants pretrial that had previously only been applicable during trial.

Indeed, when it came to intentional detention of noncapital defendants based on flight, it appears that Congress relied on virtually no authority whatsoever when it began codifying the practice. In the House Report accompanying the D.C. Court Reform and Criminal Procedure Act of 1970, which was the first federal legislative articulation of intentional detention of noncapital defendants based on either flight or public safety, the Committee on the District of Columbia wrote that, "Criminal defendants today may be detained if found likely to flee regardless of the conditions of release imposed."[138] In making this statement, however, the Committee cited no authority whatsoever.[139]

Similarly, in a comprehensive and contemporaneous law review article describing the D.C. Act, the authors stated the same conclusion – that it was lawful to detain noncapital defendants for risk of flight – and cited to *Melville,* discussed above.[140] Unfortunately, and as mentioned previously, the *Melville* court did not uphold purposeful or intentional detention without conditions, but rather upheld amounts of financial conditions that merely led to detention, a fact pattern falling more appropriately into the category of cases dealing with unintentional detention. Indeed, while the court in *Melville* wrote, in dicta, that it could foresee cases in which "no workable set of conditions can supply the requisite reasonable assurance of appearance for trial," it also said that it was only assuming that a court might be able to detain on that basis.[141] Moreover, that court found that the amounts ordered led "practically to a denial of release conditions in a case where justification for this extreme result is not established," and thus the court set its own set

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[137] *See, e.g., Blunt v. United States*, 322 A.2d 579, 584 (D.C. Ct. App. 1974) (superseded by statute on other grounds) (citing *Carbo* and *Gilbert* while reviewing the constitutionality of the D.C. pretrial detention statute); *see also United States v. Edwards,* 430 A.2d 1321 (D.C. Ct. App. 1981) (citing *Carbo* and *Blunt* while doing same).
[138] H. Rep. No. 91-907, at 88, 92 (1970).
[139] Citing *Carbo and Gilbert,* the Committee Report did note, however, that, "Defendants may be detained prior to trial if they threaten witnesses or otherwise obstruct justice." *Id.* at 92.
[140] *See* Carl S. Rauh & Earl J. Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970,* 20 Am. U. L. Rev. 252, 289 (1970-71) [hereinafter Rauh & Silbert].
[141] *See Melville*, 306 F. Supp. 124, at 127.

of financial conditions of release that it believed the defendants "may be able to post."[142] Accordingly, using *Melville* as direct support for a conclusion that courts may lawfully detain noncapital defendants was most definitely misplaced.

In reality, there was no decent authority to detain noncapital defendants on purpose based on risk of flight when the D.C. Act was enacted in 1970. Between 1970 and 1984, the First Circuit Court of Appeals decided *Abrahams,* discussed above, which relied on *Melville's* dicta to become the first federal court to publish an opinion allowing the intentional detention – without conditions – of an otherwise bailable noncapital defendant for risk of flight. Nevertheless, it appears that the *Abrahams* holding never took root beyond the First Circuit from which it was decided. While other courts (including a fairly long list of New York federal district courts in cases extending beyond the Bail Reform Act of 1984) dodged the argument or mentioned *Abrahams* only in passing, the First Circuit was the only Circuit that ever cited to *Stack v. Boyle*[143] and *Abrahams* as twin authority for the proposition that bailable defendants facing noncapital charges could be detained without bail through some extra-statutory "inherent" authority when "no condition or combination of conditions" under the Bail Reform Act of 1966 would suffice to provide reasonable assurance of court appearance.[144]

When enacting the Bail Reform Act of 1984, Congress nonetheless used *Abrahams* as its singular precedent when it said it was "codify[ing] existing authority to detain persons who are serious flight risks."[145] Congress did so despite the fact that *Abrahams* rested on dubious authority itself, and never

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[142] *Id.* at 129.

[143] 342 U.S. 1 (1951). In fact, *Stack* does not support detaining bailable noncapital defendants pretrial. In addition to equating the right to bail with the "right to release before trial," and the "right to freedom before conviction," that opinion also noted that setting a financial condition in order to intentionally detain a defendant pretrial "is contrary to the whole policy and philosophy of bail." *Id.* at 4, 10.

[144] *See, e.g., United States v. Schiavo,* 587 F.2d 532 (1st Cir. 1978) ("The Standards of 18 U.S.C. § 3146, with its 'presumption of releasability' apply. Only in the rarest of circumstances can bail be denied altogether in cases governed by §3146.") (citing *Abrahams,* 575 F.2d 3 (1st Cir. 1978)). The Eighth Circuit came close to a holding like *Abrahams,* but that case was vacated as moot by the United States Supreme Court. *See Hunt v. Roth,* 648 F.2d 1148, 1158 (8th Cir. 1981) ("We recognize that there may be instances where no amount of bail can sufficiently protect the state's interests. In such a case, a court may consider the relevant factors and deny bail.") (citing *Abrahams*), *vacated as moot* 455 U.S. 478 (1981).

[145] S. Rep. No. 98-225, at 18, 1983 WL 25404, at *8. As noted previously, the panel in *Abrahams* reviewed several cases for lack of clear guidance and was ultimately persuaded by three sentences from a 1969 district court case surmising, without support, "It has been thought generally that there are cases in which no workable set of conditions can supply the requisite reasonable assurance of appearance at trial." *See Melville*, 306 F. Supp. 124, 127 (S.D.N.Y. 1969).

found its way beyond mostly mere mention within the First Circuit Court of Appeals. Indeed, among the cases cited within the *Abrahams* opinion, those that concerned intentional detention with no conditions were concerned almost exclusively with a court's authority only to purposefully detain to protect witnesses. Purposeful detention for flight for noncapital defendants was not only a historical aberration; it was also novel to even modern American justice. The fundamental point is that purposeful pretrial detention with no conditions for risk of flight by noncapital defendants was not some deeply rooted American tradition when Congress began codifying it. The release of all noncapital defendants was.

Third and finally, whether to protect against risk of flight or to protect witnesses or jurors, the detention cases virtually always noted that any exception to release should be reserved only for the "extreme and unusual case,"[146] and thus the facts of those cases instruct on what, exactly, the courts believed to be extreme cases of risk. In *Carbo,* for example, the case in which Justice Douglas surmised that safety of witnesses might justify pretrial detention in "extreme or unusual" cases, the Justice noted that one witness in the case at hand had received 200 threatening phone calls, had been severely beaten, had seen an "ominous" car near his home that was driven by associates of the defendants, all of which led the trial judge to conclude that there was a "strong likelihood that witnesses in this case will be further molested or threatened and perhaps even actually harmed."[147] In *Wind,* the case that extended "inherent" or "extrastatutory power" to detain without bond to the pretrial phase because such detention was not addressed in the 1966 Act, the Sixth Circuit Court of Appeals noted that the defendant had admitted "he would post the $1,000,000-bond and then would flee, and that no witness would testify against him."[148] This, along with evidence that potential witnesses refused to testify for fear of the defendant, led the Sixth Circuit to conclude that there was substantial evidence that the defendant "possessed dangerous propensities" toward witnesses. Even so, that court nonetheless vacated the denial of bail because the reviewing judge apparently also relied on additional evidence gleaned from an in camera hearing, in which the defendant and his lawyer were excluded.[149]

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[146] *See, e.g., Abrahams,* 575 F.2d 3, at 8 ("This is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail."); *United States v. Schiavo*, 587 F.2d 532, 533 ("Only in the rarest of circumstances can bail be denied altogether in cases governed by § 3146.").
[147] *Carbo,* 82 S. Ct. 662 at 664, 668 (1962) (internal quotation omitted).
[148] *United States v. Wind*, 527 F.2d 672 at 673 (6th Cir. 1975).
[149] *Id.* at 674-75.

The facts of *Abrahams,* too, are enlightening. In that case, a panel of the First Circuit noted that the defendant: (1) had three previous convictions; (2) was an escaped prisoner from another state; (3) had given false information at a previous bail hearing in the same case; (4) had failed to appear in the current case; (5) had failed to appear in a case in a third state and was a fugitive there; (6) had used several aliases; and (7) had transferred 1.5 million dollars to Bermuda within the previous two years.[150] Based on these facts, the panel concluded:

> The record before us depicts a man who has lived a life of subterfuge, deceit, and cunning. He is an escaped felon. He did not hesitate to flee to Florida and forfeit $100,000 to avoid [a hearing]. There is nothing in the record that suggests that bail will result in his appearance at trial. Every indication is to the contrary. This is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail.[151]

Even later, in a case decided after the Bail Reform Act of 1984, we see mostly extreme facts justifying pretrial detention. In *United States v. Melendez-Carrion,* the court upheld detention solely for risk of flight when the defendant: (1) was found to be a member of a paramilitary, terrorist organization or gang seeking to advance Puerto Rico independence; (2) had knowledge of and access to various gang safe houses; (3) had assisted a convicted felon to escape detection; (4) had recently traveled to Costa Rica and Panama for reasons not explained to officials; and (5) had in his possession documents reflecting various contacts in foreign countries.[152]

Later we will see how the United States Supreme Court absorbed risk to jurors and witnesses into the larger notion of risk to the general public. Nevertheless, the fundamental lesson learned from these detention cases is that, for a number of reasons, America struggled with the boundaries of intentional detention in ways that conflicted with the notion of bail as release. Those reasons are numerous, and perhaps interwoven, and include a variety of social changes seen in this country throughout the nineteenth and twentieth centuries, including increased use of drugs and guns, more efficient means of travel, and increased fear of crime, to name only a few. These social changes were offset somewhat, however, by improved

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[150] *United States v. Abrahams,* 575 F.2d 3, at 4-5 (1st Cir. 1978).
[151] *Id.* at 8.
[152] *United States v. Melendez-Carrion*, 790 F.2d 984, at 994-95 (2d Cir. 1986).

policing, jails, court systems, and even laws attempting to keep up with those changes.

Overall, from this struggle with intentional detention we see that America had become dissatisfied with accepting widespread releases by declaring virtually all defendants bailable and limiting the process of release only to assuring court appearance. Due to this dissatisfaction, both unintentional and intentional detention began to flourish, thus eroding the broad right to bail coupled with a rule that virtually all bailable defendants should be released. But jurisdictions should note that both kinds of detention of bailable defendants are historical and legal aberrations. For centuries, bailable defendants were only rarely detained unintentionally, and they were never allowed to be detained intentionally. By the mid-twentieth century, however, through two discreet lines of cases, America saw countless defendants detained unintentionally, and the beginning erosion of the time-honored rule against intentional detention of bailable defendants. This struggle would ultimately lead to the need for some sort of fix – some way to allow courts to answer the foundational questions of who gets released and who gets detained based on the two subsidiary questions of (1) "How risky is this person?" and (2) "Risky for what?"

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember that America was founded on a broad right to release before trial, with only rare instances of unintentional detention and virtually no instances of intentional detention. This, alone, should lead jurisdictions to consider only the narrowest gateways toward pretrial detention overall. Moreover, even when it was allowed, intentional detention was based only on "rare" or "extreme" circumstances, such as in the cases described above. In sum, when we first began intentionally detaining people for flight and danger, flight and danger were defined to include only the most extreme instances of facts and circumstances showing a high likelihood of fleeing to avoid prosecution or harming identifiable people through serious or violent crimes.

The Big Fix

It is clear that by the mid to late 1960s, America was in need of some fix. The Bail Reform Act of 1966 was only designed to reduce the needless detention of bailable defendants. However, as discussed above, it did not stand in the way of either unintentional or intentional detention. Moreover,

it was not designed to deal with the issue of public safety. Although setting bail for public safety – considered an unlawful purpose – was discussed at the 1964 National Conference on Bail and Criminal Justice, the 1966 Act only narrowly addressed public safety by allowing courts to consider dangerousness posed by capital defendants and defendants awaiting sentence or appeal.[153]

In 1970, a committee of Congress wrote that the 1966 Act went far in trying to eliminate money as a barrier to release, but that by "totally eliminating" dangerousness as a criterion in setting conditions of release, the Act was not copied by the states because it "ignored the rationale behind 700 years of legal practice."[154] In fact, the 1966 Act did no such thing because dangerousness was never there to begin with. What America did, in fact, was much more nuanced. It initially broadened the right to bail to virtually all defendants. In doing so, it forced judges to consider factors one might normally think would help with the in-or-out decision (including giving judges some indication of dangerousness) only when deciding on the amount of money necessary to avoid flight. All of this was designed to follow the "Big Rule," which said that people called "bailable" should be released. Nevertheless, soon persons showing extremely high risk for flight and to public safety began to interfere with our notions of both release and detention, causing America to struggle with both unintentional and intentional detention. Interference with release and detention causes bail reform, and so we have endured a century of trying to provide an overall fix designed to simply put defendants in the right places.

Nevertheless, throughout American history it was widely known that risk of flight was the only constitutionally valid purpose for limiting pretrial freedom, and thus basing detention on risk of future dangerousness was simply not a lawful part of the American bail system. Indeed, when America narrowed the eligibility for detention to mostly capital offenses, it did so *not* to protect the community, but instead to protect against flight from a defendant facing death; as noted previously, it was commonly

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[153] Former Section § 3148 allowed the detention of capital defendants or convicted persons awaiting sentence or on appeal if the court believed that "no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community." 18 U.S.C. § 3148 (1966).

[154] H.R. Rep. 91-907, at 840-85. Today, it is clear that many states did copy parts of the 1966 Act. However, because the states did not eliminate secured financial conditions – in part because they were deemed necessary to detain defendants for purposes of public safety – those states never fully fixed the problem of unnecessary detention due to money.

assumed that a person facing death would flee to avoid the punishment.[155] The detention cases provided some articulation of danger, but not nearly enough to easily extend those cases to reflect danger beyond witnesses and jurors. Moreover, the extremely limited number of flight cases also illuminated the lack of explicit guidance from the 1966 Act as to how to deal with extreme cases involving risk of flight.

To fix these issues, Congress passed two laws: (1) The District of Columbia Court Reform and Criminal Procedure Act of 1970,[156] and (2) The Comprehensive Crime Control Act of 1984, [157] which contained the Bail Reform Act of 1984. The fix involved: (a) determining up front who should be purposefully released and detained through a detention eligibility net; (b) making sure intentional detention was further limited through a process capable of dealing with extreme cases of risk ultimately for both flight and public safety; and (c) attempting to eliminate unintentional detention altogether through significant limits on the use of money.

The D.C. Court Reform and Criminal Procedure Act of 1970

The pretrial release and detention provisions of the D.C. Court Reform and Criminal Procedure Act of 1970 ("1970 Act") layered provisions on top of the Bail Reform Act of 1966 for the District of Columbia, leaving much of the 1966 Act in place but with three important changes.

First, the 1970 Act allowed courts to consider danger to the community in setting nonfinancial conditions of release. As mentioned previously, prior to this Act, court appearance was the only lawful purpose for limiting pretrial freedom in the federal system (and, at least theoretically, all American states). Pursuant to the Act, judges were still required to release noncapital defendants on personal recognizance or an unsecured appearance bond, but now the Act added the following language: "unless the [judicial] officer determines . . . that such a release will not reasonably assure the appearance of the person as required *or the safety of any other person or the community*." [158]

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[155] *See United States v. Edwards,* 430 A.2d 1324, 1326 (D.C. Ct. App. 1981) (quoting Tribe, *supra* note 1, at 397, 400-02 (1970)).
[156] Pub. L. No. 91-358, 84 Stat. 473 (1970) (codified at D.C. Code Ann. §§ 23-1321-1332) [hereinafter D.C. Act].
[157] Pub. L. No. 98-473, 98 Stat. 1976 (1984) [hereinafter 1984 Act].
[158] D.C. Act, *supra* note 156, § 23-1321 (a) (emphasis added).

While financial conditions were retained, a new provision declared that "[n]o financial condition may be imposed to assure the safety of any other person or the community."[159] This prohibition was likely added to reflect the facts that: (1) throughout the rest of the Act judges were given broad authority to use nonfinancial conditions and even pretrial detention to respond to public safety;[160] and (2) then, as today, financial conditions of release have nothing to do with public safety.[161]

By leaving money in the process, however, the 1970 Act did nothing new to avoid unintentional detention. Instead, the Act relied on the existing 1966 provisions dealing with review and appeal of unattainable conditions[162] while, at the same time, adding provisions designed to separate pretrial defendants detained through unattainable release conditions from convicted persons within secure facilities.[163] Moreover, we now know that leaving money in the process also did nothing to change *intentional* detention, despite the new provisions dealing with detention for public safety purposes, discussed below, and despite the prohibition on using money for purposes of public safety. Due to the ease of using money to detain defendants without a hearing, the District of Columbia largely ignored the 1970 preventive detention provisions and used money to detain until 1992, when it added language requiring money bonds to be attainable.[164]

Second, the Act provided a procedure to detain noncapital defendants for public safety. The issues surrounding the ability to detain for dangerousness – significant issues concerning the right to bail, due process, and the Eighth Amendment due to its collision with American notions of liberty – overshadowed the fact that the Act rested on a dubious premise that the detention of bailable noncapital defendants for flight was already permissible and widely accepted in America. Because of this premise, however, the Act contained no provisions for explicit detention based on

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[159] *Id.* § 23-1321.
[160] Rauh & Silbert, *supra* note 140, at 288.
[161] No research has ever shown a connection between money and public safety for released defendants and in virtually every state, the money on a bail bond cannot even be forfeited for new crimes. Money only has a connection to public safety when judges unlawfully use the financial condition to intentionally detain an otherwise bailable defendant, which was one of Congress's primary reasons for enacting the 1970 Act.
[162] The appeals provisions were also modified to allow appeal after the new intentional detention provisions as well as to give the government the right to dispute and appeal certain bail decisions. *See* D.C. Act, *supra* note 156, § 23-1324 (c), (d) (1970).
[163] D.C. Act, *supra* note 156, § 23-1321 (h).
[164] *See* Pretrial Justice Institute, *The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth* [hereinafter *D.C. Lessons*], at 5, found at https://university.pretrial.org/viewdocument/the-dc-pretrial-serv.

flight. In a report accompanying the Act, the Congressional Committee on the District of Columbia only mentioned in passing that, "Criminal defendants today may be detained if found likely to flee regardless of the conditions of release imposed," but cited no authority whatsoever to support the claim.[165] Moreover, and as noted previously, the authors of a concurrent comprehensive law review article describing the Act made the somewhat conclusory statement that, "The Bail Reform Act of 1966 permits the detention of . . . noncapital defendants on grounds of flight."[166] Because those authors could not cite to language allowing detention based on flight in the Act, they instead cited to *Melville* (discussed above), the case in which a federal district court stated in dicta that there may be extreme cases in which noncapital defendants could be detained for risk of flight.

Nevertheless, detention to address public safety was not the only purpose of the 1970 Act. As noted in the Committee Report accompanying the Act, pretrial detention was designed to reduce violent crime[167] as well as to:

> [E]liminate from the bail system the hypocrisy of locking up defendants, without fixed standards, through the device of requiring a high money bond. This second objective, of removing the practice of detaining defendants arbitrarily by setting a bond which they can not [sic] meet, is too often overlooked when considering this question.[168]

Interestingly, the detention provisions were also added to address Congress's seemingly urgent fear that appellate courts would soon find current bail practices unconstitutional. In a separate report submitted for consideration of the 1970 Act, the authors wrote:

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[165] H. Rep. No. 91-907, at 92.
[166] Rauh & Silbert, *supra* note 140, at 289.
[167] There appears no doubt that violent crime – including violent crime committed by those released pretrial – was of great concern to Congress and the District of Columbia at the time this law was enacted. Nevertheless, a reading of the entire legislative history of the 1970 Act points to language suggesting at least some hyperbole to instill fear ("The criminal is just not punished here, and continues to roam the streets of Washington, increasing, month by month, his murders and his rapes, his robberies and aggravated assaults, his housebreaking, larceny and auto thefts"), H. Rep. No. 91-907, at 15, as well as racism (a set of narrative case histories, ostensibly chosen to show "glaring deficiencies in the bail system," nonetheless began each case with a heading titled, "Negro, Male."). *Id.* at 95-104. The bail reform provisions were, in fact, only "one of the many facets of this bill that seeks to provide some relief to the crime problems besetting the District of Columbia," including providing additional funding for courts and the pretrial services agency as well as various other provisions dealing with, for example, wiretapping, recidivist penalties, and an overall reorganization of judicial functions. *Id.* at 93.
[168] *Id.* at 82.

> It is inconceivable that for decades *de facto* detention through high money bond and absent any procedural protections could avoid constitutional condemnation, while a measured response to bail recidivism fully surrounded by due process protections, the net result of which will guarantee the release of many persons wrongfully detained, will not pass Constitutional muster.[169]

Indeed, in the primary house report to the 1970 Act, the Committee on the District of Columbia similarly wrote as follows:

> Ten years from now, court decisions based on equal protection of the law may give the indigent defendant the means to force his release before trial if money is the barrier between jail and freedom. Such a development could not be welcomed by a society besieged with crime unless that society were empowered to protect itself against the truly dangerous defendant. In the judgment of a majority of your Committee, the only effective means of protection is pretrial detention.[170]

Through hindsight, we now know that allowing secured money bonds to exist in our pretrial release and detention systems – including seemingly well-engineered preventive detention provisions – has continued to interfere with the process. Also through hindsight, we now know that states have largely ignored the above quoted warning for 35 years, just as courts have largely ignored equal protection analysis at bail, thus resulting in the continuation of unfair and un-transparent pretrial detention based on wealth.[171]

Third, the 1970 Act added provisions designed to deal with pretrial failure, an extremely important concept given that risk is inherent in bail, and that in America we are expected to embrace that risk by releasing as many defendants as possible. The Bail Reform Act of 1966 contained provisions

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[169] Committee Print, *Statement of the Managers on the Part of the Senate Submitted Regarding the Conference Action Upon S. 2601, The President's Crime Legislation for the District of Columbia,* at 34 (July 15, 1970).
[170] H. Rep. No. 91-907, at 85.
[171] Only recently have we seen cases with the potential to force the release of defendants kept in jail due to the lack of money. *See,* Equal Justice Under Law, *Ending the American Money Bail System,* found at http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/.

for willful failure to appear, but not for violation of other conditions of release, and it also had what some considered to be an inadequate contempt provision.[172] The 1970 Act added detail to the contempt section and also a new provision dealing with violating conditions of release that allowed for revocation and an order of detention or for prosecution for contempt.[173] Essentially, a judge could order a previously released defendant back to detention if there were clear and convincing evidence of the violation and a finding that no condition or combination of conditions would reasonably assure court appearance or public safety.[174]

A Detention Eligibility Net and Further Limiting Process

For purposes of the present discussion, it is important to consider how the "fix" enacted through the 1970 Act can help jurisdictions to discern where to re-draw the line between release and detention today. The legislative history to the Act mentions the need to expand detention to "selected defendants, in categories of offenses characterized by violence," "the most dangerous" of defendants who commit crimes while on bail, and "dangerous defendants in certain limited circumstances."[175] It attempted to accomplish this purpose by establishing initially a detention eligibility net, and then by articulating a further-limiting process for defendants within the net, along with procedural due process safeguards including hearings, time limits on detention orders, and speedy trial guarantees.

The detention eligibility net included three categories of defendants. The first category consisted of defendants charged with "dangerous crimes," defined at the time to include robbery by force or threat of force, burglary or arson of a business or sleeping premises, forcible rape or assault with intent to commit forcible rape, and unlawful sale or distribution of certain drugs.[176] Detention was allowed for a defendant in this category, *but only if* the government certified that the defendant's "pattern of behavior consisting of his past and present conduct" along with existing factors to determine conditions of release meant that "no condition or combination of conditions [will] reasonably assure the safety of the community."[177] The requirement to

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[172] See Rauh & Silbert, *supra* note 140, at 301.
[173] *See* D.C. Act, *supra* note 156, §§ 1329-1330.
[174] *Id.* § 1329.
[175] H. Rep. No. 91-907, at 82, 83, 91, 181.
[176] *See* Rauh & Silbert, *supra* note 140, at 290.
[177] D.C. Act., *supra* note 156, § 23-1322

consider the pattern of behavior was apparently designed to avoid basing detention on charge alone.[178]

The second category consisted of defendants charged with a "crime of violence," defined at the time to include many more crimes than "dangerous crimes," including second-degree murder, forcible rape, carnal knowledge of a girl under sixteen, taking or attempting indecent liberties on a child under sixteen, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the above offenses. Detention was allowed for a defendant in this category, *but only if* the defendant had been convicted of a crime of violence in the past ten years, was also currently released on bail, probation, parole, or mandatory release pending a sentence, or was a narcotics addict.[179]

The Committee Report noted that detention based on dangerousness was restricted "to those charged with serious felonies which pose risk of death or serious bodily harm to the victim," many of which, the Report stated, were punishable by death in 1791.[180] While likely true, this statement concerning capital punishment ignored the fact that most states in America gradually but purposefully enlarged the right to bail to all but capital defendants while simultaneously reducing the number of charges eligible for the death penalty.[181]

The third category consisted of defendants charged with any offense, *but only if* the defendant threatened or attempted to threaten, injure, or intimidate a witness or juror.[182] The House Report to the Act cited *Carbo* and *Gilbert* (discussed above) for this proposition, but, also as noted above, *pretrial* detention (versus detention after the trial had begun) to protect witnesses and jurors, like flight, was only barely supported in the common law.

This detention eligibility net was further narrowed by a limiting process, which included a due process laden hearing from which a judge was required to conclude that: (1) there was clear and convincing evidence that

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[178] *See* Rauh & Silbert, *supra* note 140, at 291 n. 181.
[179] *See id.* at 292-93 (explaining D.C. Code Ann. § 23-1322 (a) (2) as well as § 23-1323, which contained the special provisions and processes for detention of an addict); DC Act, *supra* note 156, §23-1323.
[180] *See* H. Rep. No. 907, at 93.
[181] *See* Carbone, *supra* note 16, at 529-535.
[182] D.C. Act, *supra* note 156, § 23-1322 (a) (3).

the person was eligible for detention; (2) based on the relevant factors, there was "no condition or combination of conditions of release which would reasonably assure the safety of any other person or the community;" (3) except for people believed to be obstructing justice, there was substantial probability that the defendant committed the offense charged.[183]

Overall, these provisions point to a "fix" that includes a narrow detention eligibility net combined with a further limiting detention process, but with provisions designed to deal with the failure that is inherent in bail. While not perfect, it provided America's first attempt to provide for purposeful release and detention, erring on the side of release, and with nothing hindering the judge's decision either way.

The Bail Reform Act of 1984

The second phase of the "big fix" came 14 years later, when Congress passed the Comprehensive Crime Control Act, which contained the Bail Reform Act of 1984.[184] Like the 1970 D.C. Act, the 1984 Act attempted, once and for all and for the entire federal system, to provide an in-or-out release and detention scheme by determining up front who would be released or detained, with limitations on intentional detention while dealing with cases presenting extreme risk of flight or public safety. Unlike the 1970 Act, however, it was also designed to end unintentional detention through unattainable conditions altogether.

It did all of this through two particularly significant provisions, the first of which was a radical limitation on money bail designed to end unintentional pretrial detention.[185] To explain this, the reader should note that the 1984 Act provided only four alternatives to judicial officers making the release or detention decision: (1) release the defendant on a personal recognizance or unsecured bond; (2) release the defendant on conditions; (3) temporarily detain a defendant for certain reasons; and (4) detain the defendant fully prior to trial. The rest of the Act worked through each of these four alternatives. Obviously, release on personal recognizance or an unsecured appearance bond did not cause unintentional detention, but traditionally the

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[183] *Id.* § 23-1322 (b).
[184] Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 3141-3150).
[185] For a complete discussion of the Bail Reform Act of 1984 and a comparison of that Act with the 1966 Act, *see* Judge Donald P. Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion,* 11 Wm. Mitchell L. Rev. 929 (1985) [hereinafter Lay & De La Hunt].

second alternative – release on conditions – did, and so the Bail Reform Act added perhaps its most profound provision designed to prevent unintentional detention from occurring. While still allowing for judicial officials to use financial conditions, the 1984 Act nonetheless stated: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person,"[186] a provision not found in the 1970 D.C. Act. Coupled with the other provisions, this line virtually assured that defendants would not be detained for lack of money to pay the financial condition.[187] By adding this line, Congress intended the Bail Reform Act of 1984 to be, at its core, an intentional in-or-out system.

Second, the 1984 Act expressly articulated that preventive detention was allowable for *both* risk of flight and public safety.[188] As mentioned previously, the 1966 Act said nothing about intentional detention of noncapital defendants for flight, and so courts struggled through their opinions to decide whether such detention was lawful. The D.C. Act of 1970 added detention based on public safety, but left out any express authority to detain noncapital defendants for risk of flight.[189] The 1984 Act attempted to clear up this overall confusion by expressly listing both public safety and court appearance as proper purposes for limiting pretrial freedom up to and including detention.

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[186] 18 U.S.C. § 3142 (c) (1984).

[187] Despite the prohibition, courts have occasionally determined that it is not a violation of the statute if defendants are detained when they are unable to raise the money of the financial condition. These cases are based on faulty reasoning, however, and are undoubtedly incorrect. *See, e.g., United States v. Fiddler,* 419 F.3d 1026, 1028 (9th Cir. 2005) (reasoning that when a defendant is unable to meet the financial condition but the court has determined that the amount is sufficient, it is "not because [the defendant] cannot raise the money, but because without the money, the risk of flight [or danger to others] is too great"). The proper interpretation of this and other cases is found in an unpublished order in *United States v. Clark,* No. 1:12-CR-156, 2012 WL 5874483 (W.D. Mich. Nov. 20, 2012) (memorandum detention order), in which the court reveals that virtually every case upholding release orders with unmet financial conditions has only done so because the unmet condition triggered a proper detention hearing, which follows the overall intent of the Bail Reform Act. *See id.* at *3 ("If *Fiddler* were to be read to say only that a court may circumvent the procedural safeguards of a full detention hearing by attaching heavy financial conditions to a release order that a defendant could not meet, using as excuse that without such financial imposition the risk of flight would be too great, the court would clearly be defying the intent of Congress and inviting a re-examination by that body of a court's role in setting bond. Fortunately, the reading of the statute is seldom so circumscribed.").

[188] *See* 18 U.S.C. § 3142 (e) (1984).

[189] As noted previously, in the legislative history Congress mentioned only in passing that it felt detention for flight was lawful. Later documents issued by the Department of Justice indicate that DOJ believed intentional detention for noncapital defendants based on flight was clearly prohibited by the 1966 Act. *See Special Report -- Pretrial Release and Detention: The Bail Reform Act of 1984*, at 2 (BJS, 1988) ("[D]etention without bail was permitted only in cases involving capital crimes."), found at https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf.

Much like the legislative history surrounding the 1970 Act, Congress justified its authority to detain noncapital defendants pretrial in 1984 on fairly amorphous authority. In the Senate Report accompanying the Act, Congress wrote as follows:

> The decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial. However, not only the interests of the defendant, but also important societal interests are at issue in the pretrial release decision. Where there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate. This rationale – that a defendant's interest in remaining free prior to conviction is, in some circumstances, outweighed by the need to protect societal interest – has been used to support court decisions, which, despite the absence of any statutory provision for pretrial detention, have recognized the implicit authority of the courts to deny release to defendants who have threatened jurors or witnesses, or who pose significant risks to flight. In these cases, the societal interest implicated was the need to protect the integrity of the judicial process. The need to protect the community from demonstrably dangerous defendants is a similarly compelling basis for ordering detention prior to trial.[190]

For the proposition that detaining defendants for threatening jurors or witnesses provides justification for detention based on safety to the broader public, in 1984 Congress cited to *Wind* and *Gilbert*, which, as discussed previously, provide at least some authority for detaining defendants for that purpose. But as to flight, Congress said it was only "codify[ng] existing authority to detain persons who are serious flight risks"[191] and cited only to *Abrahams,* also discussed above. As mentioned previously, though, *Abrahams* rested on dubious authority itself, and never found its way beyond mostly mere mention within the First Circuit Court of Appeals. Thus, as seen from the quote above, one of Congress' primary legal justifications for allowing the intentional detention of noncapital defendants pretrial for

[190] S. Rep. 98-225, at n. 27, 28 and accompanying text (1984) (internal footnotes omitted).
[191] *Id*. at n. 63 and accompanying text.

purposes of public safety – justification based on the fact that America already allowed it for flight – appears fairly slim.

It is important to note that due to the significant debate surrounding whether America could ever detain a person for purposes of public safety, we often gloss over the notion that "preventive detention" as a concept involves detaining someone preventively for *either* flight or public safety. To this day, people inaccurately describe preventive detention as something only done to address danger.[192] This is likely due to a number of factors, including, ironically, the fact that historically when a defendant was bailable, he or she was supposed to be actually released. Accordingly, when jurisdictions first began discussing preventive detention in the 1960s, it was assumed that risk of flight simply could not be used to detain persons beyond those extremely narrow "categorical" crimes, such as capital offenses. Thus, preventive detention began with the notion that it would be used only for public safety. That notion, however, has gradually changed, beginning with the detention cases, and continuing up and through the 1984 Act.

Indeed, as the 1984 Act illustrates, when courts detain today for risk of flight, they are detaining preventively. Even in states having so-called "broad right to bail" provisions that, for example, grant the right to release to all but capital defendants, those states are still correctly described as having systems of preventive detention – historically based on flight for capital defendants. Thus, the primary novelty of the detention cases and the "big fix," discussed above, is not in the *creation* of "preventive detention." Rather, the novelty of the cases is in the gradual extension of preventive detention pretrial for flight to noncapital defendants. The novelty of the "big fix" is further extending preventive detention to defendants for purposes of public safety and in ultimately attempting to eliminate unintentional detention.

Nevertheless, by citing to *Wind, Gilbert,* and *Abrahams*, Congress provided some intent concerning how limited detention should be. As noted previously, each of those cases cautioned that a judge's inherent authority to

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[192] Indeed, in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, at 798-99 (9th Cir. 2014), the dissent argued that *Salerno* and its discussion of due process could only provide a basis for evaluating a "no bail" provision based on dangerousness and not flight. As Judge Fisher correctly noted in the majority opinion, however, "the Supreme Court has never recognized – or even suggested – that distinction. *Id.*at 792, n.16 (citing cases).

detain pretrial should be used only in "extreme and unusual cases," exercised with great care and only after a due process hearing.[193] Moreover, the facts of *Abrahams,* also recounted above, are particularly helpful in telling us just how extreme the risk of flight should be. Indeed, throughout the legislative history of the 1984 Act, Congress repeatedly said it was reserving pretrial detention for those posing "serious" risks of flight or new criminal activity.[194] More specifically, it was reserving pretrial detention based on public safety to a "small but identifiable group of particularly dangerous defendants" who pose an "especially grave risk" to the community and for whom neither conditions nor the prospect of revocation suffice to protect the public.[195]

A Detention Eligibility Net and Further Limiting Process

Like the 1970 Act, Congress sought to operationalize these terms by creating a narrow net for detention eligibility with an additional limiting process with procedural safeguards. Unlike the 1970 Act, however, the new law significantly broadened that net, and incorporated the use of "rebuttable presumptions" leading toward detention in certain cases.[196] As noted by one federal appellate court, the 1984 Act made it both harder and easier to detain:

> It [made] it harder by specifying explicitly what was implicit in prior law, namely that magistrates and judges cannot impose any 'financial condition' that will result in detention. High money bail cannot be used as a device to keep a defendant in custody before trial. The Act [made] detention easier by broadening the category of persons whom the officer can order detained.[197]

Under the 1984 Act, defendants potentially eligible for detention fell into six, not three categories. First, a defendant might be detained if he was charged with a "crime of violence."[198] In 1984, a crime of violence was

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[193] *See United States v. Gilbert,* 425 F.2d 490, 491 (D.C. Cir. 1969); *United States v. Wind,* 527 F.2d 672, 675 (6th Cir. 1975); *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978).
[194] S. Rep. No. 98-225, at 5, 10, 16, 21.
[195] *Id.* at 6-7, 10, 20.
[196] *See* 18 U.S.C. §§ 3142 (e).
[197] *United States v. Jessup,* 757 F.2d 378, 379 (1st Cir. 1985) (internal citation omitted) (abrogated on other grounds).
[198] 18 U.S.C. § 3142 (f) (1) (A) (1984).

defined as "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[199] This definition was shaped by court opinions, but would likely have included most of the crimes listed under the 1970 Act's net relating to "dangerous" and "violent" crimes.

Second, a defendant might be detained if he was charged with an offense for which the maximum sentence was either life imprisonment or death.[200] Third, a defendant might be detained if he were charged with certain serious drug offenses with sentences of ten years or more.[201] Fourth, a defendant might be detained in any case in which he posed "a serious risk that [he would] obstruct or attempt to obstruct justice, or threaten, injure or intimidate, or attempt [to do the same to] a prospective witness or juror."[202] These four relatively narrow categories mirrored somewhat the 1970 Act's net, albeit lacking additional narrowing elements such as requiring the government to certify certain conduct, or requiring certain preconditions, such as the defendant currently being on pretrial release, probation, or parole.

The next two detention eligibility categories, however, represented a significant broadening of the net found in the 1970 Act. Category five allowed a court to detain a defendant for any felony after conviction of two or more crimes like those found in the first three categories.[203] The sixth and final category allowed a court to detain a defendant if he presented "a serious risk that [he would] flee."[204] While perhaps flowing naturally from the gradual erosion of early American law that rarely (if ever) expressly allowed *any* intentional detention of noncapital defendants for risk of flight, the 1984 Act's allowance of pretrial detention based on a "serious" risk of flight still represented a major shift.

Nevertheless, these wider nets were likely made necessary by Congress's equally important goal of eliminating unnecessary (or unintentional) pretrial

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[199] *Id.* § 3156.
[200] *Id.* § 3142 (f) (1) (B).
[201] *Id.* § 3142 (f) (1) (C).
[202] *Id.* § 3142 (f) (2) (B).
[203] *Id.* § 3142 (f) (1) (D).
[204] *Id.* § 3142 (f) (2) (B).

detention – as Congress said in 1966, to remedy "the evils which are inherent in a system predicated solely upon monetary bail"[205] – and the hypocrisy of sub rosa and standardless detention caused by money bail.[206] Indeed, it is likely that no state in the future can avoid making a similar choice. When money is taken out of the process – i.e., when unlawful and standardless detention is removed – it focuses one's attention on who, exactly, should be released and detained, and that question is initially answered by the detention eligibility net. The less people know about risk in general, the wider that net will likely be.

The 1984 Act also augmented these detention eligibility categories with so-called "rebuttable presumptions" toward detention based on certain preconditions. Like the 1970 Act, the 1984 Act included a limiting process designed to further narrow the net of detention eligible defendants, which included a due process laden hearing from which a judge must find based on the relevant factors that no condition or combination of conditions would reasonably assure court appearance or public safety.[207] Nevertheless, the 1984 Act also added a rebuttable presumption that no conditions or combination of conditions would suffice to protect the public in cases in which: (1) the defendant had been previously convicted of a crime listed in the first three net categories (or any state or local offense equivalents); (2) the offense for that conviction was committed while the defendant was on pretrial release; and (3) no more than five years had elapsed since the date of that conviction or release from imprisonment, whichever is later.[208] At least two legal scholars predicted, correctly, that the set of circumstances found in this first rebuttable presumption was not expected to happen often.[209]

A second rebuttable presumption, though, pointed toward a finding of "no conditions or combination of conditions" for both flight and public safety in cases in which the defendant was charged with felonies punishable by ten years or more of imprisonment covering certain serious drug cases or use of a firearm to commit a felony. [210] According to the Senate Report, these were considered by Congress to be "serious and dangerous offenses" committed by defendants that pose a "significant risk" both for pretrial crime and, in the

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[205] H.R. Rep. 1541, 89th Congress, 2nd Sess. 8-9 (1966).
[206] See H. Rep. 91-907, at 82; 98-225, at 5 (1970).
[207] 18 U.S.C. § 3142 (e). For a list of the elements used in this process, *see* the discussion on *United States v. Salerno, infra.*
[208] *See id.* at 3142 (e) (1), (2), (3) (1984); s*ee also* S. Rep. 98-225, at 19.
[209] *See* Lay and De La Hunt, *supra* note 185, at 940.
[210] *See* 18U.S.C. § 3142 (e) (1984).

case of drug offenders, for flight or escape to other countries.[211] This presumption was predicted to be triggered far more often.

United State v. Salerno

The "big fix" was given legal affirmation in the case of *United States v. Salerno*,[212] discussed previously. In *Salerno,* the United States Supreme Court concluded that the Bail Reform Act's detention provisions did not facially violate the Due Process Clause or Excessive Bail Clause of the United States Constitution. In so doing, the Court made it clear that: (1) public safety was a constitutionally valid purpose for limiting pretrial freedom; (2) in certain circumstances pretrial detention could be used based on predicted risk of danger; but (3) if used, pretrial detention had to be both extremely limited and fair.[213]

Accordingly, the Court emphasized the importance of the various limits concerning detention that might serve as narrowing functions.[214] As to the detention eligibility net, the Court stated that the Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes (detention hearings available if case involves crimes of violence, offenses in which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders)."[215] The Court's use of the phrase "most serious" accords not only with the legislative history of the Act, which was directing detention toward a "small but identifiable" group of defendants posing "especially grave risks," but also with the holdings from

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[211] S. Rep. No. 98-225, at 19-20.
[212] 481 U.S. 739 (1987).
[213] *Id.* Another interesting, but lesser known aspect of *Salerno* is that it essentially obviated the need to consider safety to witnesses or jurors – sometimes tied to an articulated purpose of "ensuring the integrity of the judicial process" – separately from any other notions of public safety. In *Salerno,* 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. The court of appeals expressly noted that it considered this contention to be wholly different from what it considered to be clearly established law that pretrial detention was proper to prevent flight or threats to persons solely within the judicial process, such as witnesses and jurors. *See United States v. Salerno,* 794 F.2d 64 (2nd Cir. 1986). In the brief before the Supreme Court, the government highlighted the anomaly presented by a scheme that would allow courts to detain persons deemed high risk to witnesses and jurors, but not to other members of the public. *See* Brief for Appellee at 13, *United States, Salerno,* 481 U.S. 739 (1987). Had the Supreme Court not reversed the appellate court, this distinction between those within the judicial process and those outside of it might have remained. Instead, by upholding the 1984 Act, the Supreme Court forever expanded the notion of public safety to encompass all potential victims, whether in or out of the judicial process.
[214] The Harvard Law School *Primer, supra* note 3 at 27, correctly and uniquely calls these narrowing functions "limited entry points" to any scheme of preventive detention.
[215] *Salerno,* 481 U.S. at 747.

the detention cases, most of which used strong limiting adjectives concerning risk – such as "extreme or unusual" – to keep detention within proper boundaries. Obviously, and as discussed later, our notions of which defendants pose which risks have been altered by current risk research.

While approving a fairly broad expansion of pretrial detention, *Salerno* nonetheless provided states with the oft-quoted line that can be used to guide American jurisdictions on the proper formulation of detention eligibility nets and limiting processes: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[216] This line is important given the fact that American jurisdictions might differ on what they consider to be "the most serious of crimes" or even "high risk defendants." Even the most crime-fearing and risk-averse jurisdictions must come to accept that fundamental American notions of liberty require many more persons to be released pretrial than detained. Of course, the "norm" is not defined, which is why we must learn from history, the law intertwined with that history, and even the facts of various detention cases to determine the levels of risk that we must embrace.[217] Jurisdictions should note an overall theme arising from the detention cases, to the "big fix," to *Salerno,* which is that preventive pretrial detention was designed to be used only in extremely unusual cases, on a small but identifiable group of highly risky persons, and as a carefully limited exception to an overall presumption of release.

Some persons argue, incorrectly, that *Salerno's* statement concerning the "norm" reflects some higher philosophical notion of American freedom. In particular, they argue that we must look at every single defendant – including those released on citations or summonses – before we decide whether liberty has been preserved for most persons. But *Salerno* was not decided abstractly; the Court was reviewing the detention provisions of the Bail Reform Act of 1984, which were only triggered when persons were arrested, charged, and brought before a judicial officer to determine release or detention.[218] Thus, when measuring release and detention under the "norm" standard, jurisdictions should look, at least initially, at its arrested

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[216] *Id*. at 755.

[217] The Court's use of the word "norm" was likely prompted by the ACLU's amicus brief in the case, in which that organization argued that the government appeared to be advocating "that regulatory detention is the norm, rather than the exception." Amicus Curiae Brief of the ACLU**,** at 8, *United States v. Salerno,* 481 U.S. 739 (1987).

[218] *See* 18 U.S.C. § 3141, 3142 (1984).

population. Importantly, however, this notion might change given certain advances in pretrial justice.[219]

The Court also emphasized the importance of the Act's detention limiting process and procedural safeguards, which included: (1) a "full-blown adversary hearing," with counsel, the ability to proffer evidence, witnesses, and cross examination; (2) judicial guidance through standards; (3) a requirement that the judicial official only detain after finding by clear and convincing evidence that the defendant "presents an identified and articulable threat" and that no condition or combination of conditions suffice to provide reasonable assurance of public safety or court appearance; (4) a requirement of a written findings for detention; and (5) the ability for an immediate and expedited appeal.[220]

In *Foucha v. Louisiana,* a commitment case for a defendant found not guilty by reason of insanity, the Supreme Court described the Bail Reform Act as a "sharply focused scheme," which stressed all these procedural elements, including the limited duration of detention as well as need for the government "to convince a neutral decision maker through clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, *i.e*., that the 'arrestee presents an identified and articulable threat to an individual or the community.'"[221] In her concurrence, Justice O'Connor noted that without concrete evidence of dangerousness – such as a criminal conviction – courts should pay deference to reasonable legislative judgments about dangerousness,[222] but nonetheless stressed that *Salerno* allowed pretrial detention only when "individuals arrested for 'a specific category of extremely serious offenses' are detained and 'Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest.'"[223]

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[219] For example, if a police agency were to use an actuarial pretrial risk assessment instrument on the street and make the decision to arrest based on the instrument, the dynamic of the jail population might change. This would be a rational system for determining whether to arrest someone, and yet it could potentially lead to the arrest of only high risk persons. In such a case, a more rational system that reduces needless arrests might be put in place but lead to decisions that – again, rationally and legally defensibly – cause liberty for that population to be less than the "norm." In one respect, the "norm" term represents a ratio. And thus, once again, it is likely the rationality of the process that will ultimately determine the appropriate ratio.
[220] *Salerno*, 481 U.S. 739, 742, 750-52 (1987).
[221] *Foucha,* 504 U.S. 71, at 72 (1992).
[222] *Id.*at 81.
[223] *Id.*at 88.

When reviewing *Salerno* as a part of America's "big fix," jurisdictions must also remember that the case presented a "facial" challenge to the Bail Reform Act against Due Process and Eighth Amendment claims. A facial challenge, as the Court noted, presents a "heavy burden," and "is the most difficult challenge to mount successfully, since the challenger must establish that no set of conditions exists under which the Act would be valid."[224] Put another way, if even one conceivable set of circumstances exists under which the law would operate constitutionally, a facial challenge fails. Losing a facial challenge, however, does not erode the very real possibility of appellate courts finding individual federal cases being decided unconstitutionally for failure to follow the various elements within the 1984 Act, and this would be true for any state that attempts to emulate the Act through its own bail laws. For example, even if a state were to enact a process virtually identical to 1984 scheme, the fact that a court within that state might neglect one element – such as having defense counsel present at the detention hearing, or, indeed, having the hearing at all – could lead to an appellate court to declare a constitutional violation.

This is not to say that the only way to follow the Constitution is to enact a process identical to the 1984 Act. For example, due to differences in federal and state law, a state might provide a broader list of detention eligible offenses than those covered under the Act.[225] Moreover, it seems unlikely that the Supreme Court would find fault in a state's new detention eligibility net based on empirical research demonstrating a justification for the net. Nevertheless, *Salerno* highlights two fundamental problems – one current and one future – facing America today.

Currently, the biggest problem appears not to be that jurisdictions differ over details in their bail schemes; instead, the problem is that despite the states' recognition of *Salerno* and its emphasis on limited detention, they routinely ignore fundamental principles embodied in *Salerno,* which should lead – and, indeed, have already led – to findings of constitutional violations. For example, in *Lopez-Valenzuela v. Arpaio* the Ninth Circuit Court of Appeals struck an Arizona detention provision because it was not "carefully limited," as mandated by *Salerno.*[226] Similarly, the Arizona Supreme Court recently struck a state constitutional detention provision as violating *Salerno's* requirement that provisions be "narrowly focused" on preventing the stated

[224] *Salerno*, 481 U.S. at 745.
[225] *See* LaFave, et al., *supra* note 52, § 12.3 (d), at 73, n. 96.
[226] 770 F.3d 772 (9th Cir. 2014)

harm.[227] Bail scholars have predicted these and other potential constitutional objections to various aspects of pretrial detention for some time.[228]

Indeed, most state detention schemes would likely fail if merely held up to *Salerno*, and the risk of constitutional violations found in individual cases appears even greater. This is due, primarily, by the fact that the "big fix" did not spread in any meaningful way to the states. After the D.C. Act of 1970, states added references to public safety in bail setting fairly quickly. Even before the Bail Reform Act was reviewed for constitutionality by the United States Supreme Court, some states even changed their constitutional right to bail provisions to allow for the denial of bail or release to a larger class of defendants.[229] Like the release provisions from the 1966 Act, states often enacted the detention provisions from the 1984 Act only in part, or in some perverted form by allowing for detention without the necessary due process hearings. In many cases, fairly decent preventive detention provisions – often resembling the federal law – are ignored, with judicial officials relying instead upon the ease in which money detains. In short, many American jurisdictions have not learned the lessons of *Salerno,* and instead have apparently come to believe that the case gives states broad latitude to detain in any way they see fit.

The big problem in the future appears to be how to take *Salerno's* fundamental principles and apply them given what we know today about risk. The bail scheme reviewed by *Salerno,* and indeed, virtually every other bail scheme in America, was based on certain assumptions, such as an assumption that a serious charge meant the defendant posed a serious risk. As we will see later, the risk research is causing us to re-think the assumptions used in creating our current bail laws, and to reword them to provide rationality today. While tempting to think that we can simply switch from a "charge-based" detention scheme to a "risk-based" one, current limitations in risk research mean that we must resist that temptation.

These are significant problems, but they seem less so compared to a broader issue facing America. That issue concerns how to stop the continued growth of pretrial detention when pretrial detention tends only to prove itself. The

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[227] *Simpson v. Miller,* 387 P. 3d 1270 (Ariz. 2017).
[228] *See, e.g.,* LaFave, et al., *supra* note 52, at § 12.3 (d), at 79 ("Starting with Salerno, the contention might be that all of these state constitutional provisions violate substantive and/or procedural due process unless the requirements emphasized in that case are engrafted onto these provisions.").
[229] *See* Goldkamp, *supra* note 3, at 15-16 (1985); Fagan & Guggenheim, *supra* note 3, at 415, 417-18.

risk of over-detaining – using money, charge, or risk – is real for either public safety or flight, and broadening our ability to detain by any of these measures must be curtailed by scrutinizing detention models through the law and the research. Money, of course, over-detains in ways that are clearly unconstitutional. But risk, too, can pose similar problems. Once we say that every defendant is "risky" – as we do now with actuarial pretrial risk assessment instruments – what is to keep us from gradually detaining unconstitutional numbers of defendants, especially when detention leads to the outcomes we seek?

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember what the law and the history of bail tell us. Specifically, they tell us that the English system basically involved assessing pretrial risk before declaring anyone bailable. America gradually changed that system to one in which people were declared bailable up front, allowing judges only to consider various risk factors in setting the amount of the financial condition. At first, the system worked well and did not offend the historic rule that bailable defendants must be released. Later, however, when courts began seeing relatively higher flight and public safety risks, those courts struggled with how to deal with both unintentional and intentional detention. Accordingly, in the 1970s and 1980s, America needed some fix that would provide a purposeful system of release and detention based both on risk for flight as well as public safety. That fix needed to provide a narrow detention eligibility net and further narrowing process to reflect American notions of liberty, while still allowing the intentional detention of "high" risk defendants, and while eliminating unintentional detention by reducing the effects of money at bail.

Because that fix involved a significant overall expansion of pretrial detention – a stark departure from earlier and much more limited release and detention notions[230] – the purposeful narrowing of detention to encompass only extremely serious public safety and flight risks through a detention eligibility net, a further narrowing process, and other due process safeguards theoretically lessening the overall use of detention as a response to risk, was a pivotal part of the solution. Unfortunately, however, the interrelated parts

[230] In a comprehensive review of various modes of American preventive detention, the authors note that the Bail Reform Act of 1984 tended not to follow the other modes of preventive detention, which greatly narrowed what had been traditionally broad common law powers. *See* Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice,* 2 Harv. Nat'l Security J. 85 (2011) [hereinafter Klein & Wittes].

to this "fix" did not successfully spread to the states, and have become eroded to near unrecognizable levels in the federal system.

Future attempts at re-drawing the line between release and detention can be informed by knowledge of the law and history, which both point toward using information about risk to maintain America's emphasis on liberty and freedom while rationally addressing historic fears over flight and crime.

What Does the Pretrial Risk Research Tell Us About Re-Drawing the Line Between Pretrial Release and Detention?

Pretrial research in all its forms (historical, legal, observational, opinion, social science, etc.) significantly informs the field of pretrial release and detention. By far, however, social science research – and specifically, research concerning defendant risk – provides us with the most compelling data for helping to re-draw the line between pretrial release and detention. Indeed, this is one of the quintessential questions in bail and no bail today; can risk itself serve to draw the line between release and detention, replacing a line previously drawn (albeit somewhat ignored) by defendant charge as a proxy for risk? In many jurisdictions, people argue the need to detain "high risk" defendants, but this only leads to further questions. Questions such as, what do we mean by "high" risk?; should we then release everyone who is not "high' risk"?; should we detain a "high" risk person even if that person is only charged with, say, shoplifting?; concomitantly, should we release a "low" risk person even if that person is charged with, say, murder?; and "high" or "low" risk for what, exactly?

These questions lie at the very heart of this generation of bail reform. Jurisdictions now know more about defendant risk than they ever knew in a mostly charge and money-based system. Accordingly, the overarching question becomes whether risk research, and especially the research going into the development of actuarial pretrial risk assessment instruments, provides us with information helpful to re-drawing the line between release and detention. To answer that question, it is helpful to know four things about actuarial pretrial risk assessment instruments, including: (1) what these instruments tell us; (2) how these instruments highlight certain significant flaws in our current system by illuminating often counterintuitive outcomes; (3) what these instruments do not tell us; and (4) how actuarial pretrial risk assessment and the risk research interact with the law.

Before we discuss these concepts, however, we must remember that "risk assessment" is not new. We have been assessing risk at bail since at least 400 A.D., when the first group of Saxons assigned a personal surety (usually a family member) to protect the property due as a penalty for some wrong if the accused (or the "convicted" offender) were to flee. Since then, we have always been concerned with risk. There is a tendency today to speak of the advent of "risk assessment" as some new technology to solve the world's problems with bail, but that is incorrect. Today's statistically-derived, multi-jurisdictional risk tools are simply the latest in a long line of historical ways to assess risk.[231] Indeed, every American jurisdiction today attempts to assess risk – perhaps through intuition, or a variety of statutory factors, or even a money bond schedule looking only at criminal charge – but it is assessment nonetheless. Today's statistical methods are superior to that; indeed, they are so superior that they, alone, are likely responsible for much of this current generation of bail reform. It is helpful to know, however, that previous generations of risk assessment either contained or exacerbated certain limitations to the task surrounding bail, and so we should not be surprised that this new generation contains similar limitations. Moreover, we should not be surprised to find that despite being exceptional at helping with release and conditions of release, actuarial risk tools are only partially helpful in assessing overall risk for the things we hope to address with detention.

It helps to consider a simple thought experiment. If, in the future, America developed an accurate way to determine, with 100% accuracy, that a certain defendant would definitely commit an aggravated murder on a date certain, we would likely detain that defendant and detention, in that case, might appear infinitely reasonable. If, however, this form of risk assessment told us that the crime he was going to commit was simple trespass, we might reconsider detention altogether and try to fashion conditions designed to dissuade him from ultimately making that choice. Moreover, if we knew that a defendant was going to commit a crime on a date certain, there are likely other things we could do outside of conditions to avoid that crime from happening while on pretrial release, such as moving up the court date, or

[231] *See generally* NIC *Fundamentals*, *supra* note 6. As noted in that document, a significant shift in risk assessment occurred in 2003 with the creation, by Dr. Marie VanNostrand, of a multi-jurisdictional, statistically-derived risk assessment tool, the Virginia Pretrial Risk Assessment Instrument. For a general overview of risk and risk tools, *see* Anne Milgram, Alexander M. Holsinger, Marie VanNostrand, & Matthew W. Alsdorf, *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making,* 27 Fed. Sentencing Rep., No. 4, at 216 [hereinafter Milgram, et al.].

simply using police surveillance as is done in virtually every other attempt to thwart crime.

Similarly, with flight, it would depend on whether the instrument predicted true flight to avoid prosecution versus simply forgetting a court date, and even then the risk might disappear by simply reducing the number of court appearances. The point is that even in a perfect system illustrating 100% infallible risk prediction, we might still refrain from entertaining the idea of detention because of our notions of what it means to be an American. Current risk assessment is far from this perfect system, and so we should not be surprised when the law – erring on the side of liberty and freedom – trumps findings of risk based on today's actuarial assessments.

What Do Actuarial Pretrial Risk Assessment Instruments Tell Us?

At their core, actuarial pretrial risk assessment instruments attempt to predict the risk of a defendant "failing" through misbehavior while on pretrial release. In America, the two types of misbehavior the government is allowed to address at bail are court appearance and new criminal activity, and so these risk instruments help us to determine defendant risk for these two outcomes as well as to guide us toward appropriate interventions designed to reduce that risk.[232] For example, if we know that a defendant is relatively risky for failing to appear for court, we can place conditions on his or her release designed to help provide reasonable assurance of court appearance. Again, this generation of risk assessment using actuarial tools is better than any other efforts of assessing risk we have done in the past, [233] and the

[232] *See generally* Milgram, et al., *supra* note 231; Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* (PJI, 2015) [hereinafter PJI *Risk*], found at https://nicic.gov/library/029999.

[233] For a good review of the history and then-current research of pretrial risk assessments as well as a description of how one was constructed, *see* Christopher T. Lowenkamp, Richard Lemke, & Edward Latessa, *The Development and Validation of a Pretrial Screening Tool,* 72 Fed. Prob. 2 (2008); For a general description of risk assessment generations, *see* Sarah L. Desmarais & Jay P. Singh *Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States: An Empirical Guide* (CSG, 2013) [hereinafter Desmarais & Singh]; the American Bar Association Standards on Pretrial Release trace the development of empirical risk since the 1920s, ending with VanNostrand's Virginia instrument, *see* ABA Standards, *supra* note 100, Std. 10-1.0 (b) (i) (commentary), at 57, n. 22; *see also* Council of State Governments, *Risk Assessment: What You Need to Know* (2015) ("Risk assessments are absolutely, statistically better at determining risk than the old ways of doing things."), found at https://csgjusticecenter.org/reentry/posts/risk-assessment-what-you-need-to-know/; Charles Summers & Tim Willis, *Pretrial Risk Assessment: Research Study* (BJA, 2010) [hereinafter Summers & Willis], found at https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf.

literature suggests that they are significantly better than clinical (i.e., largely subjective) prediction. As noted by researchers Sarah Desmarais and Jay Singh, "There is overwhelming evidence to suggest that assessments of risk completed using structured approaches produce estimates that are both more accurate and more consistent across assessors compared to subjective or unstructured approaches."[234]

This is true in the pretrial setting, and using these tools – empirically-based actuarial instruments that classify defendants by differing levels of pretrial risk through weighted factors – is considered to be an evidence-based practice, and is often a critical prerequisite to adopting other best practices in the pretrial field.[235] These assessment instruments provide standardization and transparency, help avoid arbitrary decision making, and help to maximize our pretrial goals. Moreover, by telling us pretrial risk in a more accurate way, these tools also help us to follow the so-called "risk principle," which instructs jurisdictions to expend less or no resources on lower risk persons and more resources on higher risk persons, and which thus includes a requisite finding of risk to allocate resources properly. The risk principle is well known in the post-conviction field, and has equal relevance to pretrial release and detention decisions.[236]

Overall, actuarial pretrial risk assessment instruments are invaluable to the process, and, by themselves, an exceptional justification for eliminating money at bail. They can help courts and justice systems with virtually all issues concerning release (including structuring and evaluating supervision strategies, crafting responses to violations, assessing the efficacy of bond "types," evaluating jail populations, helping to encourage more summonses and citations and even providing some rationale to emergency releases, when necessary), and they can assist with detention. Using them can even lead to more confidence in data processes and systems policies. Moreover, they are always improving; as noted previously, the Arnold Foundation's pretrial risk assessment tool, developed in 2013, has various attributes tending to ameliorate many of the concerns from previous generations.

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[234] Desmarais & Singh, *supra* note 233, at 1 (citing Stefania Aegisdottir, et al., *The Meta-Analysis of Clinical Judgment Project: Fifty-Six Years of Accumulated Research on Clinical Versus Statistical Prediction,* 34 The Counseling Psychologist, 341 (2006)).
[235] *See generally* PJI *Risk, supra* note 232.
[236] Milgram, et al., *supra* note 231, at 216-17; Marie VanNostrand, & Gena Keebler, *Pretrial Risk Assessment in the Federal Court* [hereinafter VanNostrand & Keebler] (Washington, D.C.: Office of Federal Detention Trustee, 2009), found at https://www.ncjrs.gov/App/publications/abstract.aspx?ID=250813.

Using these tools to better follow the law, by helping courts to determine reasonable assurance of court appearance and public safety, by making sure that pretrial liberty on least restrictive and otherwise lawful conditions is the "norm" (with no intentional or unintentional pretrial detention outside of any particular lawful process for doing so), by assuring that pretrial detention is done in a "carefully limited" way,[237] and by helping courts to follow other fundamental legal principles, is a legal and evidence-based practice, the very thing that American jurisdictions are attempting to achieve in the pretrial field. Pretrial risk assessment tools are not designed to replace professional discretion, but rather to enhance pretrial decision making by coupling instinct or experience and objective assessment, which research has shown produces the best results.[238]

How Actuarial Pretrial Risk Assessment Instruments Are Created

To understand whether we can use these actuarial tools to re-draw the line between release and detention, it is important to know how they are created, and we will do so using the Colorado Pretrial Assessment Tool (CPAT) as a primary example, as virtually all pretrial risk assessment instruments in use today are similar to the CPAT in their construction. Overall, an actuarial pretrial risk assessment instrument uses scientific methods and data collection to test variables for their predictability of certain relevant outcomes, which, in the pretrial field, are failure to appear for court and new criminal activity (and, occasionally, failure to abide by other conditions). While a group of researchers might test hundreds of potential variables (such as previous FTAs, level of charge, etc.) the end result is a set of variables (such as 8 in Virginia, or roughly 70 in Washington, D.C.) that, when used together and in the manner in which they are weighted, are best at predicting the two outcomes that the law allows us to consider pretrial. For example, in creating the CPAT, the researchers tested over 150 variables resulting in a tool having 12 factors, which, when weighted and considered together, provide the best set of factors to predict risk.[239]

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[237] *United States v. Salerno,* 481 U.S. 739, 750 (1987).
[238] *See* Milgram, et al., *supra* note 231, at 219-20.
[239] *See* Pretrial Justice Institute/JFA Institute, *The Colorado Pretrial Assessment Tool,* at 13 (PJI/JFA, 2012) [hereinafter PJI/JFA].

In some ways, the set is better than using Colorado's statutory factors – none of which are weighted and many of which did not end up on the tool at all.[240] For example, "age at first arrest" is a statistically-derived risk predictor on the CPAT, but it is not listed among the statutory factors judges are encouraged (and were once mandated) to consider when setting bail.[241] Similarly, judges in Colorado are statutorily encouraged (and were once mandated) to consider prior failures to appear (which also appears on many risk tools around America), but due to data limitations, that factor does not appear on the CPAT.[242] In other ways, however, the set is inferior to certain statutory variables, which allow judges to inquire into facts and circumstances that may provide nuance to severity or type of risk.

Nevertheless, an important point to remember is that based on variations in population, data collection methods, adequate data sources, and other variables, actuarial pretrial risk assessment instruments differ among the jurisdictions that use them. In 2009, VanNostrand and Keebler identified nine statistically significant and policy relevant predictors of pretrial outcomes in the federal system to guide decision makers in the release and detention process in the federal courts.[243] Two years later, Mamalian examined studies undertaken in the previous decade and summarized the six most common pretrial risk factors identified by those studies.[244] Despite their commonalities, however, she advised caution in extrapolating those factors due to their nuanced differences.

That same year, Bechtel, Lowenkamp, and Holsinger completed a comprehensive meta-analysis to examine numerous risk factors and to identify which factors were statistically associated with pretrial failure.[245] Most recently, the Pretrial Justice Institute listed 17 risk factors variously linked to six widely-used assessment tools; interestingly, no single factor

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[240] *See* Colo. Rev. Stat. § 16-4-103 (2016).

[241] Like most states, there is a catch-all in the Colorado statutes that allows judges to consider "any other facts," but before the CPAT was created, it is highly unlikely that judges ever considered age at first arrest. *See id.,* § 16-4-103 (h), (i), (j).

[242] This is somewhat counterintuitive, and seems to be an aberration from many other tools, which do include prior failures to appear as a risk factor. It is widely believed that the variable's inability to predict is due to Colorado's data collection surrounding missed court dates.

[243] VanNostrand & Keebler, *supra* note 236.

[244] Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment* (PJI/BJA, 2011), found at https://university.pretrial.org/viewdocument/state-of-the-science.

[245] Kristin Bechtel, Christopher Lowenkamp, & Alex Holsinger, *Identifying the Predictors of Pretrial Failure: A Meta-Analysis,* 75 Fed. Prob. 78 (2011) [hereinafter Bechtel, et al.], found at https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=258843.

was included in all six tools.[246] In sum, the differences among various assessment tools (including the weighting of the predictive factors themselves), nuances in meaning behind predictive factors, and even operational or legal and cultural differences mean that certain elements that are considered predictive in one jurisdiction may not be considered predictive in another. Accordingly, no single list is produced as definitive, and jurisdictions must recognize the necessity of continually validating any proposed set of predictive factors to their local populations.

Nevertheless, many of the factors found in the various tools are similar, and tend to fall into two groups: (1) static (unchanging factors typically pertaining to criminal justice history or involvement, such as history of FTAs or prior convictions); and (2) dynamic (changing factors typically pertaining to community stability, such as employment or residence).[247] Of these two groups, static factors are emerging as the strongest predictors of pretrial misconduct,[248] although some researchers have argued that dynamic factors and the defendant interviews often needed to ascertain them likely have independent value. Nevertheless, the combination of the acute need for research-based pretrial assessment in America and budgetary considerations means that an assessment instrument using only static factors that does not take a defendant interview to complete is likely to become even more popular in the future.

In 2013, researchers funded by the Laura and John Arnold Foundation created such a tool, named the Public Safety Assessment (PSA). It uses nine static factors (which are weighted and tested to be race-and-gender-neutral) to accurately predict the risk that a defendant will commit any new crime, commit a violent crime, or fail to appear for court.[249] The PSA was created using an extremely large defendant population, making the tool initially generalizable to all states. It is currently being tested in multiple American jurisdictions, and a recent study in Kentucky reported that after six months

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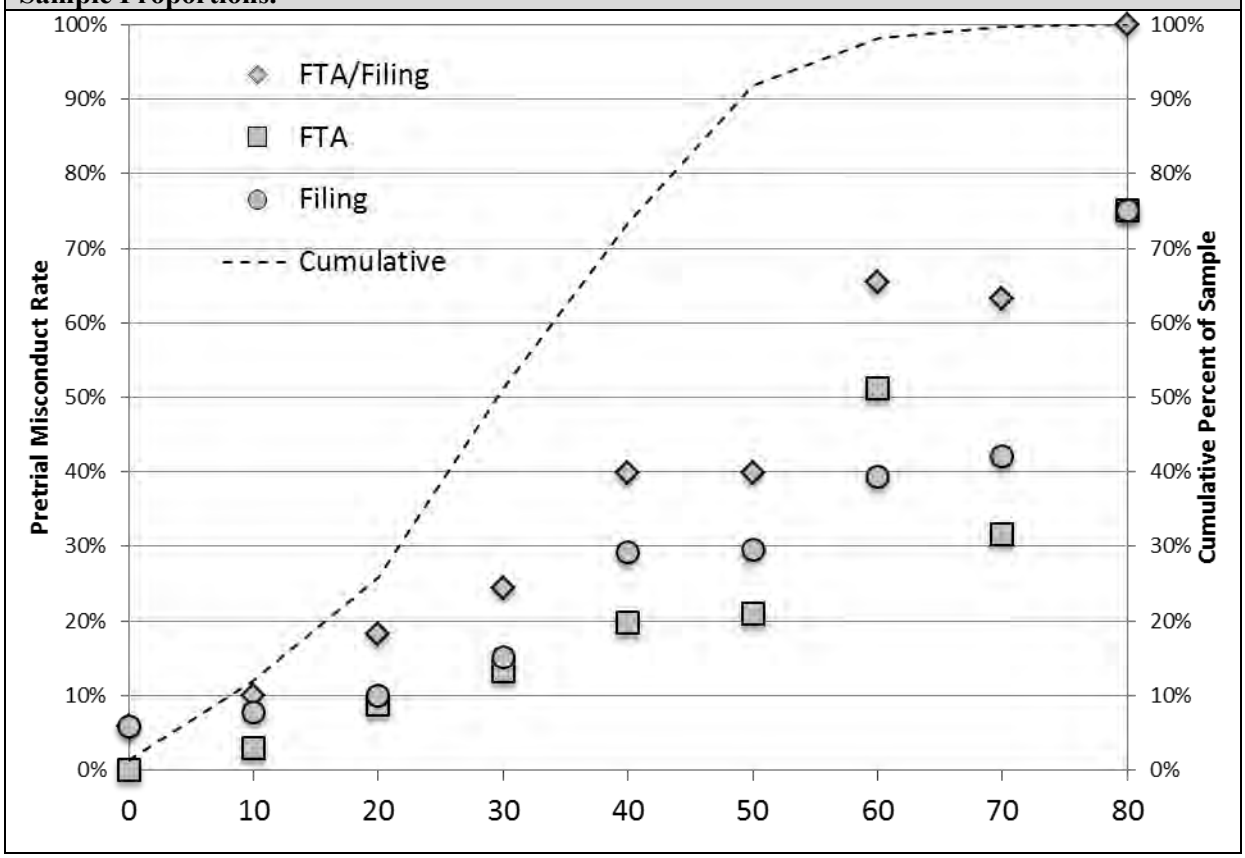
[246] PJI *Risk, supra* note 232, at 3.
[247] *See* Marie VanNostrand & Christopher T. Lowenkamp, *Assessing Pretrial Risk Without a Defendant Interview* (LJAF, 2013) [hereinafter VanNostrand & Lowenkamp], found at http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_no-interview_FNL.pdf.
[248] *See* Bechtel, et al., *supra* note 245; VanNostrand & Lowenkamp, *supra* note 247, at 5.
[249] *See* Laura and John Arnold Foundation, *Developing a National Model for Pretrial Risk Assessment* (LJAF, 2013), found at http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.; VanNostrand & Lowenkamp, *supra* note 247, at 15-18; Laura and John Arnold Foundation, *Public Safety Assessment: Risk Factors and Formula* (LJAF, 2016) [hereinafter LJAF], found at http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf.

of using the tool, that state was able to release more defendants pretrial and yet reduce pretrial crime by nearly 15%.[250]

After testing the various theoretical predictors of risk, the researchers helping a jurisdiction develop a risk assessment instrument typically create a graph showing the varying levels of misconduct associated with rising scores. Colorado's misconduct graph looked like this:[251]

Diagnostic Plots of Misconduct Rate by Points on the Risk Assessment Scale with Cumulative Sample Proportions.



Note. FTA/Filing refers to either a FTA or a new filing.

Based on this data pattern, researchers in Colorado then decided where to divide the data into groups to represent categories of risk. These categories can be created in different ways, and Colorado ultimately used a so-called "natural breaks" method, which examined the data for places along the graph where data naturally cluster together or break apart. No matter which

[250] Laura and John Arnold Foundation, *Results From the First Six Months of the Public Safety Assessment – Court in Kentucky* (LJAF, 2014), found at http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf.
[251] PJI/JFA, *supra* note 239, at 14.

risk instrument one uses, the user will quickly notice that the data have been reduced into certain categories, often corresponding to scoring on the tool and telling persons the predicted success rates for the various categories. In Colorado, the natural breaks led to the creation of four categories, which were refined and are now represented in the graph below: [252]

Revised Risk Category	Risk Score	Public Safety Rate	Court Appearance Rate	Overall Combined Success Rate
1	0 to 17	91%	95%	87%
2	18 – 37	80%	85%	71%
3	38 – 50	69%	77%	58%
4	51 - 82	58%	51%	33%
(Average)	**30**	**78%**	**82%**	**68%**

From this chart, one can see that, for example, a defendant scoring from 0-17 places him or her in Category One, which represents the lowest risk or the best chances for success with a predicted public safety rate of 91% and a predicted court appearance rate of 95% (another graph, not included here, illustrates that in Colorado, about 20% of defendants will fall into this category). Likewise, Category Four defendants – who represent approximately 8% of all defendants arrested and brought to jail – are predicted to succeed at 51% and 58% levels for public safety and court appearance, respectively. One complicating factor with the Colorado tool (and similar tools) is that the "overall success rate" – that is, how many defendants remain completely arrest free and return for all court hearings – is lower than the categories separately. This rate, comprised of defendants who succeed at both outcomes simultaneously, is somewhat smaller merely because it is rarer for defendants to remain both crime and FTA free than to remain only crime or only FTA free.

Virtually all risk instruments operate this way, with risk scores transferring to categories based on cutoffs that are largely determined by researchers or the jurisdictions using the instrument. Thus, in Colorado, when a defendant scores as a category one, the summary document tells the court that this particular defendant looks like other, similar defendants, who, when released, have performed at these levels. We do not know whether this particular defendant will perform the same and, in fact, we will never know whether this particular defendant will perform the same until he or she is released. The difficulty for any judicial official setting bail is to try to determine if this defendant is like the vast majority who will succeed, or if

[252] *Id.* at 18.

he or she will be among the nine or five percent of CPAT Category One defendants who fail.

These instruments have significant utility in determining what conditions to use to manage pretrial risk for released defendants. In short, knowing a defendant's risk category, along with other information gleaned from a pretrial services interview combined with knowledge of the risk literature, can allow a pretrial services agency officer to recommend some set of research-based techniques designed to manage risk of released defendants. For example, in Denver, Colorado, the pretrial services agency has learned what has also been shown in national research: through supervision, a jurisdiction can significantly improve overall success rates of even the highest risk defendants when they are, in fact, released.[253]

How Do the Risk Research and Actuarial Pretrial Risk Assessment Instruments Illuminate Flaws in the Current System?

Much of the knowledge we have gained from the research used to create actuarial pretrial risk assessment instruments illuminates dramatic flaws in our current system of pretrial release and detention. It does this primarily by showing that criminal charge, while in many cases some part of defendant risk, is only a small part of defendant risk. For example, in the revised validated Virginia tool of 2009, "primary charge type" (i.e., whether the charge is a felony or misdemeanor) was only one of eight factors necessary to predict risk; a 2016 modification from primary charge type to "charge is felony drug, theft, or fraud" indicates a more nuanced and superior measure, but still remains only one of several factors.[254] In the Florida tool, "current most serious charge" is one risk factor of eleven, and, in fact, that tool weighs a "current property charge" at four times a "violent charge."[255] In Colorado, the study – admittedly counterintuitively – found that the statistics

[253] Denver Dept. of Pub. Safety, Denver Pretrial Servs. Prog. CY15 Ann, Rep. at 7 [hereinafter Denver Annual Report], available from the author or the Denver agency. This is consistent with other, national research showing that general supervision can increase court appearance and public safety rates for released defendants showing moderate and high risk in significant numbers compared to defendants without such supervision. *See* Harvard Law School *Primer*, *supra* note 3, at 16-17.

[254] *See* Marie VanNostand & Kenneth Rose, *Pretrial Risk Assessment in Virginia,* at 13 (CDCJ/VCJA, 2009); Mona J.E. Danner, Marie VanNostrand, & Lisa Spruance, *Race and Gender Neutral Pretrial Risk Assessment, Release Conditions, and Supervision* (Luminosity, 2016).

[255] James Austin, Avi Bhati, Michael Jones, & Roger Ocker, *Florida Risk Assessment Instrument*, at 13 (JFA Inst., 2012) [hereinafter Austin, et al.,], found at https://university.pretrial.org/viewdocument/florida-pretrial-ris.

"failed to show that the nature (e.g., person or property crime) or severity (felony, misdemeanor) of the defendant's current charge was statistically significantly related to pretrial misconduct."[256]

Most recently (and importantly, due to the large defendant population used to test the tool), the Arnold Foundation's PSA tool showed charge type and severity were not predictive for failure to appear or new criminal activity, but "current violent offense" was one of five factors used to create its so-called "violence flag."[257] The way that current charge type and severity is used in these instruments lies in stark contrast to the way jurisdictions have used them previously in pretrial release and detention. Previously, jurisdictions looked almost exclusively at charge, assumed risk based on charge to set some arbitrary financial condition – with amounts rising as charges appear more and more serious – and then waited to see what happened.

Indeed, these more nuanced examinations of defendant risk have turned much of what we have believed about "risk based on charge" on its head. As long as America has been a country, we have operated on a somewhat intuitive assumption that "the higher the charge, the higher the risk." This notion is grafted onto our constitutions and statutes and is a primary part of our current release and detention policies and practices such as through the use of monetary bail bond schedules, which assign rising dollar amounts to increasingly serious crimes. *Salerno* was decided using certain charge-based assumptions, and in its opinion, the Supreme Court specifically noted that the Bail Reform Act "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."[258] Compared to the research available today, these findings are likely now somewhat simplistic.[259] Instead, risk assessment research tells us what logic should suffice: we see

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[256] PJI/JFA, *supra* note 239, at 20.
[257] LJAF, *supra* note 249, at 3.
[258] *United States v. Salerno,* 481 U.S. 739, 750 (1987).
[259] Congress's findings on this matter were derived primarily from two studies. The first study apparently only showed that a certain percentage of defendants committed crimes while on release, a finding necessary to conclude that public safety should be a consideration at bail. In addition, Congress used a second study of felony defendants in the District of Columbia and made certain assumptions about risk based on whether any particular defendant was (higher risk) or was not (lower risk) on a surety bond. *See* S. Rep. No. 98-225, at 6-7.

low and high risk defendants facing charges of all types[260] and, indeed, some of our riskiest individuals released pretrial (as measured by a risk tool) are facing the least serious charges such as non-violent misdemeanors or property offenses.[261]

This point is crucially important to understand when it comes to re-drawing the line between release and detention. As we will see in detail later, creating a detention eligibility net by using an actuarial pretrial risk assessment instrument from the current generation of instruments (or creating an unlimited charge-based net while using the tool to sort defendants later) is significantly flawed, which points to jurisdictions continuing to use criminal charge to initially delineate whom to release and detain. But unless those jurisdictions are able to somehow also justify that charge-based determination – that is, unless they can show some research that a defendant facing a particular charge (or one of a particular group of charges) is somehow at an elevated risk to do the thing that society hopes to avoid – then we likely have no justification to initially detain anyone pretrial. The risk tools consistently tell us that, when it plays any part at all, current charge is only one small part of defendant risk, and that we see persons showing all levels of risk for all charges. Knowing this, jurisdictions must tread lightly when crafting a detention eligibility net based on criminal charge.

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[260] For example, in New York, the New York City Criminal Justice Agency has tracked local pretrial re-arrest data for many years. In 2005, that agency reported that the pretrial arrest rate for a 2001 sample of defendants was 17%, but that those re-arrests were split nearly evenly among persons charged with violent felonies, non-violent felonies, and misdemeanors. Moreover, defendants were re-arrested for all types of crimes (with certain nuanced variations), and for all different charge types and severity levels as compared to the initial charge. Qudsia Siddiqi, *Research Brief No. 8: Pretrial Re-Arrest Among New York City Defendants,* at 3-4 (NYCCJA, 2005).

[261] Support for this notion is not always easy to find in the published material. Nevertheless, support can be found by looking at how risk instruments occasionally weigh levels of crime when levels of crime are actually deemed a predictor of risk; for example, and as noted previously, the Florida risk tool weighs property crimes higher than both drug and violent crimes for risk. *See* Austin et al., *supra* note 255, at 13. Support is sometimes found when jurisdictions keep comprehensive data about their pretrial program. For example, in Mesa County, Colorado, local jurisdiction data collection revealed varying risk scores for all separated charge categories, including "high risk, low charge" and "low risk, high charge" groupings. The American Bar Association Standards on Pretrial Release note "some evidence that the risk of non-appearance or criminal behavior may actually be greater for persons charged with relatively minor non-violent offenses (e.g., prostitution, retail theft, numbers-running, small-scale drug possession) than for some persons charged with more serious crimes." ABA Standards, *supra* note 100, Std. 10-5.1(b) (commentary), at 104 (citing John S. Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger, 1979); John S. Goldkamp, Michael R. Gottfredson, Peter R. Jones, & Doris Weiland, *Personal Liberty and Community Safety* (New York: Plenum Press, 1995)).

As we learn more about who, exactly, is "risky" pretrial, we are faced with certain dilemmas surrounding our charge-based assumptions. For example, jurisdictions are often comfortable with separating out sex offenders for special punishments, and, indeed, before they are convicted, jurisdictions are equally comfortable with giving persons charged with sex offenses higher money bail conditions due to the serious nature of the charge.[262] In any given case, however, risk assessment can illustrate that a person accused of a sex offense poses very little risk whatsoever. If so, what should we do about persons charged with sex offenses? We are used to demanding high bond amounts, an act that simultaneously assumes high risk and signals our beliefs about the seriousness of the alleged crime. But if particular charges only play one small part of defendant risk, and if an accused sex offender poses little risk, are we willing to let that defendant out under minimal supervision, as the risk research would suggest? The same issue is raised in the case of a "high risk" person charged with a "lower level" crime. Do we release the low risk defendant accused of murder but detain the high risk homeless defendant accused of trespassing, and which of these situations are perhaps more appropriately addressed outside of bail?

Risk assessment research also illuminates flaws in the traditional charge and money-based system by showing that defendants are simply not all that risky (relatively speaking) to begin with, and that failure is much less likely than we probably assumed when we had no empirical data to back it up. Indeed, if one looks at the research behind any particular pretrial risk assessment instrument, he or she will see that lower risk defendants are incredibly successful, operating in predicted risk categories with success rates in the 90th percentiles.[263] Moreover, "high risk" defendants in most instruments are often predicted to succeed more than half of the time,[264] and can actually succeed at higher rates than predicted when released with conditions

[262] Indeed, Arizona added certain sexual offenses in its "categorical" no bail constitutional provision. *See Simpson v. Miller,* 377 P. 3d 1003 (Ariz. Ct. App. 2016).
[263] *See, e.g.,* PJI/JFA, *supra* note 239, at 18.
[264] *See* PJI *Risk, supra* note 232, at 4 (showing even Kentucky's overall success rate for level 5 (higher risk) defendants is 64%). A risk instrument could be created to include a "high risk" category in which defendants failed at, say, 80% levels, but the number of defendants covered by that category would be significantly lowered.

designed to manage risk.[265] In short, during that small window we call the pretrial phase of a criminal case, defendants are not as risky as we think.[266]

Additionally, when defendants fail, the failures are simply not as bad as the failures we have historically articulated that we wish to avoid. For example, when it comes to public safety, America has historically articulated that it wants to avoid extremely dangerous persons committing serious or violent crimes while on bail. Under the traditional charge and money method, our assumptions regarding risk meant that risk and resulting failure were tied to the charge; accordingly, for example, if we arrested a bank robber, we might assume that he or she was risky to commit another bank robbery (or something equally serious). This assumption thus justified the notion of setting higher bond amounts for more serious crimes. Research surrounding pretrial risk assessment, however, tells us that when people fail by committing new crimes, they are not typically the kinds of crimes we fear. For example, in Washington D.C., while 91% of released defendants remain arrest free, 98% remain arrest free for a crime of violence while on pretrial release.[267] This gets at a more nuanced discussion concerning the question of "risk of what," which is discussed under the section of this paper titled, "What Do Actuarial Pretrial Risk Assessment Instruments Not Tell Us?"

This is not to say that certain defendants – especially defendants charged with serious or violent offenses – do not commit crime while on bail. Indeed, as will be shown later, the research on violent crimes provides some empirical justification for a charge-based detention eligibility net covering violent offenses that simply does not exist for other categories. Overall, however, defendants are not as risky as we think, and the ones who are extremely risky are often hard to spot due to the rarity of the event.

The notion that the research tells us that defendants are less risky than we think is clouded by the fact that "risk" is largely determined subjectively by the researchers creating the instruments and the jurisdictions adopting them. For example, and as noted above, when the CPAT was created in Colorado,

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[265] In 2013, Denver showed an overall success rate of 58% for its highest risk defendants, much higher than the CPAT's predicted overall success rate of 33%. *See* Denver Annual Report, *supra* note 253. Readers are reminded that the "overall" success rate is typically lower than either of the individual success rates for court appearance and public safety, which are 51% and 58%, respectively.

[266] This can be due to many reasons, including, logically, the shorter periods of time defendants are watched. The need only to assess risk during the pretrial period is one reason why jurisdictions should use caution when looking at research that evaluates outcomes beyond the pretrial window.

[267] *See* D.C. Pretrial Performance Measures, found at https://www.psa.gov/?q=data/performance_measures.

the researchers plotted a line indicating failures based on risk assessment scores. That graph was then used to create cutoffs, initially by the researchers simply dividing the data into quarters. Later, local researchers looked for the "natural breaks" to create different cutoffs, which were molded, as well, by local criminal justice leader input.

Together, the researchers and Colorado officials decided who belonged in a category and what to call it. In Colorado they used numbers, labeling the lower risk defendants as "in Category One" and higher risk defendants as "in Category Four." With equal confidence and propriety, however, Colorado could have used only two categories, or six, or could have made it so a Category Four included only 2% of all defendants, or could have named the categories, "extremely low," "low," "medium low," and "slightly above low." For these and other reasons, the categories and cutoffs differ across the country, and represent fairly subjective notions concerning varying jurisdictional tolerance (or likely intolerance) for risk. Most relevant to this paper, the subjective aspects surrounding these instruments, by themselves, makes them potentially inadequate for deciding whom to release and detain pretrial in the first instance based solely on prediction.

Together, these two notions – the notion that defendants are simply not as risky as we think (especially for the things we fear) coupled with the notion that we define risk somewhat subjectively – become crucially important when we consider perhaps the most deceptively dangerous thing that many actuarial pretrial risk assessment instruments do: they subtly tell us that all defendants are risky simply because they are all labeled as "risky." Historically, being ignorant of actual defendant risk allowed us to avoid dealing with risk altogether, even though it is the primary consideration at bail. Courts could make certain assumptions about the charge, assign an amount of money reflecting either those assumptions or their sense of seriousness surrounding the charge, and yet be largely unaware of detailed information that might cause them to re-think release or detention in any meaningful way.

Although this problem has existed to some degree before, in this generation of bail reform courts are increasingly handed information in the form of scientific, statistically-based risk instruments labeling every defendant as "risky" and containing detailed information showing that even so-called "low risk" defendants fail. Judges are then told that although the defendant standing before them is likely to succeed, his or her individual risk cannot be

predicted. Given this information, it seems natural to assume that those courts will likely err on the side of over-conditioning versus under-conditioning, on detention versus release. In other words, having now been given statistical data showing with mathematical precision that some defendants in every risk category will undoubtedly fail, can we hope courts will still follow American law by embracing the risk associated with release? Without some significant increase in bail education, asking courts to release more defendants pretrial (a goal in American bail since the country was founded) while simultaneously showing them statistical evidence of failure seems destined to lead only to the opposite outcome: more detention.

Risk assessment also illuminates flaws in the current system by allowing us to see exactly who is in jail based on risk category, and for the most part this helps to generally confirm our surmise that many of the wrong people are in and out of jail. Whenever a person conducts a study either directly or indirectly examining jail population by risk, we see that there are significant numbers of low and medium risk defendants in jail, and that there are occasionally higher risk defendants out of jail.[268] This, of course, is a monumental finding of the sort that has led to bail reform throughout the history of England and America. Throughout history, whenever the wrong people are in jail pretrial, bail reform occurs as a natural correction.[269] Obviously, from any incarcerated defendant population, one will see instances of a "low risk" person who, in fact, presents a higher risk of the sort not necessarily measured by current statistical instruments.[270] Nevertheless, thinking about these things in the aggregate, we must view the issue of who should be in and out of jail in the context of the issues discussed above. Knowing that we define risk and create the cutoffs subjectively, acknowledging that almost all defendants are risky but are actually far less risky than we have assumed, and knowing that they are not so risky for the things we actually fear or seek to address through detention, should lead us to conclude that there are, in fact, far more persons in jail

[268] *See, e.g.,* Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, at 12 (PJI, 2013) (showing both "low" risk persons held in jail and "high" risk persons released from jail).
[269] *See generally* NIC *Fundamentals*, *supra* note 6.
[270] Indeed, in any particular jail population, there will undoubtedly be instances where defendants assessed "low" risk by a risk assessment tool will nonetheless pose an identifiable and unmanageable risk to do something bad if released, just as there will be instances where defendants assessed as "high" risk by a risk assessment tool will be manageable if released. Assessing risk for the jail population nonetheless gives jurisdictions at least a broad idea about who is in their jails.

pretrial who likely should be released, and far fewer persons out of jail who likely should be detained.

What Do Actuarial Pretrial Risk Assessment Instruments Not Tell Us?

The answer to this question is perhaps the most significant answer when deciding how to incorporate empirical defendant risk into re-drawing the line between release and detention. As noted previously, many jurisdictions have begun making wholesale changes to their release and detention practices by replacing their mostly charge-based system with a mostly risk-based one. To do this, they are using actuarial pretrial risk assessment instruments to guide them so as to – putting it somewhat simplistically – detain higher risk defendants and release lower risk ones. This articulation of purpose is attractive, but it sets up a system that is in need of further analysis and, ultimately, rational justification.

Preliminarily, some of what actuarial pretrial risk assessment instruments do not tell us is tied to what they do tell us. For example, because risk assessment instruments tell us primarily who is likely to succeed only in a particular jurisdiction, they do not necessarily tell us who is likely to succeed in all jurisdictions.[271] Likewise, because properly created risk assessment instruments tell us a prediction of a narrow band of misconduct for only the pretrial period, they do not tell us risk in the long term, and thus they should not be used, for example, for program placement, pleas, or to otherwise aid in the sentencing decision. Moreover, in many cases risk instruments do not necessarily tell us how defendants will become more or less risky with conditions or some other treatment; for that, we must rely on other research or experience.[272] For purposes of this paper, however, actuarial pretrial risk assessment instruments *do not* tell us three important things: (1) individual risk; (2) detail concerning "risk of what;" and (3) protective factors that offset risk and what to do with assessed risk.

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[271] The Arnold Foundation's Public Safety Assessment is an attempt to create a single risk instrument capable of being used across all American jurisdictions. It has the potential to do this through its creation from an extremely large data set. Nevertheless, the tool is still being tested and validated to specific jurisdictions' populations.

[272] General risk research tends to illustrate the "risk principle," which suggests using more interventions or supervision for higher risk persons and less interventions or supervision for lower risk persons. *See* Milgram, et al., *supra* note 231, at 216. As noted previously, in some American jurisdictions, experience has led people to believe that pretrial supervision (versus detention) for "high" risk persons can result in better outcomes than predicted by any particular assessment tool.

Individual Risk

First, actuarial pretrial risk assessment instruments do not tell us individual risk. Instead, they predict individual risk based on how a group of similar defendants performed under like circumstances. The general inability to assess individual risk has been described by LaFave, et al., as presenting, at least arguably, a "fundamental constitutional defect" under any legal theory because to reliably detain any individual who would, in fact, miss court or commit a new crime while on pretrial release, a judge would have to also detain those who ultimately would not fail.[273] As noted previously, however, risk assessment at bail has been done since at least 400 A.D., so risk prediction of this sort is not the sort of government action that would necessarily shock the conscience and thus lead automatically to a finding of unconstitutionality. Moreover, and as also noted by LaFave, it is a defect that will likely remain tolerated to some degree as the Supreme Court itself has written that "there is nothing inherently unattainable about a prediction of future criminal conduct."[274] Of course, the Court wrote this sentence before we ever had empirical evidence showing just how many incorrect predictions we might actually have. Accordingly, jurisdictions tempted to move toward incorporating laws or policies designed to detain all "high risk" defendants should do so with caution simply because most actuarial pretrial risk assessment instruments tell us that, more often than not, a "high risk" person will typically succeed if released while additional risk research has shown that these persons will succeed at even higher rates with certain interventions such as pretrial supervision. True individual risk (of the sort we desire to know prior to using pretrial detention) is thus something that must be ascertained from something beyond current actuarial tools operating with existing cutoffs.

LaFave's concern once again raises the issue of false positives at bail – an incorrect prediction that someone is either dangerous or a flight risk – when the decision to detain such persons is unfalsifiable.[275] If an actuarial pretrial

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[273] LaFave et al., *supra* note 52, §12.3(f), at 81-82.

[274] *United States* v. *Salerno,* 481 U.S. 739, 751 (1987) (quoting *Schall v. Martin,* 467 U.S. 253, 278 (1984)).

[275] Generally speaking, if predicting risk of violence, for example, a true positive would be a person predicted as violent who subsequently commits a violent offense. A true negative would be a person predicted to be nonviolent who does not subsequently commit a violent offense. A false positive would be a person predicted as violent who proves to be nonviolent, and a false negative would be a person predicted to be nonviolent who subsequently commits a violent offense. While false negatives are also extremely

risk assessment instrument tells us that a defendant looks like a group of similar defendants labeled as "high risk" for public safety, but the same tool also tells us that "high risk" defendants who are released will succeed more often than they fail, detaining all "high risk" persons just to make sure we capture all crimes for this group of persons will inevitably lead to significantly high numbers of false positives. This problem is exacerbated by the fact that risk research tells us that only an extremely small number of "high risk" defendants commit serious or violent crimes when released. If a jurisdiction detains 100 defendants just to make sure it reaches the one defendant who will commit a violent crime, then despite what the Supreme Court says about prediction, that jurisdiction will undoubtedly have false positives in unconstitutionally high numbers.

Caleb Foote called the people we allow to be in the category of false positives, "a dehumanized second-class category of persons" who are, in fact, "expendable."[276]Authors Jeffrey Fagan and Martin Guggenheim similarly write that it is helpful to view false positives as "individuals deprived of their liberty for utilitarian purposes" – that is, persons "jailed not to stop them from any wrongdoing but in order to throw a wide enough net to cover others, who, if not stopped, would endanger society."[277] Nevertheless, and as those authors also suggest, while decisions diminishing the rights of *convicted* persons for the collective good might in some instances be acceptable, at bail they are decidedly less so. Accordingly, when re-drawing the line between release and detention, jurisdictions should be informed of our inability to predict individual risk as well as our ability to recognize that individual rights likely outweigh claims of utility.

Moreover, if we are truly concerned about not detaining persons who would, in fact, succeed if we released them, then we must also deal with base rate problems. A base rate is simply the rate at which a thing that we are trying to predict happens naturally in the population of interest.[278] As Stephen Gottfredson explains, the difficulty of predicting becomes more problematic

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important in bail, they are not unfalsifiable because the defendants are released. *See* Dean J. Champion, *Measuring Offender Risk: A Criminal Justice Sourcebook*, at 73 (Greenwood Press, 1994).

[276] Caleb Foote, *Comments on Preventive Detention,* 23 J. of Legal Ed. 48, 52 (1970).

[277] Fagan & Guggenheim, *supra* note 3, at 428. In this document, Fagan & Guggenheim describe the results of a "natural" study caused when the courts required judges to release juveniles the judges had already determined to be dangerous, thus making the decision falsifiable and thus subject to analysis.

[278] *See* Stephen D. Gottfredson, *Prediction: An Overview of Selected Methodological Issues,* at 25, in 9 Prediction and Classification: Crim. Just. Decision Making (U. of Chicago Press, 1987) [hereinafter Gottfredson].

whenever the base rate either increases or decreases from 50%.[279] When base rates are high, "the difficulty involves developing bases to make predictions that improve on randomness."[280] But when base rates are low, prediction is only good if it improves upon the base rate.

In bail, for example, we are trying to predict flight and violent or serious crime during pretrial release. Unfortunately, however, these things are actually very rare and so the base rates are extremely low. Noted legal philosopher Andrew von Hirsch explains what makes criminal conduct generally resistant to prediction:

> (1) It is comparatively rare. The more dangerous the conduct is, the rarer it is. Violent crime – perhaps the most dangerous of all – is the rarest of all. (2) It has no known, clearly identifiable symptoms. Prediction therefore becomes a matter of developing statistical correlations between observed characteristics of offenders and criminal conduct.[281]

And when it comes to statistical correlations, unless we can predict a relatively rare event the same or better than its actual rate, we will have problems with false positives. For example, if we are concerned with reducing violent pretrial crime, but only 1% of defendants are known to commit violent pretrial crime, then our prediction method leading to detention must do better than simply letting all defendants out of jail, for letting all defendants out of jail will yield results that are right 99% of the time.

There are fundamental issues with how America is beginning to almost reflexively adopt actuarial pretrial risk assessment instruments as a panacea to bail problems. Perhaps the most important issue is that by adopting these instruments, we have adopted their definitions, and thus we call all defendants "risky." And yet, when defining that risk, we have moved away from worrying about flight to worrying about all FTAs, and from worrying about serious or violent crime while on release to worrying about any and all

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[279] *Id.*
[280] Fagan & Guggenheim, *supra* note 3, at 426.
[281] Andrew von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons,* 21 Buff. L. Rev. 717, 733 (1971-71) [hereinafter von Hirsch]. Von Hirsch goes on to explain that what makes violence so particularly difficult to predict is both rarity and situational quality; that is, violence does not apparently adhere to certain individuals, but, instead, can happen to any person based on a number of variables beyond the characteristics of the defendant.

crime. This, in turn, has altered our base rates. This is discussed in greater detail later in this paper, but jurisdictions should be mindful of how this issue is manifesting in this generation of bail reform by reading through the following brief explanation.

As noted previously, ever since America began intentionally detaining noncapital defendants in the 1960s, we articulated a common desire only to detain defendants who presented an unmanageable risk of willful flight to avoid prosecution or a risk of serious or violent criminal activity while on release. Those two things were incredibly rare, however, and so it was difficult for any generation of statistical risk assessment to predict them. And because they were hard to predict, any method for dealing with them was likely to lead to a staggering number of false positives. For these and other, mostly political reasons, we thus began (perhaps unwittingly) to change the definitions of the things we wanted to do at bail; instead of flight, we began articulating a desire to avoid all failures to appear, no matter how benign, and instead of serious and violent crimes, we began articulating a desire to avoid all criminal activity, no matter how minor. Doing so actually allowed us to reduce false positives because it is easier to predict things that happen far more frequently. While avoiding all crimes and failures to appear is an appropriate goal of pretrial release, doing so becomes problematic when we allow the risk of those things to lead to pretrial detention.

For example, and as noted previously, if we say we care about a defendant committing a violent crime while on bail, but if only one of 100 defendants will commit a violent crime while on bail, releasing all defendants will be 99% correct, and any prediction method will have to be at least that correct (or better) to eliminate false positives. Increasing the base rate, however, can help with prediction. Accordingly, if we develop an assessment that can show a particular group is, say, 50% likely versus 1% likely to commit a violent crime, we have increased the base rate, making prediction somewhat less error prone. We would still have false positives, but not nearly so many as if the base rate remained so low.

Unfortunately, in America we have created assessments with base rates hovering around 50% for subgroups not necessarily by better predicting the violent crimes, but instead by including more and more minor crimes to our measurement of public safety. By adding those minor crimes, "it becomes increasingly difficult to demonstrate a need for societal protection of the degree of urgency that could conceivably warrant the kind of pretrial

deprivation of liberty [we would see]."[282] Adding more and more crimes to our definitions of public safety may have been unavoidable, because "it is only when we allow a wide, standardless definition of pretrial danger that the efficacy of the predictions even makes sense."[283] But do we really want to be a country that uses secured detention to respond to a risk of committing minor crimes, such as drug use or low level property offenses, simply to get at the one or two persons who are extremely high risk to commit a serious or violent crime? As noted by Fagan & Guggenheim, when we add petty and minor offenses into our decision standard for dangerousness, we "run[] the risk of predicting everything and nothing at the same time."[284]

In sum, "data based on infrequently occurring behavior has low predictive utility."[285] Three ways to deal with this problem include: (1) continually narrowing the focus of the risk instruments (or the concept of risk generally) to screen out higher and higher numbers of false positives by better predicting the low number of true positives for the thing we seek to avoid; (2) using cutoffs to identify a subgroup that has a much higher incidence of the thing we wish to avoid and try to predict from that group; or (3) using cutoffs for subgroups *but also* re-defining the thing we are attempting to predict more broadly so that it includes defendants who have higher base rates of pretrial misconduct of around 50%.With the research in America, as noted above, we have tended to do option number three. Most risk instruments today include subgroups of "risky" defendants, often with a cutoff for "high risk" defendants with base rates for pretrial misconduct hovering around 50 to 60%, which seems rational and which research suggests is an appropriate rate to avoid false positives.[286] But in our ongoing attempt to predict something that is hard to predict, we have (again, likely unwittingly) re-defined the risk that we seek to avoid quite broadly to include all failures, and simultaneously moved consideration of that definition to the detention decision. American notions of freedom and liberty, however, would suggest that we instead define those things quite narrowly. Accordingly, until the science concerning risk begins to do options number one and two, above, we should view what we have done through option number three with extreme caution and be ready to override

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[282] *Id.* at 738.
[283] Fagan & Guggenheim, *supra* note 3, at 447.
[284] *Id.* at 448.
[285] Hazel Kemshall, *Understanding Risk in Criminal Justice*, at 66 (Open University Press, 2003).
[286] *See* von Hirsch, *supra* note 281, at 737; Fagan & Guggenheim, *supra* note 3, at 426 (and sources cited therein).

our decision making frameworks based on actuarial pretrial risk assessment instruments to effectuate higher rates of release.

Consider the adoption of the CPAT as a more specific example. In Colorado, policy makers and researchers created cutoffs on that tool from one through four, with "Category Four" representing defendants most likely to fail relative to other defendants.[287] Approximately eight percent of all defendants assessed were predicted to end up in Category Four, and research showed that defendants in that category tended to fail for new criminal activity 42% of the time (succeed 58% of the time), and fail to appear for court 49% of the time (succeed 51% of the time). Because these base rates are near 50%, predictions of this subgroup are more likely to be free of false positives than groups with lower base rates.[288] But these base rates for the subgroup are only high because Colorado defined "public safety" as "a filing for *any* new felony, misdemeanor, traffic, municipal, and petty offense, and was not limited to a more narrowly defined set of crimes that involve a form of physical or emotional harm to one or more victims."[289] Colorado thus likely improved upon the base rate for predicting crime while on bail, but it has done so only by re-defining public safety to include far more minor crimes versus only serious or violent crime while on bail.

Similarly, in Colorado, risk of failure to appear was defined broadly on the CPAT, which labels a defendant as a failure for missing a single court date out of possibly 10 or more court dates. The base rate for a defendant willfully failing to appear for court to avoid prosecution, however, is undoubtedly quite low. In creating the CPAT, Colorado has thus likely improved upon the base rate for "flight," but it has only done so by attempting to redefine flight to mean "failure to appear."

It should be noted that in these examples, we have been looking only at subgroups for "high risk" defendants with higher base rates for new criminal activity that approximate 50%. Despite jurisdictions broadly re-defining public safety and flight to improve upon the rates, other subcategories of defendants still have much lower base rates even for those broadly-defined categories of failure (e.g., defendants in a "low risk" category might only fail

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[287] *See generally* PJI/JFA, *supra* note 239.

[288] *See* von Hirsch, *supra* note 281, at 737. As Gottfredson explains, the difficulty of predicting becomes more problematic whenever the base rate either increases or decreases from 50%. *See* Gottfredson, *supra* note 278, at 25. When base rates are high, "the difficulty involves developing bases to make predictions that improve on randomness."

[289] PJI/JFA, *supra* note 239, at 18, n. 23 (emphasis in original).

5% of the time), meaning that detaining defendants found within these categories will likely lead to a high and possibly unacceptable number of false positives.[290] All of these things suggest that if we do not use caution, jurisdictions will likely over-detain "high risk" defendants due to our extremely broad definitions of public safety and flight, and over-detain everyone else due to the definitions as well as extremely high base rates and potential false positives.

Detail Concerning "Risk of What?"

Second, as mentioned above and intertwined in any discussion of base rates and false positives, actuarial pretrial risk assessment instruments do not tell us the important question concerning the nature and severity of the risk. In short, they do not adequately answer the fundamental question of, "risk of what?"[291] For example, when we are told that a defendant is a Category Four ("higher risk") on the CPAT, that designation not only does not tell us whether that particular defendant will succeed or fail (indeed, the "high risk" group itself succeeds over 50% of the time), it also does not tell us what that defendant who fails is likely to do to cause that failure. In Colorado, it could mean risk of a new filing for anything from a petty or traffic offense all the way to homicide. For flight, it could mean missing a bus on the way to court all the way to moving to Venezuela. Making matters more complex, this same question would likely be answered differently in other jurisdictions using other tools.

The issue is not unknown to the pretrial field. In 2007, Dr. Marie VanNostrand noted that, "Although pretrial risk assessment instruments in most instances do well in predicting the likelihood of danger to the community (often measured by new arrest pending trial) there is no known research that explores the nature and severity of the new arrest."[292] Although

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[290] *See* PJI/JFA, *supra* note 239, at 18. For example, a Category One defendant on the CPAT has predicted base failure rate of 9% for new criminal activity and 5% for failure to appear for court (with base rates based on the much broader definitions of the two outcomes). For a judicial in-or-out decision based on a predictive instrument to provide value, that decision would have to do better than the base rate for pretrial crime and FTA because releasing *all* defendants in that category would likely yield 91% and 95% success rates. To do better than the base rate and to avoid false positives (if, indeed, it could to any acceptable numbers), though, an instrument would have to settle by missing a number of true positives. *See* von Hirsch, *supra* note 281, at 733-35.

[291] *See* Harvard Law School *Primer, supra* note 3, at 22 (stating that "[a] simple designation of 'high risk' may not tell a decision-maker whether that reflects risk of arrest for a serious violent crime"); Summers & Willis, *supra* note 233, at 4 ("research is needed on the severity or type of risk identified by PRAIs").

[292] Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services,* at 17-18 (NIC/CJI, 2007).

we are likely getting closer to exploring that nature and severity – the Arnold Foundation's PSA Tool includes a so-called violence flag, which "flags defendants presenting an elevated risk of committing a violent crime"[293] – we are still far from the kind of research that would settle nagging doubts about using risk assessment for certain functions, like using them as the sole basis to detain.

This overall concept is so important that it requires further and separate emphasis from previous discussions surrounding the topic. As noted earlier in this paper, our previous bail schemes often operated on an assumption that a person arrested for a particular crime was either unmanageably risky for flight or to commit the same or similar crime if released, an assumption that led mostly to detention eligibility nets based on certain serious criminal offenses. But the risk of an armed robber committing another armed robbery is far different from the risk of that robber trespassing. It would help to know the distinction. And yet, actuarial pretrial risk assessment instruments are created, and success or failure is ultimately measured, by defining the "risk of what" differently than the risk America historically has sought to address.

For example, throughout the history of America we have been concerned with flight – the kind of willful flight to avoid prosecution that would hinder our ability to bring a defendant to justice in a legal process that relies on the moral deterrence of written laws and requires freedom before conviction. When America gradually began to allow intentional detention of noncapital defendants based on flight, it was only allowed in "the rare case of extreme and unusual circumstances,"[294] a concept that followed into the Bail Reform Act of 1984. In most jurisdictions, however, risk and failure are measured by a defendant missing any single court date out of any possible number of court dates. Indeed, this proxy measure is the national standard for measuring this particular outcome.[295] Essentially, we are assessing and measuring risk of merely failing to appear for court, which, in virtually all cases, is quite far from flight. While judges certainly have legitimate concerns over making sure that defendants also do not forget their court

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[293] *Public Safety Assessment: Risk Factors and Formula*, at 1 (Arnold Found. 2016), found at http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf.
[294] *United States v. Abrahams,* 575 F.2d 3, at 8 (1st Cir. 1978).
[295] *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field*, at v, 3 (NIC 2011) [hereinafter NIC *Measuring*].

dates, or miss their buses to get to the court,[296] these concerns likely do not rise to a level justifying pretrial detention.

Likewise, in the latter half of the twentieth century, America became concerned with defendants committing new crimes while on bail, and the examples and statistics used to justify massive changes to our detention schemes – starting with the 1970 D.C. Act and continuing through state constitutional changes and *Salerno* – reflected our desire to enact measures to address extreme risk of defendants committing serious and violent crimes during the pretrial phase of the criminal case. Indeed, when America began to allow intentional detention of capital and noncapital defendants based on risk to public safety, it articulated a desire to "reduce violent crime" during the pretrial period,[297] committed by "the most dangerous of … defendants."[298] While the Bail Reform Act of 1984 broadened the purpose of detention to include reducing nonphysical harms in addition to physical violence,[299] it was nonetheless still directed toward a "small but identifiable group of particularly dangerous defendants"[300] who pose "an especially grave risk to the safety of the community."[301] In most jurisdictions, however, risk and failure concerning public safety are indicated by a defendant being charged with any criminal offense, a definition of public safety vastly broader than American history suggests. The national standard for measuring this outcome urges jurisdictions to count a defendant as having failed if he or she is charged with any offense that "includes a prosecutorial decision to charge" and "carries the possibility of incarceration or community supervision upon conviction."[302]

Essentially, we are often assessing and measuring risk of the potential for committing nearly all criminal offenses, which, in virtually all cases, is quite far from the sort of public safety risk we have historically sought to address. In 1970, Congress supplied ten examples to justify detention based on danger, and nine of the ten involved persons charged with violent felonies,

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[296] There is now a great deal of literature showing that court date reminder programs dramatically increase court appearance rates among defendants. This same literature also suggests that a significant portion of failures to appear are due not to willful flight, but to other factors, such as forgetfulness.
[297] H. Rep. 91-907, at 82 (1970).
[298] *Id.* at 83.
[299] *See* S. Rep. 98-225, at 12-13 (examples included corrupting a union or the risk that a defendant would engage in drug trafficking).
[300] *Id.* at 6.
[301] *Id.* at 5. The Court in *Salerno* also mentioned the necessity of factors designed to gauge the "nature and seriousness of the danger posed by the suspect's release." 481 U.S. 739, at 743.
[302] NIC *Measuring*, *supra* note 295, at 3.

and all ten involved persons who subsequently committed violent felonies while on pretrial release. Today in Colorado, the CPAT considers a defendant to have "failed" if he or she violates a traffic offense and misses a single court date for any reason, and does not distinguish between risk of failure to appear and risk to public safety (something the newer instruments are doing).[303] While not routinely found in the published literature, email correspondence with developers and users of other tools shows similar issues. For example, the Florida risk assessment tool considers a defendant to have "failed" if he or she violates a municipal ordinance leading to a summons or citation to appear.[304] Moreover, in an email to the author of this paper, an official in one state pretrial services department said, "We count everything. Arrests and citations from speeding to capital murder."[305] Occasionally, and on their own, jurisdictions will make individual determinations that arrests for certain crimes should not be included as failure despite its definition within the tool, but this only adds to the somewhat random nature of risk instrument use between locales. Again, while jurisdictions may have legitimate concerns over making sure that people do not miss a single court date for any reason, and that they refrain from all criminal activity while on pretrial release, these concerns, too, likely does not rise to a level justifying pretrial detention.

This primary defect in using actuarial pretrial risk assessment as the sole basis for detention – the fact that we are measuring something different from the threat we seek to address – is likely more fundamental, constitutionally speaking, than the defect of allowing risk prediction generally because it can lead to over-detention based on circumstances (failure through a nonviolent infraction, for example) that do not necessarily constitute a legitimate state interest for detention to begin with. In short, while actuarial pretrial risk assessment instruments may be the best current method of reliably assessing

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[303] *See* PJI/JFA, *supra* note 239, at 19. Likewise, while the Virginia Pretrial Risk Assessment Instrument measures an FTA as a failure only if it results in a capias (coming slightly closer to a finding of willfulness for court appearance even if warrants are overused), it considers an arrest for any new jailable crime to be a failure. Because of the limitation to jailable offenses, it includes felonies and Class 1 and 2 misdemeanors, but not traffic, local ordinance violations, or class 3 or 4 misdemeanors, which are "fine only" offenses. *See* Marie VanNostand & Kenneth Rose, *Pretrial Risk Assessment in Virginia,* at13 (CDCJ/VCJA, 2009); Mona J.E. Danner, Marie VanNostrand, & Lisa Spruance, *Race and Gender Neutral Pretrial Risk Assessment, Release Conditions, and Supervision* (Luminosity, 2016); Va. Code Ann. §§ 18.2-10, 18.2-11. Examples of Class 3 and 4 misdemeanors include destruction of property, public intoxication, regulatory and license enforcement issues.

[304] Email correspondence from bail researcher to Timothy R. Schnacke, Sept. 1, 2016 (name withheld for privacy).

[305] Email correspondence from bail practitioner to Timothy R. Schnacke, Sept. 1, 2016 (name withheld for privacy).

probabilities of individual risk, at their core they are likely only measuring a portion of the risk necessary to trigger pretrial detention.

Thus, it is helpful to think of pretrial risk leading to detention as having two components: (1) the risk of what we fear or seek to address, which includes the "extreme or unusual" risk of flight and serious or violent crime while on pretrial release; and (2) the risk that virtually all actuarial pretrial risk assessment instruments measure, which is typically the risk of FTA and public safety as measured by any new crime while on pretrial release. The risk measured by the assessment instruments can be used for 99% of everything at bail, including some small part of detention, but it cannot be used solely to detain. As articulated in the Harvard Law School *Primer on Bail Reform*, risk assessment as measured by a tool is perhaps a necessary but not sufficient basis to trigger a hearing on detention, but only if those tools are "geared specifically to the risk of re-arrest for violent or serious crime, as opposed to instruments that lump together re-arrest for serious and non-serious crime or do not distinguish between re-arrest and non-appearance."[306] In fact, because of the many things that risk tools do not tell us, it is likely only appropriate to use them as one factor in the detention decision after some other triggering event.

Protective Factors That Offset Risk and What to Do With Risk

Actuarial pretrial risk assessment instruments also do not tell us various protective factors that offset assessed risk and what to do with assessed risk once jurisdictions have measured it. As mentioned previously, simply labeling every defendant as "risky" might subtly lead jurisdictions toward over-detention and over-supervision, but this is likely still preferable to a system of release and detention based on money. Nevertheless, the issue of overestimating risk is likely due, at least in part, to the fact that pretrial risk assessment instruments focus on risk factors rather than so-called "protective factors," which are "variables that can be shown to decrease the likelihood of failure," and which can help to better determine individual versus aggregate risk.[307] Additionally, once risk is measured, the instruments do not

[306] Harvard Primer, *supra* note 3, at 27.
[307] Summers & Willis, *supra* note 233, at 4-5; *see also* John Jay College Prisoner Re-Entry Institute, *Pretrial Practice: Building a National Research Agenda for the Front End of the Criminal Justice System* (Oct. 26-27, 2015) [hereinafter John Jay], at 29 (statement of the Vera Institute of Justice describing the need for some assessment of strengths instead of just risks). This document provides an invaluable overview of pretrial research, including what is currently available and what is still needed as of the date of publication. In Maine, researchers created "one of the very few" pretrial assessments to include protective

tell jurisdictions what to do next. Thus, it is helpful for jurisdictions to remember that knowing defendant risk is simply not enough; other social science research must be used to tell us "what works" to achieve our lawful pretrial goals, and the law must provide our overall boundaries for using risk assessment, including whether it should ever be used to draw the line between release and detention.[308]

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember that actuarial pretrial risk assessment instruments do not tell us individual risk, adequate detail concerning "risk of what," and things that offset risk along with what to do with assessed risk. Understanding this can be a crucial part of justifying either a detention eligibility net or a further limiting process as well as in crafting rules or laws designed to effectuate the in-or-out decision. These limitations are a hindrance only – and I must emphasize only – when people wish to use actuarial pretrial risk assessment instruments as the sole basis for pretrial detention.

How Does Risk Research Interact With the Law When It Comes to Re-Drawing the Line Between Pretrial Release and Detention?

Actuarial pretrial risk assessment instruments, and specifically what they do and do not tell us, illuminate important new interactions with fundamental legal theories. Each new interaction would likely fill its own volume, but we will briefly consider a few here, including how risk assessment interacts with due process, excessive bail, and equal protection.

Initial Balancing Issues

Initially, each of these legal theories requires some sort of balancing test, which, in turn, requires courts to assess the government's means it has employed to meet a lawful government objective. Assuming that a defendant's liberty interest is fundamental, requiring strict or at least some

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as well as risk factors. *See* Two Rivers Reg. Jail/USM Muskie School of Pub. Serv./Vol. of America, *M Risk: Pre-trial Risk Assessment, Maine Demonstration Project,* 2 (BJA, 2011).

[308] The research and the law are intertwined in this aspect. If the research shows that a particular condition of release does not work to achieve our lawful goals, it would be irrational or unreasonable to set it, and thus courts would likely conclude its imposition itself to be unlawful.

"heightened" scrutiny,[309] and assuming that crime control and court appearance are compelling government interests, a jurisdiction would have to show that the way it administers pretrial detention for some class of defendants is necessary to protect its compelling interest of reducing defendant crime or flight while on pretrial release. The argument that actuarial pretrial risk assessment cannot meet this test because the tools cannot predict individual risk largely has failed (as noted previously, the Supreme Court has there is said "there is nothing inherently unattainable about a prediction of future criminal conduct.").[310] Nevertheless, today's risk research would likely require the government to provide more detail than historically provided in its articulation of a compelling interest sufficient to trigger potential pretrial detention.

Specifically, the government would likely need to provide some research leading to findings that a certain type of indicator or combination of indicators (such as charge) is likely to lead to higher risk for pretrial failure – a finding made difficult by the research itself. Moreover, if the government wished to use actuarial pretrial risk assessment to determine detention eligibility, it would also likely have to articulate a compelling interest that not only overrides the risk of over-detaining, but also an interest in protecting all of society from pretrial crime that includes things like traffic offenses, for that is included in what those tools measure. It would require the government to articulate the need to protect the administration of justice not only from willful flight to avoid prosecution, but also from a single FTA for a court hearing that may or may not even be necessary.

The notion that the government needs to take greater care in articulating its compelling interest is beginning to show up in court opinions. In *Lopez-Valenzuela v. Arpaio,* the Ninth Circuit Court of Appeals struck an Arizona detention provision due, in part, to the government's inability to articulate "a particularly acute problem," quoting one of the elements mentioned by the United States Supreme Court in *Salerno.*[311] The Ninth Circuit noted:

> The record in *Salerno* contained empirical evidence establishing that the legislation addressed 'a pressing societal problem,' and the law operated only on individuals 'Congress

[309] *See United States v. Salerno,* 481 U.S. 739 (1987); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (2014).
[310] *United States* v. *Salerno,* 481 U.S. 739, 751 (1987) (quoting *Schall v. Martin,* 467 U.S. 253, 278 (1984)).
[311] 770 F.3d 772, at 782-84.

> specifically found . . . are far more likely to be responsible for dangerous acts in the community after arrest.' This evidence figured prominently in the Court's decision to uphold the Bail Reform Act.[312]

While there may still be persons "far more likely to be responsible for dangerous acts in the community," today's actuarial pretrial risk assessment instruments: (1) do not tell us precisely who they are; (2) illustrate that there are fewer of them than we ever believed; and (3) in fact, show that even the "highest risk" defendants – a label jurisdictions have largely made up – often succeed more than fail, and can include persons posing only a high risk to commit some infraction while on release. The same is true for flight. In short, the empirical evidence points to less of a pretrial crime problem than we likely ever thought existed before. This, in turn, makes it more difficult for the government to justify detention.

Excessive Bail Generally

Beyond the above balancing issues faced in any of the three legal challenges, an excessive bail challenge in most states requires the court to determine whether a condition is reasonable – excessive bail is often defined as "unreasonable" bail and non-excessive bail is defined as "reasonable" bail[313] – and the general test is whether a court needs a particular condition (or detention) to provide "reasonable assurance" of public safety or court appearance.[314] And thus the same risk research and attributes of actuarial risk assessment that make it more difficult to justify a particular balance – what it tells us, what it does not tell us, and the fact that the risk instruments measure something different than what we seek to address through detention – means that a court would likely be on solid footing under the Excessive Bail Clause by releasing all defendants pretrial. For example, if a court knew that it could not predict individual risk, knew that most of even the highest risk defendants would succeed pretrial, and knew that what made defendants "high risk" to begin with was a subjective determination (through definitions and cutoffs) that those defendants might commit virtually any crime while

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[312] *Id.* at 783.
[313] *See, e.g., In re Losasso,* 24 P. 1080, 1082 (Colo. 1890) ("bail must be reasonably sufficient to secure the prisoner's presence at the trial"); *People v. Lanzieri,* 25 P.3d 1170, 1175 (Colo. 2001) ("The right to reasonable bail . . . following arrest lessen[s] the impact of an unlawful arrest."); *Ex parte Ryan* 44 C. 555, 558 (Cal. 1872) (Bail is excessive when it is "unreasonably great, and clearly disproportionate to the offense involved, or the peculiar circumstances appearing must show it to be so in the particular case.").
[314] *See Stack v. Boyle,* 342 U.S. 1, 10 (1951).

on release, it would likely be deemed reasonable for that court to release all defendants pretrial. This presents a monumental shift in thinking from traditional or historical excessive bail analysis, which, through a discussion of "reasonableness," allowed courts to simply compare equally arbitrary numbers associated with different cases to come to a result.

Due Process and Equal Protection Generally

Looking broadly at due process and equal protection, understanding risk research highlights issues of fairness. For due process, is it fair to consider detention based solely on actuarial pretrial risk assessment instruments when those tools have subjective or political elements? Is it not arbitrary or unreasonable to detain all "high risk" persons when we only seek to keep one or two from committing a violent or serious crime? When attempting to treat similar persons similarly pursuant to equal protection analysis, can we justify detaining both the "high risk" defendant who might commit an extremely violent crime and the "high risk" defendant who might only commit a traffic offense? Is an arrest enough to trigger detention when many non-arrested persons pose even higher risks?

More particularly, *Salerno* (as well as case law leading to it) specifically informs that to survive due process scrutiny a proper detention provision requires both a net and a further limiting process to make sure that detention is the "carefully limited exception" to release.[315] Specifically, *Salerno* approved the Bail Reform Act's limitation of detention to "a specific category of extremely serious offenses,"[316] a net created by Congress based on certain assumptions associating higher risk to those charges. Moreover, any limiting process developed in the wake of *Salerno* would likely require an adversary hearing to at least determine by clear and convincing evidence that no condition or combination of conditions could reasonably assure public safety or court appearance, and would need to craft the overall assessment to focus on "the nature and seriousness of the suspect's release."[317]

Based on this, important questions loom for jurisdictions seeking to change their release/detain dichotomies. Can actuarial risk assessment, which in most cases labels persons as "high risk" based on their likelihood of

[315] *See Salerno,* 481 U.S. 739 at 755 (1987).
[316] *Id.* at 750.
[317] *Id.* at 743, 750.

committing virtually any crime on release, ever be considered an adequate basis for creating a detention eligibility net? Likewise, can our further limiting processes use an actuarial tool when the tools themselves appear to broaden certain nets? The PSA Court's violence flag is a step in the right direction, and that tool, like others, can be an invaluable tool for all aspects of release, but many of the fundamental shortcomings of prediction still exist when considering the somewhat drastic remedy of pretrial detention.

Fair Notice

One of those shortcomings deals with the fact that preventive detention based solely on risk gets dangerously close to violating due process based on the premise that in America, "we insist upon limiting the criminal law to enforceable rules about the specific conduct in which men may or may not engage rather than confining all persons with criminal propensities before their deeds are done."[318] Put another way, Herbert Packer wrote, "[i]t is important, especially in a society that likes to describe itself as 'free' and 'open,' that a government should be empowered to coerce people for what they do and not for what they are."[319] Accordingly, "'the criminal law ought to be presented to the citizen in such a form that he can mold his conduct by it, that he can, in short, obey it.' Due process forbids punishment that one has no assured way to avoid."[320] In sum, people should be able to order their lives to be able to stay out of trouble, and the law should be written in clear ways to discourage discriminatory enforcement. Author Christopher Slobogin writes as follows:

> The constitutional version of this principle is vagueness doctrine, which as a matter of due process requires invalidation of statutes that do not sufficiently define the offending conduct. The purposes of vagueness doctrine are to ensure citizens have notice of the government's power to deprive them of liberty and concomitantly to protect against the official abuses and the chilling of innocent behavior that can occur if government power is not clearly demarcated.[321]

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[318] Tribe, *supra* note 1, at 394-95.
[319] Christopher Slobogin, *Defending Preventive Detention*, at 70 (Oxford Press 2009) (Eds. Paul H. Robinson, Stephen P. Garvey, Kimberly Kessler Ferzan) [hereinafter Slobogin] (quoting Herbert Packer, *The Limits of the Criminal Sanction*, 74 (1968)).
[320] Tribe, *supra* note 1, at 395 (quoting L. Fuller, *The Morality of Law*, at 105 (1964)).
[321] Christopher Slobogin, *A Jurisprudence of Dangerousness,* 98 N.W. U. L. Rev. 2, 18 [hereinafter Slobogin *Dangerousness*] (2003-04) (internal footnotes omitted).

This concern should be foremost in jurisdictions' minds even though the Supreme Court has labeled preventive detention "regulatory restraint" and not "punishment" in the traditional sense.[322] In short, "Vagueness doctrine should govern the scope of preventive detention laws even if it is assumed . . . that such laws are not 'criminal' in nature."[323] This accords with analyses by other legal scholars, who have commented on the Court's application of "fair notice" outside of the criminal law.[324] Indeed, Eugene Volokh writes that at least one recent Supreme Court opinion suggests that "fair notice" might apply "whenever there's any legal effect, even a modest one that falls far short of criminal punishment."[325]

Vagueness has been largely ignored in the past when bail schemes were designed to detain persons based only on terms such as "dangerousness" and "community safety," but it is highly relevant today as jurisdictions try to make sense of the risk research and how that research applies to making an initial determination about release and detention. In sum, the notion of adequately describing triggering conduct is crucial to the criminal law generally and equally so when discussing pretrial detention. Indeed, the fact that we have laws on the books describing failure to appear for court or committing new crimes while on release is a way of giving advance notice to persons that those things will bring some governmental response during the bail process. Under a theoretically pure charge-based detention eligibility net, a person may reasonably believe that he or she will not be detained pretrial unless he or she is charged with committing a crime within the net.

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[322] Slobogin writes that despite consideration of a logical syllogism that preventive detention is not punishment (i.e., punishment occurs after conviction; with preventive detention there is no conviction; accordingly, there is no punishment), "[I]f a liberty deprivation pursuant to a prediction fails to adhere to the logic of preventive detention . . . then it can become punishment" when held up to the general due process requirement that "'the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" *Id*. at 13 (quoting *Jackson v. Indiana,* 406 U.S. 715 (1972)).

[323] *Id.* at 18.

[324] *See, e.g.,* Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of "Fair Notice,"* 86 So. Cal. L. Rev. 193 (2013).

[325] Eugene Volokh, *The Void-for-Vagueness/Fair Notice Doctrine and Civil Cases* (June 21, 2012), found at http://volokh.com/2012/06/21/the-void-for-vagueness-fair-notice-doctrine-and-civil-cases/. That opinion, from *FCC v. Fox Television Stations,* 132 S. Ct. 2307 (2012), applied the fair notice doctrine to a regulated entity, and even mentioned "reputational injury" beyond even regulatory "punishment" as a basis for relief. *Id.* at 2318-19. Vagueness applies both to ensure that affected persons know what is required of them so they may act accordingly as well as to ensure that "those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 2309. A "risk-based" detention eligibility net implicates both concerns: persons will not be able to glean how to keep from being "risky," and the somewhat arbitrary nature of the risk tools themselves (along with the ability for overrides) can easily lead to arbitrary enforcement.

That reasonableness evaporates when that net is described only in terms of risk, using actuarial pretrial risk assessment instruments based on subjectively broad definitions and labels of "risk," public safety, and flight, and on aggregate determinations of risk, which reflects the conduct of others that cannot be controlled by any particular individual.[326]

Take, for example, the new constitutional right to bail provision enacted in New Jersey, a state that desired to move from a "charge and money-based" release and detention system to one based more on empirical risk. The previous constitutional language articulated a right to bail for all defendants, "except for capital defendants when the proof is evident or the presumption great," a broad right to bail provision modeled after the Pennsylvania law of 1682.[327] Theoretically, under this prior language, persons would know that unless they committed a capital crime, they would have a right to bail. As mentioned before, that right – historically meant to be a right to release – has been eroded over time and practically eviscerated through the use of money. Nevertheless, the right was there for all who did not commit capital crimes. The new bail language, however, states than any person can be denied pretrial release "if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal process."[328] By itself, this language would be wholly incapable of warning individuals of what conduct might lead to pretrial detention. The lack of adequate conditions might be determined subjectively, or even based on adequate government resources. The new provision is presumably based on notions that certain defendants are dangerous and flight risks, but even if the constitution expressly said so, persons would have a difficult time ordering their lives to somehow remain un-dangerous or un-risky for flight, however those things might be defined.

The New Jersey statute limits the constitutional detention language to "eligible defendants," who are persons charged with indictable crimes, which are equivalent to felonies elsewhere, and "disorderly persons

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[326] As noted in the Harvard Law School *Primer*, *supra* note 3, at 22-23, and n. 195, "While an individual's conduct is within his control, that individual cannot control the aggregate conduct of others who share some characteristic deemed relevant for the risk assessment instrument."
[327] N.J. Const. art. I, § 11 (2013).
[328] *Id.* (2017).

offenses," which are equivalent to a broad range of misdemeanors including possession of marijuana under 50 grams, simple assault, shoplifting of less than $200 worth of merchandise, resisting arrest, underage possession of alcohol, bad checks, and possession of a fake ID. While not posing the acute subjectivity problems of a risk-based net, this is an extremely broad charge-based detention eligibility net – much broader than the net reviewed by the U.S. Supreme Court in *United States v. Salerno*.[329] Within that net, a provision in the New Jersey law allows a prosecutor to move to detain eligible defendants for a certain array of clearly defined crimes (such as a crime with punishment of life in prison), but also for "any other crime for which the prosecutor believes there is a serious risk that: (a) the eligible defendant will not appear in court as required; (b) the eligible defendant will pose a danger to any other person or the community."[330] This nearly limitless net, coupled with a statutory mandate to use statistically-derived risk assessment to determine release and detention,[331] makes it virtually impossible for anyone to conduct themselves in ways that would clearly avoid pretrial detention.

In New Jersey, as in the rest of America, no one should fear that pretrial detention – sometimes lasting weeks or months – will be possible for the vast majority of crimes, just as no one should fear the death penalty as a possible punishment for all crimes. And whatever actuarial pretrial risk assessment instrument is ultimately used in that state, it might have the same limitations discussed above – for example, it might label risk levels somewhat subjectively; it might determine its cutoffs subjectively and possibly even for political purposes;[332] and it might define a risk to public safety and flight in such broad terms as to make virtually all defendant

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[329] Even defenders of preventive detention have written that, "If the state's preventive detention power is not limited by the requirement that it prove some affirmative act that is predictive of a legislatively defined danger, then the government, not the individual, controls if and when the government intervenes. Conditions, dispositions, and thoughts, even if highly predictive of danger and identified as such, cannot be the 'point of no return' described by Packer because there is no identifiable 'point' at which they can be avoided. Slobogin, *supra* note 319, at 3-4 (quoting Herbert Packer, The Limits of the Criminal Sanction, at 74 (1968)). While this affirmative act need not always be articulated as a crime, it is, by far, the most rational way to do so within the criminal law. Moreover, that conduct, when articulated in terms of a crime, must be narrow. When arguing before the *Salerno* Court in support of the Bail Reform Act of 1984, the government itself sought to assure the Court that by using a limited charge-based net, the Act would not "grant federal courts a roving commission to ferret out dangerous individuals wherever they may be found." *See* Brief of United States of America, *United States v. Salerno,* 1986 WL 727530, at 12 (1986).
[330] N.J. Stat. Ann. § 2A:162-19 (2017).
[331] *See Id.* § 2A:162-17 (3) (a), (b).
[332] *See* Harvard Law School *Primer*, *supra* note 3, at 21 (writing that a given characterization or definition of a risk level "is a policy judgment, not a statistical one").

conduct potentially detainable.[333] As explained by von Hirsch, such a system would eviscerate any safeguard based on giving persons the ability to avoid the coercive effects of the law and to determine their own fates:

> An individual would have little choice as to whether he is confined or remains at large. His liberty would depend not upon his voluntary acts, but upon his *propensities* for future conduct as they are seen by the state. Far from being able 'to identify in advance the space which would be left free to him from the law's interference,' his liberty would depend upon predictive determinations which he would have little ability to foretell, let alone alter by his own choices.[334]

As noted previously, these issues should not be ignored based on the notion that preventive confinement is not technically deemed "punishment." Even if regarded as simply precautionary (or "regulatory," as explained by the Supreme Court in *Salerno*), preventive detention provisions based solely on risk can still provide little guidance to persons hoping to avoid incarceration. Moreover, whether punishment or not, the detention of persons who are not actually dangerous – the so-called false positives – is nonetheless unjust:

> The force of this argument – that preventive confinement of the false positives is essentially unjust – does not, in fact, depend upon whether such confinement is classified as punishment. Even if it is regarded as a precautionary, rather than a punitive measure, the justification of preventively confining an individual would depend upon his *actually* being dangerous. The individual is being deprived of his liberty because, if he were to remain at large, he would interfere with the liberty of others by committing crimes. If he is *not* in fact dangerous, this justification simply collapses; and what we have left is gratuitous suffering imposed upon a harmless individual.[335]

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember how risk research and actuarial

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[333] This is not much different from other charge-based state bail schemes today, which often include broad detention eligibility nets and that do not adequately define terms such as "danger" and "community safety."
[334] von Hirsch, *supra* note 281, at 746 (quoting H.L.A. Hart, Punishment and Responsibility 181-82 (1968)).
[335] *Id.* at 743, n. 74.

pretrial risk assessment instruments interact with the law, especially the law surrounding excessive bail, due process, and equal protection. Each of these fundamental legal principles suggest, again, that we should err on the side of release and on constantly narrowing any system of detention that can be justified through the research, the history, or the law. Jurisdictions must remember to fully define flight and danger – the "risk of what" – when articulating the test for detention, and to carefully avoid vagueness when crafting laws that impact human liberty.

Can We Use An Actuarial Pretrial Risk Assessment Instrument Solely As Our Eligibility Net When We Re-Draw the Line Between Pretrial Release and Detention?

Using one of today's actuarial pretrial risk assessment instruments solely to draw a line between release and detention – for example, by saying that a particular state will detain only "high risk" individuals as measured by a risk tool or by creating an unlimited charge-based net to be sorted out later by risk tool, while tempting, would be wrong. It is tempting because the idea contains superficial logic, and it gets us back to the historical ease of assessing risk prior to labeling a defendant either "bailable" or "unbailable." Unfortunately, however, the various notions discussed above – that while the risk research used to create them is fairly unassailable, the structure and application of current risk tools through labels and cutoffs is somewhat subjective[336] and political; that they lead to overestimates of risk; that they do not eliminate the problems with base rates and false positives; that they do not necessarily even measure the type of risk to which we are trying to respond; that they are vague when used as a standard; and that all of these things implicate and potentially offend fundamental legal notions underlying bail – mean that we: (1) must never use them solely to determine release or detention in the first instance based on risk; (2) must never use them in creating our detention eligibility nets; and (3) must never use them to automatically determine defendant detention within a wide charge-based net. Jurisdictions using so-called "bail guidelines," "matrices," or other such documents that guide courts toward detention in certain cases, must also

[336] Allowing detention based on a finding that "no condition or combination of conditions" suffice to provide adequate assurance of public safety or court appearance (a standard often used today) is equally subjective, and has additional problems associated with resources (jurisdictions with fewer resources are likely to detain more defendants based on this standard). Detaining based on the actuarial risk tool requires special caution because its subjective nature and lack of adequate definitions to determine severity of risk are somewhat masked by the outward appearance of objective science.

understand the limitations in using actuarial pretrial risk assessments instruments that have an overinflated role in the detention decision.

While the Supreme Court has previously rejected arguments against using prediction in the release or detention process, those arguments likely only failed because there existed a backstop – in the form of a charge-based detention eligibility net – to restrain detention to constitutionally acceptable levels. The Court was faced with using prediction only among a small set of defendants facing extremely serious crimes. It was not faced with a prediction method that could potentially lead to detention of countless "high risk" individuals on relatively minor charges. Everyone is risky, and some persons simply walking down the street today would be deemed "high risk" if they were merely stopped and measured with an actuarial tool. Accordingly, jurisdictions must determine, in advance, when it is proper to assess this pre-existing risk. It may not be proper after stopping someone for a traffic violation, but it might be proper after arresting a person on a violent felony. But in both cases, and wherever that line is ultimately drawn, the risk *used to detain* someone pretrial should be the kind of risk to which we seek to respond with detention.

Thus, jurisdictions must constantly remind themselves that everything we have learned from the history of bail, the law surrounding release and detention, and the pretrial research points to discerning a different kind of risk to detain than that currently provided by actuarial pretrial risk assessment instruments today. Put another way, actuarial risk assessment tools provide the best way to measure the kind of risk that those tools measure. But until they adequately answer whether a defendant poses a substantial and unmanageable risk of willful flight versus simply failure to appear for court, and risk of committing a serious or violent crime against knowable persons versus the risk of committing any crime against potentially all persons, they should never be used solely to determine detention eligibility in the first instance (i.e., based on prediction alone).

Accordingly, and most importantly, when re-drawing the line between pretrial release and detention, jurisdictions must remember not to use results from the current generation of risk assessment instruments to create their detention eligibility nets, which should more appropriately be based on justifiable and limited categories of criminal charge. In sum, there are two types of risk today. There is the risk as measured by the risk tool, and there is the risk that we may use to detain. While risk assessment instruments can

be helpful tools, jurisdictions must "look under the hood" of these instruments to determine exactly what they show, and be prepared to use "risk as measured by the tool" perhaps primarily for determining conditions of release for defendants outside of the eligibility net as well as defendants within the net who are nonetheless released into the community.

Will Future Actuarial Pretrial Risk Assessment Instruments Theoretically Be Sufficient to Function as a Detention Eligibility Net?

As noted previously, a perfect pretrial risk assessment instrument would give jurisdictions a 100% probability that a particular person would do the particular thing we fear during pretrial release. Today we are far from that perfect tool, but the research continues to improve. Indeed, today we are now better able with some assessment instruments to predict the risk of a defendant committing a violent crime while on release. This ability, while groundbreaking, is still likely not enough to overcome the legal and policy problems associated with relying on aggregate risk to determine detention. For example, an assessment tool might tell us that a person looks like other people who are risky for violent behavior, but it still will not tell us that *this* defendant is so risky. Moreover, while the tool may indicate "high risk," it will not tell us why "high" was determined to be at that particular cutoff, and it will still likely overestimate risk and lead to an unacceptable number of false positives. For a while, at least, it may still differ jurisdiction to jurisdiction. Importantly, it will not provide any basis for persons to guide their behavior to avoid being labeled risky and detained. And finally, due to all of these issues, without boundaries it will likely lead to assessing and potentially detaining defendants charged with any criminal offense, possibly violating the Due Process, Equal Protection, and Excessive Bail Clauses as well as American norms that include more risk tolerance for minor crimes. While nearly unimaginable to think it could happen, in the worst case it could nonetheless lead to a government rounding up all "risky" or "dangerous" individuals on any charge, knowing that being so labeled will lead to detention.

This author has heard the argument that, in some distant future, police officers will not arrest as many persons (possibly using a risk tool for that decision), and then a near-perfect risk tool – meaning it performs the same or better than base rates, eliminates nearly all false positives by somehow

better identifying individual risk, is the same in every jurisdiction, is somehow created in a way that reduces or eliminates subjectivity and politics, and that adequately assesses risk for flight (versus FTA) and serious and violent criminal activity (versus all criminal activity) – will be used to sort defendants into a net. Even then, and despite other remaining issues addressed throughout this paper, jurisdictions will still need to further sort defendants based on charge or risk having those schemes declared unlawful based on multiple legal theories. The need for a charge-based net exists no matter how or when we use even near-perfect actuarial risk tools in the process.

Nonetheless, jurisdictions must be constantly reminded that using actuarial pretrial risk assessment instruments to do anything is nonetheless far superior to using money, as we have in America since the 1800s. Money has no empirical justification and offends legal principles far more readily and completely. Moreover, actuarial pretrial risk assessment is better than using charge-based schemes that have no basis or justification underlying them. Thus, if a jurisdiction simply said that it intended to change its pure charge-and-money-based system with one based on results from a risk tool, it would likely be preferable to the previous system and might even be deemed rational and lawful by an appellate court. This paper, however, looks to create an "ideal" process in an era when money will not be available to detain; an era when jurisdictions must articulate, up front, who, if anyone, they may purposefully initially detain pretrial. While someday the pretrial research may reach a point at which it will overcome the various hurdles associated with solely using actuarial risk tools to reach that ideal, in this author's opinion, today is not that day.

What Do the National Standards Tell Us About Re-Drawing the Line Between Pretrial Release and Detention?

The national standards concerning pretrial release and detention provide concrete recommendations based on the law and the research. Both the American Bar Association (ABA)[337] and the National Association of Pretrial Services Agencies (NAPSA)[338] have standards, but because the current NAPSA Standards are virtually identical to the ABA Standards for the

[337] ABA Standards, *supra* note 100.
[338] *Standards on Pretrial Release (3rd ed.)*, Nat'l. Assoc. of Pretrial Servs. Agencies (Oct. 2004).

relevant provisions (moreover, at the time of this writing, they were being updated) this paper will only briefly describe the ABA Standards.

For the most part, the ABA Standards reflect notions underlying the "big fix" as found in the 1970 D.C. Court Reform Act and the Bail Reform Act of 1984. Thus, they recommend an in-or-out decision making process that is fair and transparent and that has nothing, like money, impeding the decision to release or detain. Likewise, following the opinion in *United States v. Salerno,* the Standards attempt to create primarily a charge-based detention eligibility net along with a detention hearing procedure both to further limit detention and to provide the appropriate due process protections necessary to deprive one of his or her liberty. Broadly, the Standards provide justification for a narrow detention eligibility net (and thus a broad presumption of release) by stating that the law favors release pending trial, which "is consistent with Supreme Court opinions emphasizing the limited permissible scope of detention."[339]

The current detention provisions in the ABA Standards are found in Standards 10-5.6 through 10-5.10. These provisions are part of an overall scheme allowing for three separate triggers leading to pretrial detention. The first trigger occurs if a defendant violates a condition of release, including a new crime or willful failure to appear for court, and the court considers revocation of release followed by a detention hearing.[340] If a judicial officer finds probable cause for a new crime while on release or clear and convincing evidence of a violation of other conditions, that officer may follow Standard 10-5.8 to initiate a detention hearing.

The second trigger occurs whenever persons are charged with a crime and are: (1) already on release pending trial on another charge; or (2) on release pending sentencing or appeal; or (3) on probation or parole for any offense, and "may flee or pose a danger to the community of to any person."[341] When this occurs, the Standards recommend temporary detention for a recommended three days, "to allow time for the jurisdiction or court that released the defendant in the original case to decide whether to modify release conditions, initiate a revocation hearing, or lodge a detainer before

[339] ABA Standards, *supra* note 100, Std. 10-1.1 (commentary), at 38 (citing *Salerno* and *Stack v. Boyle,* 342 U.S. 1, 4-5 (1951)).
[340] *See* Std. 10-5.6, at 116-17.
[341] *Id*., Std. 10-5.7, at 120.

the arresting jurisdiction takes action on the new charges."[342] At the end of the period of temporary detention, the court must initiate a full detention hearing or release the defendant on conditions.

The third trigger involves making a determination in the first instance based on prediction that a defendant presents an unmanageable risk of either flight or public safety warranting secure confinement.[343] This initial detention is the primary subject of discussion within this paper; nevertheless, when considering where to re-draw the line between release and detention, jurisdictions should question whether they have the ability to temporarily detain defendants in certain circumstances, and, perhaps more importantly, whether they have the ability to revoke a bond and order detention if a defendant willfully violates fundamental conditions of release.[344] These are elements of a proposed model process, which is revealed later in this paper.

The Detention Eligibility Net

As mentioned previously, the Standards create a detention eligibility net (limited by charge except for risk to witnesses and jurors) for pretrial detention in the first instance (based solely on prediction), which is articulated in Standard 10-5.9, and which is wider than the net articulated in the previous editions of the Standards. A brief history of the evolution of the current net is helpful to the instant discussion.

The ABA Standards Relating to Pretrial Release were created in 1968, and while those Standards contained provisions for revocation of release, the first time that the Standards articulated recommendations for a general procedure for pretrial detention was in the Second Edition, published in 1979.[345] Those recommendations were an admitted attempt merely to "alleviate" some of the continuing problems associated with the bail system that were not fixed in the first generation of bail reform (and the first edition of the Standards), including defendants being held due to lack of money.[346] The 1979 Standards attempted to do this primarily by establishing "[a] fair

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[342] *Id*. (commentary) at 123.
[343] *See id.,* Stds. 10-5.8 through 10-5.10.
[344] States are advised to check their case law, as occasionally courts interpret constitutional bail provisions to either allow or deny the ability to detain a "bailable" defendant, even when that defendant has committed a new crime or willfully failed to appear for court.
[345] *See* American Bar Association Standards, Pretrial Release (approved Feb. 12, 1979) [hereinafter 1979 ABA Standards].
[346] *Id.* (introduction), at pp. 10.5-10.6.

system for detaining individuals who have engaged in specific pretrial conduct demonstrating dangerousness, or who cannot meet monetary conditions necessary to deter flight."[347]

This edition of the Standards was clear in expressing that it was not recommending pretrial detention premised on a general prediction of dangerousness – something it still saw as "constitutionally dubious," and which had been seen as having largely failed through disuse in the District of Columbia.[348] Nevertheless, these 1979 Standards did attempt to provide a fair and constitutionally acceptable way to detain defendants without using money "when there is no way to assure their reappearance or because they have demonstrated that they constitute an unacceptable risk to the community."[349]

As noted above, they did this primarily by articulating a detention eligibility net triggered either by specific defendant conduct while on pretrial release, or by instances when a defendant could not meet the monetary condition. Specifically, commentary to 1979 Standard 10-5.9 read as follows:

> There are four ways in which the procedures in this standard can be triggered: (1) by a judicial determination . . . that monetary conditions are necessary to assure reappearance and the defendant's failure to satisfy those conditions; (2) by a judicial determination . . . that there is probable cause to believe that a defendant has willfully violated a condition of release; (3) by a judicial determination . . . that there is probable cause to believe that the defendant has committed a new crime while on pretrial release; or (4) upon a formal complaint executed by the prosecutor, a law enforcement officer, or a representative of the pretrial release agency alleging that the defendant is likely to flee, threaten or intimidate witnesses, or constitute a danger to the community.[350]

While the fourth category appears quite broad, the Standards further narrowed it by requiring judicial findings based on specific defendant

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[347] *Id.* at pp. 10.98.
[348] *Id.* Std. 10-5.9, at p. 10-98. It is widely known that the District of Columbia preventive detention provisions were not used until money was removed as potential means to detain. *See D.C. Lessons, supra* note 164, at 5.
[349] *Id.* Std. 10-5.9, at p. 10.99.
[350] *Id.* at p. 10.100.

conduct – such as new criminal activity or breach of a release condition – that "demonstrate[es] in a concrete way that he or she poses an unacceptable risk to the community and ought to be detained."[351] Likewise, for flight, using the fourth category had to be accompanied by a showing either that the defendant could not make his or her monetary condition, or that he or she had violated some other condition designed to provide reasonable assurance of court appearance. The Standards then provided recommendations for a "procedurally fair and rigorous" due process detention hearing – the kind of hearing that had been included in the 1970 D.C. Act and was later part of the Bail Reform Act of 1984, which was ultimately reviewed by the Supreme Court in *United States v. Salerno*.[352]

In sum, the 1979 Standards proclaimed as follows:

> Pretrial detention, under the circumstances and with the protections provided for in this standard, is clearly constitutional. Standard 10-1.2 requires that the release of every defendant be conditioned on the defendant's refraining from criminal activity and interfering with witnesses, and standard 10-5.2 empowers a judicial officer to impose additional nonmonetary conditions of release to ensure the defendant's appearance in court, protect the safety of the community, and prevent intimidation of witnesses. With one exception, every category of defendants detained pursuant to standard 10-5.9 would have violated one of these conditions. . . . All this standard does is to provide a procedurally fair mechanism for determining when such a violation has occurred.
>
> The only circumstance in which detention is not premised on a violation is when the defendant is unable to meet monetary conditions necessary to ensure reappearance. In these circumstances, this standard merely provides an added layer of procedural protection for a defendant who would, in any event, be detained under the traditional bail systems.[353]

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[351] *Id.* at p. 10.101.
[352] *See id.* at pp. 10.96-10.97. There are some key differences, however. For example, the 1979 Standard requires courts to use normal criminal trial evidentiary rules when premising detention upon a new criminal offense.
[353] *Id.,* at p. 10.102.

It was an admittedly middle-ground solution, designed to "soften, if not eliminate" the conflicts posed by using money.[354] But the 1979 Standards did provide a strong statement against what has become commonplace today: pretending that a defendant has not been detained simply because he was ordered released on unattainable conditions: "[These Standards] end the hypocrisy of pretending that defendants too poor to post bail have been 'released' on monetary conditions. Such defendants obviously have not been released; they have been detained, and it follows that they should be afforded precisely the procedural protections granted to other detained defendants."[355]

In 1986, the ABA released supplements to the 1979 Standards, in which that organization ultimately recommended procedures for denying initial release for certain defendants based on concepts of pure preventive detention. Specifically, the ABA noted as follows:

> While the 1979 standards (standard 10-5.9) recognized 'dangerousness' and while they took into consideration issues regarding the safety of the community, those factors did not enter into play until a defendant violated a condition of release, committed a new offense, or otherwise demonstrated by acts or omissions that continued release would be inimical to community safety and the orderly administration of criminal justice.[356]

Accordingly, the 1986 supplements revised the 1979 Second Edition Standards to "recognize[] the legitimacy of initial preventive detention for a certain limited class of defendants when their dangerousness has been proved under specific criteria and with appropriate procedural safeguards."[357] Specifically, those supplements retained the 1979 provisions that allowed detention based on violating conditions, committing new crimes while on release, and the inability to meet monetary conditions. Nevertheless, the Standards added provisions for initial preventive detention

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[354] *Id.* at p. 10.103.
[355] *Id.* at p. 10.103. The need for this hypocrisy-ending stance is more necessary than ever today. Ever since the Excessive Bail Clause was interpreted to mean that defendants do not have a right to "bail" they can "meet," courts have used monetary conditions to detain, typically with no due process hearing whatsoever. It is perhaps the greatest failure in American bail law today.
[356] American Bar Association Standards, Pretrial Release (Explanatory Note), at 7S (Supp. 1986) [hereinafter 1986 Supplements].
[357] *Id.* at 8S (internal citations omitted).

with a net consisting of the following categories of detention eligible defendants: (1) defendants charged with a violent felony allegedly committed while on pretrial release, probation, or parole in connection with another violent felony; and (2) defendants charged with a violent felony who had been convicted of another violent felony within the past ten years.[358] Interestingly, the Standards considered and rejected a proposal to include a net of "any crime of violence" (settling instead only on felonies), and whether directed at persons or property (settling instead only on persons).[359]

Technically speaking, a person arrested for a violent felony who then is arrested for another violent felony while on release could be detained for violating a condition of release for his first alleged offense; the new standard would make detention appropriate for the *second* alleged offense and included release on probation and parole as qualifying preconditions. The bigger difference in overall detention policy, though, was in allowing for detention for defendants charged with violent felonies whose,

> pattern of behavior, consisting of past and present conduct, and specifically including a conviction for at least one felony involving violence within the preceding [ten] years, supports a judicial finding that no condition or combination of conditions will reasonably assure the safety of any person and the community, or reasonably prevent intimidation of a witness and interference with the orderly administration of criminal justice.[360]

This Standard took care, however, to caution jurisdictions that while a prior violent felony conviction was a predicate to the detention determination, those jurisdictions should not use a prior violent felony conviction as the *sole* basis for detention. As noted in the analysis, "a prior conviction, standing alone, cannot legitimate a preventive detention order; conversely, a person without a prior felony record cannot be detained preventively, even though there is a fear that persons may be harmed or the effective administration of criminal justice imperiled."[361]

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[358] *Id.* Std. 10-5.4, at 10.28S-32S.
[359] *See id.* (analysis), at 31S.
[360] *Id.* Std. 10-5.4 (a) (i) (B), at 28S.
[361] *Id.* (analysis), at 32S.

Nevertheless, by recognizing the legitimacy of preventive detention based on prediction of danger beyond what had previously been considered as some "inherent" judicial ability to detain in extremely rare cases, this recommendation took a significant step toward initial purposeful detention of noncapital defendants in America. Compared to today's Standards (and laws based on those standards), the 1986 net appears fairly narrow by continuing to base detention on individual defendant conduct. That net would be considerably broadened, however, in the next (and current) edition of the ABA Standards, which was approved in 2002 and published with commentary in 2007.

The current edition of the Standards reserves detention for four categories of defendants, which are "intended to encompass those defendants most likely to present a danger or fail to appear."[362] The categories are as follows: (1) defendants charged with a crime of violence or a dangerous crime; (2) defendants charged with a "serious" offense who are already on release on a different case that is also a serious offense unless the defendant was on release pending sentencing or on appeal (if the defendant was on probation or parole, the underlying conviction must be for a serious and violent or dangerous offense); (3) defendants charged with serious offenses who pose "a substantial risk . . . [to] fail to appear for court or flee the jurisdiction;"[363] or (4) defendants charged in any case "who pose a substantial risk of obstructing justice or threatening, injuring, or intimidating prospective witnesses or jurors."[364]

Commentary to this Standard provides that the "substantial risk" component to this fourth category of detention eligibility "requires that there be a showing of facts pointing to unacceptable behavior by the defendant (such as intimidating witnesses) if released. The facts could be found in the risk assessment prepared by the pretrial services agency and/or in evidence provided by the prosecution."[365] However, based on the earlier discussion within this paper concerning a risk assessment instrument's tendency to measure aggregate risk as well as the risk of something somewhat different from the sort of flight or danger of historical concern in America, it is likely that the better evidence will often be found outside of the risk tool. This notion is reinforced in Standard 10-5.8, which includes commentary

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[362] ABA Standards, *supra* note 100, Std. 10-5.9 (commentary) at 130.
[363] *Id*. Std. 10-5.9, at 129
[364] *Id*. (commentary), at 132.
[365] *Id*.

suggesting that certain evidence of relevant riskiness will not necessarily be found in the risk instrument, but rather in things such as the weight of the evidence against the defendant or the arguments of counsel.[366] Overall, this fourth category tends to follow the history of intentional detention in America, which first found justification for detaining noncapital defendants when facts and circumstances tended to show the potential for specific bad behavior to a discreet group of persons (specifically, witnesses and jurors) if released. As noted previously, detaining such defendants was believed to be within a court's "inherent" power to conduct trials.[367]

The Standards leave it up to individual jurisdictions to define "crime of violence" and "serious" offenses, but do note that serious crimes would "clearly encompass some offenses that are not violent or physically dangerous."[368] As noted previously, the 1970 D.C. law defined "dangerous" crimes to be narrower than "violent" crimes, and the subjective nature of these terms should be considered when attempting to re-draw the line between release and detention.

There are pros and cons associated with the previous and the current detention eligibility nets from the Standards. The most obvious change over time is a slow progression toward more opportunities for purposeful detention, including a clear widening of the detention eligibility net from the previous versions to the current Standards. As noted previously, this may have been prompted – as with the Bail Reform Act of 1984 – by the Standards' incorporation of language recommending judicial officials not to impose financial conditions that result in pretrial detention due to inability to pay, thus requiring some honest method for detaining risky defendants.[369]

Nevertheless, it appears that the details concerning this overall broadening of detention eligibility was based more on prevailing assumptions of defendant risk rather than on actual research. Indeed, because of troubling questions over various aspects of the 1970 D.C. detention provisions, the 1979 edition

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[366] *Id.* Std. 10-5.8 (b) (commentary), at 127.
[367] Theoretically, at least, there are some factual scenarios here (such as a defendant personally obstructing justice by bribing jurors) in which defendants would not necessarily be detainable for flight or general public safety purposes. Following *Salerno,* most jurisdictions have dropped the overall historical distinction between witnesses and jurors versus the general public by defining public safety to include any law violation. Bribery, in this sense, would be considered a public safety "failure."
[368] Std. 10-5.9 (a) (commentary), at 130.
[369] *See* Std. 10-5.3 (a), at 110. Though the Standard says that judicial officers "should not impose" financial conditions leading to detention, commentary to that Standard states that the provision "prohibits" judicial officers from doing so. *Id.* (commentary), at 112.

of the Standards were clear in requiring defendant conduct rather than a "generalized prediction of dangerousness" to trigger possible detention.[370] Moreover, when the 1986 Supplements were published adopting initial preventive detention for a certain small class of dangerous defendants, they cited no research suggesting that defendants were higher risk when facing violent felonies (instead, they also required another form of defendant conduct, a prior violent felony, to trigger detention eligibility) under an apparent assumption that those defendants should be considered higher risk.[371]

Likewise, under the current set of Standards, there is no research cited for why the detention eligible categories in that set, as opposed to any earlier set, are thought "to encompass those defendants most likely to present a danger or fail to appear."[372] The current Standards, for example, make an assumption that certain defendants facing "serious" charges are at a higher risk to flee, but they base that assumption not on research but the idea that some defendants in that category would likely have access to large amounts of money showing motivation to abscond.[373] The Standards should not be faulted for making these assumptions. Rather, the Standards merely reflect the way America was thinking prior to any research contradicting those assumptions, which was the same thinking that created the 1970 D.C. Act, the Bail Reform Act of 1984, and, indeed, the opinion in *Salerno*. Overall, the current Standards appear to have done the best job possible given that there was very little so-called risk research, such as the kind that might indicate which, if any, crimes may or may not be associated with higher risk to fail.

Support for this supposition is suggested through discussion earlier in the Standards concerning a recommendation for release on recognizance. In that particular Standard, the ABA articulates its recognition that the risk research might, in fact, point to counterintuitive conclusions. Nevertheless, it makes the case for why "risk" surrounding a "more serious" crime is qualitatively different than risk for a "less serious" crime, even when the risk might be

[370] 1979 ABA Standards, *supra* note 345, Std. 10-5.9 (history), at p. 10.98.
[371] *See* 1986 Supplements, *supra* note 356, Std. 10-5.4, at 10.28S.
[372] ABA Standards, *supra* note 100, Std. 10-5.9 (commentary), at 130.
[373] *Id.* at 132.

quantitatively higher for the lower offense:

> Empirically, there is some evidence that the risk of non-appearance or criminal behavior may actually be greater for persons charged with relatively minor non-violent offenses (e.g., prostitution, retail theft, numbers-running, small-scale drug possession) than for some persons charged with more serious crimes. However, if a person charged with a serious offense does in fact commit a similar offense while on release, the costs to society of the subsequent offense are much greater than if a defendant charged with a minor offense commits another minor offense.[374]

Once one moves from specific instances of defendant conduct to empirical estimates of individual defendant risk to detain based on aggregate data, one must find justification for why a particular group of defendants may be treated differently than others. The above quote thus suggests an attempt to find a rationale for making different decisions based on charge given that the risk research (perhaps counterintuitively) often illustrates that some persons charged with serious crimes are not empirically risky, and some people charged with less serious crimes are empirically risky. Jurisdictions thinking of moving toward a more risk-based release and detention system and away from a primarily charge-based system are directly confronted with this research. The Standards, therefore, supply a rationale for drawing a line between release and detention that might withstand scrutiny from the courts: All things being equal, it is likely necessary to treat certain serious or violent crimes differently at bail based simply on shared concerns about risk tolerance.

The Further Limiting Process

Standard 10-5.8 in the current edition of the Standards provides the main section for detention, and allows pretrial detention after a due process hearing in which "the government proves by clear and convincing evidence that no condition or combination of conditions will reasonable ensure the defendant's appearance in court or protect the safety of the community or any other person."[375] The requirement of clear and convincing evidence

[374] *Id.* Std. 10-5.1 (commentary), at 104 (internal footnote omitted). This Standard deals with release and setting conditions of release, but the rationale is relevant to determining the detention eligibility net.
[375] *Id.* Std. 10-5.7, at 124.

reflects the Standard's intention "to emphasize the deliberately limited scope for using secure detention. It places a significant burden on the prosecution to present facts demonstrating why such detention is essential and why the risks of flight or dangerousness cannot be met through some type of conditional release."[376] The rest of that Standard includes factors to be used in deciding whether no conditions will suffice, and includes only one rebuttable presumption toward detention for persons charged with a capital offense or an offense punishable by life without parole.[377]

Finally, Standard 10-5.10 provides recommendations for the requisite due process hearing necessary for pretrial detention. In the main, it mirrors provisions found in the current D.C. statute as well as the federal statute, which was reviewed by the United States Supreme Court in *Salerno*.[378] Overall, this process – arguably including the additional provisions requiring status reports, immediate appeals, and accelerated trials for detained defendants – serves as one that further limits detention even within the eligibility net. To assure that detention is the "carefully limited exception"[379] to release, the Standards thus recommend both a net and a further limiting process designed to withstand legal scrutiny for their rationality and justification.

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember that the ABA Standards, too, recommend a purposeful in-or-out system, with nothing – like money – hindering the release or detention decision. Likewise, they must remember that the Standards reflect the law, the history, and the research at bail to provide for recommendations that constantly urge jurisdictions to err on the side of release, to create rational, fair, and transparent but *extremely limited* preventive detention schemes, and to provide ample justification for whatever process is ultimately approved. Nevertheless, jurisdictions must also hold these aspirational recommendations up to what we know today about risk, and realize that both the detention eligibility net and further

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[376] *Id.* Std. 10-5.8 (a) (commentary), at 127.
[377] *Id.* Std. 10-5.8 (c). This is different from the Federal statute, which has rebuttable presumptions covering a great many more defendants. The Standards provide no rationale for why they limit the use of rebuttable presumptions, but it is likely tied to a broader philosophical stance concerning whether defendants should be forced to shoulder any burden in a criminal case. For a number of reasons, the model crafted within this paper includes no rebuttable presumptions toward detention.
[378] *See United States v. Salerno,* 481 U.S. 739, at 751-52 (1987).
[379] *Id.* at 755.

limiting process articulated by the Standards may need some alteration to provide adequate legal justification today.

What Have The States Done Up Until Now to Re-Draw the Line Between Release and Detention?

Every state has already drawn a theoretical line between pretrial release and detention. Typically, that line is drawn in a state's constitution – 41 states have constitutional right to bail provisions – and when these provisions were enacted, they represented each state's articulation of who should be given a right to bail, or release, and who could potentially be denied that right by being eligible for "no bail, or detention. Most of those early provisions granted the right to release to everyone except capital defendants, and only later added additional charges to the "no bail" side. Historically, anyone deemed bailable was to be released, and so when states articulated a right to bail for all except capital defendants, for example, those states were at least theoretically saying that their detention eligibility net consisted of persons charged with capital offenses, and that everyone else was intended to be released. States that later changed their right to bail provisions to, for example, add defendants facing violent felonies to the persons potentially ineligible for bail were saying that the detention eligibility net consisted of persons charged with capital offenses and violent felonies and that everyone else was intended to be released. Once again, these nets were often only based in theory, as practical application using money has eroded the nature of these distinctions.

These early detention eligibility nets often contained the requirement of a finding of "proof evident or presumption great" as to the charge, which added an evidentiary component to when a person could be detained and to make sure there was a way out of the net when the evidence was weak.[380] This point is important to reinforce: although persons might fall into a detention eligibility net, they could still be released, meaning that there was no automatic detention. Overall, these early models still presented the two fundamental components of any detention provision today: (1) a detention eligibility net, and (2) some further limiting process.

As noted previously, these theoretically pure models of release/detain dichotomies have been complicated by American practice, which gradually

[380] *See* Carbone, *supra* note 16, at 531-32.

began to allow the unintentional detention of bailable defendants through the use of money. Throughout the history of bail in England and America, the idea that a bailable defendant – a defendant who, today, would not be within the detention eligibility net – might be detained was deemed to be so backward and wrong that it typically led to bail reform. Today, our understanding of a clear in-or-out system, articulated as bail (release) and no bail (detention), is clouded by the fact that our practical administration of bail is completely aberrant to historical notions. Today, we say that a defendant is bailable and yet detain him. We order a defendant to be released, and yet allow a condition of that release to keep him in jail.

Nevertheless, taking a step back, one sees that every state has already articulated where it intends the line to be drawn between release and detention. It just so happens that the states have drawn that line in dramatically different variations, and that bail practice and the use of money, in any event, have confused our understanding of the dichotomies. The fundamental point is that states have already drawn theoretical lines between release and detention, and so any changes to those dichotomies today means that states are merely re-drawing those lines.

Wayne R, LaFave's treatise on criminal procedure still provides the best breakdown of the various state dichotomies, as represented in their right to bail provisions (even though it is slightly out of date due only to very recent activity in this area).[381] Based on LaFave's correct analysis of the issue, states may be placed in one of the three following groups:

(1) states having no right to bail in their constitutions (nine states, akin to the federal system operating under the United States Constitution);
(2) states having "broad" or "traditional" right to bail provisions (now likely 19 states, modeled after the Virginia law of 1682);
(3) states with constitutional "right to bail" provisions that have been amended since the 1980s to provide for additional preventive detention that is typically (but not always) charge-based and often premised on public safety (now likely 22 states).

States within the first group still typically have release/detain dichotomies in their statutes; indeed, the lack of a constitutional right to bail provision allows relative ease in creating vigorous preventive detention provisions in

[381] *See* LaFave et al., *supra* note 52, § 12.3 (b), at 55.

the statutes or court rules. These statutory dichotomies, like those in other states' constitutions, can be explicit – for example, West Virginia states expressly that, "A person arrested for an offense not punishable by life imprisonment shall be admitted to bail by the court or magistrate. A person arrested for an offense punishable by life imprisonment may, in the discretion of the court that will have jurisdiction to try the offense, be admitted to bail."[382] They can also be implicit – for example, North Carolina articulates the right for virtually all noncapital defendants to have "conditions of release determined."[383] Still others require a much closer examination, and can lead to an actual line that is quite different from any theoretical line between release and detention.

States within the second group provide the most straightforward articulation of a theoretical bail/no bail or release/detain dichotomy. For example, Alabama's Constitution provides that "all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."[384] Other states have added to the net of "capital offenses" certain categories of crimes (often called "categorical exceptions" to the right to bail), such as crimes carrying a penalty of life imprisonment,[385] or individual crimes, such as treason.[386]

States within the third group are often called "preventive detention" states, although any state potentially denying bail for either risk of flight or public safety (including so-called broad right to bail states excepting only capital defendants from the right to bail) can be said to have preventive detention. As already noted, when America began discussing preventive detention, the discussion surrounded danger only because it was commonly believed that intentional detention of noncapital defendants due to risk of flight was first prohibited, and then later gradually allowed through the courts' inherent power. Gradually, however, as the courts (and later the federal statutes) began slowly to allow such detention, the distinction between flight and danger has blurred. Today, the concept of preventive detention should not be limited only to notions of detention for dangerousness, as both flight and dangerousness are constitutionally valid purposes for limiting pretrial release, up to and including detention.

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[382] W. Va. Code, § 62-1C-1 (2015).
[383] *See* N.C. Gen. Stat. § 15A-533 (b) (2015).
[384] Ala. Const. § 16.
[385] *See, e.g.,* Nev. Const. art. I § 7.
[386] *See, e.g.,* Or. Const. art. I, § 14.

As LaFave correctly notes, the states in this last group are likely best further categorized 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.[387]

Most recently, New Jersey changed its constitutional provision from "broad right to bail" language (all persons bailable except capital defendants, proof evident presumption great) to preventive detention language allowing the denial of pretrial release whenever the court determines that "no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal process."[388] This represents a massive enlargement of the theoretical detention eligibility net in an attempt to re-draw the line between release and detention based on "risk" and not charge. As noted previously, the new statute in that state limits detention to "eligible defendants," but that definition includes defendants charged with any indictable offense (akin to any felony in other states) or charged with any disorderly persons offense (akin to most misdemeanors in other states.)[389] Thus, the detention eligibility net is extremely broad.

New Mexico, too, recently passed a change to its constitutional right to bail provision. New Mexico's previous constitutional provision was in the form of LaFave's preventive detention state subgroup number two, which allowed detention for persons charged with capital offenses or felonies with certain preconditions, such as felonies after the conviction of two previous felonies. The new language now includes "risk-based" language by allowing the denial of bail for defendants charged with any felony if the prosecutor "proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."[390] While not necessarily providing express authority to detain based on risk of

[387] See LaFave, et al., *supra* note 52, at § 12.3(b), 56-59.
[388] N.J. Const. Art I, par. 11.
[389] *See* N.J. Stat. Ann. § C.2A:162-15 (2017).
[390] Senate Joint Resolution 1, found at http://www.sos.state.nm.us/uploads/files/CA1-SJM1-2016.pdf.

flight,[391] the new language does, like New Jersey, greatly enlarge the detention eligibility net from only certain felonies with preconditions to all felonies. The court rules, which might further limit this net, have not yet been crafted at the time of the writing of this paper.

It is important to note that virtually every state constitutional provision found in groups two and three, above, are likely vulnerable to constitutional attack on various grounds, but mostly on grounds derived from the opinion in *United States v. Salerno*.[392] LaFave, et al., point out the vulnerabilities from lack of procedural safeguards,[393] but the provisions are equally vulnerable due to the apparent lack of justification for dramatically enlarging the detention eligibility nets and the lack of decent limiting processes.

Indeed, at least two recent court cases have begun what will likely be a long jurisprudential march toward determining the limits of preventive detention in the states. The first, *Lopez-Valenzuela v. Arpaio,* which has been cited for various points previously discussed in this paper, ruled that an Arizona detention provision was not "carefully limited" as required by the Supreme Court from a reading of *Salerno*.[394] The second, an Arizona Supreme Court case, is also significant because the court looked at a "no bail" provision for certain sex offenses that was added to that state's list of so-called categorical offenses – like capital offenses – that are potentially detainable if the court finds that the proof is evident or the presumption great" as to the commission of crime.[395] Holding that provision up to *Salerno,* the Arizona Supreme Court ruled the provision to be unconstitutional on its face because it was not narrowly focused on accomplishing the government's stated objective.[396] Theoretically, the Arizona court's analysis in that case would make vulnerable any charge-based detention provision that relies only upon a finding of "proof evident, presumption great," of which there are many

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[391] The constitutional language itself only allows detention based on danger. Although the provision later says, "A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond," this language does not provide express authority to detain for risk of flight. An introductory paragraph to the ballot language includes a statement that indicates the state perhaps intended to also allow detention based on risk of flight: "Proposing an amendment to Article 2, Section 13 of the Constitution of New Mexico to protect public safety by granting courts new authority to deny release on bail pending trial for dangerous defendants in felony cases while retaining the right to pretrial release for non-dangerous defendants who do not pose a flight risk." *Id.*
[392] *See Salerno*, 481 U.S. 739 (1987).
[393] *See* LaFave, et al., *supra* note 52, § 12.3 (b), at 61, 84.
[394] *See supra* notes 226, 311, and accompanying text.
[395] *Simpson v Miller,* 387 P. 3d 1270 (Ariz. 2017).
[396] *See id.*

across America.[397] At the very least, the opinion signals what will likely be a new wave of court cases examining the substance and justification for how states have currently drawn the line between pretrial release and detention.

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember how states have drawn those lines in the past, but recognize that, in many cases, those lines might not stand up to scrutiny under existing law. Jurisdictions are cautioned not to look to other state laws as examples or models unless those examples adequately follow the basic fundamental principles outlined in this paper; indeed, most detention eligibility nets in current state laws have been gradually widened based on false assumptions, fear of crime, and the fact that detention proves its own worth. As of the date of this writing, a truly exceptional "model" bail provision dealing with the line between release and detention has not been enacted. Moreover, because the federal system has greatly expanded its own detention eligibility net, has misused various rebuttable presumptions leading toward detention, and has otherwise adopted practices leading to over-detention, that law should only be used as a model in the sense that it broadly requires a deliberate in-or-out process with minimal use of money.

Do We Have to Eliminate Money at Bail Before We Re-Draw Our Line Between Pretrial Release and Detention?

There are many powerful arguments for eliminating money at bail, including that money bail is ineffective and unfair. Nevertheless, jurisdictions do not have to rid themselves of money bail in order to create a rational line between release and detention; however, they must rid themselves of money's ability to detain. Historically, money's ability to detain in the form of secured financial conditions has interfered with every state's initial attempt to draw a meaningful and purposeful line between release and detention.[398] And despite some attempts to dissuade the use of certain

[397] *See id.* The opinion's analysis is somewhat strained compared to that of the state court of appeals; indeed, the Arizona Supreme Court disagreed with both the state court of appeals as well as the Ninth Circuit's federal analysis of the federal constitutional claim, and implied that certain categorical no bail provisions with much less procedural due process might withstand scrutiny if those provisions include charges that pose "inherent risks" that can justify the denial of bail.

[398] As noted previously, detaining someone using money on purpose is unlawful. Unintentional detention, while allowable in America under some unfortunate 8th Amendment analysis, is currently under attack on other grounds, including that it violates the Equal Protection Clause. This and other papers have also articulated numerous other reasons for why using money might be irrational and unfair, and thus violate the law. Nevertheless, even if the law does not eliminate money's ability to detain, it does not remove the negative consequences most likely to affect the overall goal of this paper, which is to determine which

blatantly unlawful practices, we have been unable to keep money from causing systemic problems, including massive interference with who we feel should be released and detained pretrial. Jurisdictions can choose to leave money in the system – indeed, both the federal and D.C. pretrial systems retain money while eliminating money's ability to detain – but jurisdictions should also realize that money might be taken from them. In this generation of bail reform, many national organizations are crafting litigation strategies designed to rid the country of money bail. Elimination of money bail will, in turn, force all jurisdictions to make sure their lines between release and detention are drawn correctly, and to change them if they are not. The fundamental point is that money need not be eliminated from the pretrial system, but money the way we have used it for over 100 years must be – and likely will be – eliminated in order to create a transparent and workable demarcation between those we seek to release and those we seek to detain prior to trial.

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember that leaving secured money bonds in the process will likely thwart any efforts to set up a fair and effective release and detention system. Making sure that money does not detain is thus a crucial prerequisite to creating that system.

Will We Need to Make Sure We Have Some Resources – Like Pretrial Services Functions – To Make Everything Work?

In 1970, Congress created authority for the pretrial services agency in the District of Columbia to supervise defendants in the community (in addition to creating bail reports), which was seen as a necessary component of the purposeful in-or-out process being enacted. Likewise, in 1984 Congress considered pretrial services functions to be a critical component of the overall change from a traditional money-based system to the federal in-or-out system using virtually no money whatsoever. This recognition of the need for at least some minimal supervisory resources is akin to the history of probation in America, which once used financial conditions of release, but which eventually replaced money with some community supervision as a more effective and fair way to achieve the goals of probation. While it is

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defendants to release and which to detain pretrial. In short, leaving money in the system will significantly diminish, if not completely preclude, a jurisdiction's attempts to decide whom to release and detain, and to see those decisions purposefully effectuated.

occasionally argued that many jurisdictions currently over-supervise defendants – indeed, the research would support using far less supervision on low and medium risk defendants to achieve maximum outcomes – some resources are likely necessary for states to move to a purposeful bail scheme that desires to lawfully release and detain the appropriate people. Those resources should be in the form of traditional pretrial services functions.

Will We Have To Change Our Constitutions?

States that have right to bail provisions in their constitutions do not necessarily have to change them, but they might want to do so nonetheless. If, in fact, America eliminates money bail (or even money's ability to detain at bail), or if a state either voluntarily changes or is forced to change certain bail practices leading to more purposeful pretrial release and detention, states that are happy with their current release/detain dichotomies can simply leave their constitutions alone. For example, if a state currently has a broad right to bail (reserving potential detention only for defendants charged with "capital offenses, where the proof is evident or the presumption is great"), and the state removes money's ability to detain, the state merely has to ask whether it is acceptable to release everyone except defendants facing capital charges. If the state feels that a wider detention eligibility net is necessary – and if that state can, in fact, justify a larger net – it might want to change its constitution.

Justifying whatever new net a state hopes to create will be a crucial part of this question. Justification is discussed at length below, but for now jurisdictions should realize that the law requires proper justification for detention provisions, and recent court cases are forcing states to examine whether they have supplied sufficient justification. If, for example, a state has a relatively narrow, charge-based detention eligibility net, and after reading this paper, that state realizes that it simply cannot justify a wider net, it will not have to change its constitution so long as the first net does have some valid justification. If the first net also does not have adequate justification, the state can leave the provision alone, but it risks having that language struck later on constitutional grounds. The myriad variables associated with this decision make the undertaking somewhat complex.

Moreover, even if money (or its ability to detain) is not eliminated, a state may still want to create a system that dramatically reduces the use of money, which will, in turn, similarly require the state to articulate whom it intends to

release and detain with more precision. For example, even if money's ability to detain is not eliminated, states may want to create a more rational process for detention that does not rely upon unattainably high monetary conditions of bond to detain certain unmanageable defendants. This, too, may lead to a desire to change any particular constitutional provision. Nevertheless, it bears repeating that even states that have attempted to create more rational in-or-out processes leading to purposeful detention based on risk have seen those processes ignored when money is left in the system. The fundamental point is that states do not have to change their constitutional right to bail provisions, but it may be sound practice to do so based on their desire to properly articulate who is eligible for detention and how to effectuate that decision.

The exact wording of any proposed change to a state constitution will likely depend upon philosophical considerations. For example, if a state has a broad right to bail provision and wishes to release virtually everyone pretrial, no change to the constitution may be necessary. If, however, the state wishes to detain certain high risk defendants, it may need to create that authority within its constitution. Philosophically speaking, if that state desires to create the authority to detain so-called "high risk" defendants within a charge-based eligibility net and to release virtually everyone else, but also wants to limit future legislative determinations that would gradually erode the presumptive right to release, the state would need to add detail to its constitution to forestall those determinations. If not so concerned, the state can use broad language granting legislative authority to prescribe the detention process, and it will be the two things together – constitutional bail provision and implementing legislation – that will be reviewed for overall legality. The same concept governs current constitutional provisions that reserve detention for "violent" or "serious" crimes. States leery of legislative erosion of rights have actually defined such phrases in the constitution itself.[399]

The risk research, too, will likely impact a state's decision on particular language. Actuarial pretrial risk assessment instruments do not necessarily currently predict the type of risk we hope to address through detention, but they might in the future. Moreover, someday risk research might definitively point to a certain group of defendants whose conduct makes them extremely

[399] *See, e.g.,* Tex. Const. art. I, § 11a.

high risk for flight or new serious or violent crime. These details must be considered when a state desires to change a document such as a constitution.

Accordingly, when re-drawing the line between pretrial release and detention, jurisdictions must remember that they may wish to change their constitutional bail provisions, but that they do not have to. The decision to change will be based on individual state notions of liberty and freedom, but should be made with the knowledge that bail reform appears to be forcing jurisdictions to legally justify their constitutional provisions and may ultimately remove money (or at least the ability of secured financial conditions to detain) from the existing system.

Will We Have to Change Our Statutes/Court Rules?

Most states will find that they will have to make significant changes to their statutes and court rules in this generation of bail reform. For example, the reduction or elimination of money's ability to detain will necessarily lead to substantial changes in most state laws, which are often primarily designed around a money-based system. As another example, the courts may begin ruling that various state-articulated detention nets are unlawful under *United States v. Salerno,*[400] as was done in the Ninth Circuit case of *Lopez-Valenzuela v. Arpaio*, in which the court ruled that the relevant detention provision and lack of due process protections violated the federal constitution.[401] Rulings like this will undoubtedly also force states to "engraft such protections into the applicable provisions in the state constitutions, statutes and court rules to forestall" invalidation of preventive detention schemes on federal constitutional grounds.[402]

Thus, when re-drawing the line between pretrial release and detention, jurisdictions must remember that it will likely be necessary to change their statutes and court rules to respond to the various elements underlying the third generation of bail reform. Jurisdictions should also remember that it will be the totality of their detention process – their constitutional bail provisions (if they have one) along with their processes as articulated in their statutes, rules, or even court opinions – that will be analyzed for justification, rationality, and fairness.

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[400] *See United States v. Salerno,* 481 U.S. 739 (1987).
[401] *Lopez-Valenzuela v. Arpaio ,* 770 F. 3d 772, at 791-92 (2014).
[402] LaFave et al., *supra* note 52, §12.3 (b), at 61.

Will We Have to Change Our New Bail Guidelines/Praxes/Matrices?

In this generation of bail reform, various jurisdictions have begun creating bail guidelines, praxes, or matrices to reflect new notions dealing with defendant risk. Originally, these matrices were designed to replace traditional money bail schedules, which are documents that assign money amounts to various charges. They have since been seen as a valuable way to engage various criminal justice stakeholders in discussions about risk tolerance, release and detention philosophy, defendant supervision and responses to pretrial violations. Rather than to assign money amounts to charges, many of these new matrices often place risk assessment scores along the vertical axis (left side) of a grid, and then various charges or charge categories along the horizontal axis (top) of a grid. The boxes where these two things intersect represent decisions about presumptive conditions, supervision strategies, and risk tolerance. For example, the intersection between "low" risk and a nonviolent misdemeanor charge on a particular matrix might lead to a box with a presumptive release, presumptive conditions, and even presumptive supervision strategies. More recent matrices are using risk of failure to appear along one axis and risk of new criminal activity along the other, along with criminal charge and the PSA violence flag as other considerations to suggest various pretrial options.

The following is a risk/charge matrix, made up, but typical of several seen across America:

	Most Serious Charge					
Pretrial Risk Category	**Less Serious Misdemeanor**	**More Serious Misdemeanor**	**Non-Violent Felony**	**Driving Under the Influence**	**Domestic Violence**	**Violent Felony**
Lower	Recognizance Release with Court Reminder	Recognizance Release with Court Reminder	Recognizance Release with Court Reminder	Recognizance Release with Basic Supervision	Recognizance Release with Basic Supervision	Recognizance Release with Enhanced Supervision if Released; or Detained
Medium	Recognizance Release with Basic Supervision	Recognizance Release with Basic Supervision	Recognizance Release with Basic Supervision	Recognizance Release with Enhanced Supervision	Recognizance Release with Enhanced Supervision	Recognizance Release with Enhanced Supervision if Released; or Detained
Higher	Recognizance Release with Basic Supervision	Recognizance Release with Enhanced Supervision	Recognizance Release with Enhanced Supervision	Recognizance Release with Enhanced Supervision	Recognizance Release with Enhanced Supervision	Recognizance Release with Enhanced Supervision if Released; or Detained

The following is a risk/risk matrix recently created and used in one American county:

Despite their value, the matrices being used today can be misleading to jurisdictions. For example, sometimes a matrix will label a box "presumptive detain," even though it would be unlawful to detain under that state's current constitutional release/detain dichotomy. In other cases, the matrices are no better than traditional bail schedules, as they include money amounts in the boxes and are simply using risk versus charge to administer a wealth-based bail system.

Accordingly, some of these matrices should already be changed to reflect the actual law in their states, and still others should be changed to rely more on evidence-based research. In any event, as jurisdictions begin to dig deeper into their own laws concerning release and detention, and especially as those states begin studying the pretrial research, they will undoubtedly find that

various aspects of these matrices must be changed. On the other hand, once appropriate changes are made to a state's legal structure, the creation and operation of guidelines, matrices, and praxes can operate neatly within that structure.

Part II – If We Change, To What Do We Change?

This generation of bail reform appears to be leading states to change from the traditional charge-and-money-based system to something new. So far, that new thing has been labeled a "risk-based" or "risk-informed" way of doing bail, and involves assessing all defendants for their risk using actuarial pretrial risk assessment instruments, trying to detain only so-called "high risk" defendants, and using the law and the research to release everyone else on varying levels of supervision. While superficially simple, this paper illustrates just how complex such an undertaking can be.

In fact, it is the risk research itself that triggers our need to slow down and systematically justify everything we intend to do with pretrial release and detention. Fundamentally, the risk research dismantles many of our existing assumptions underlying the charge-and-money-based system, and yet that same research demonstrates that "risk" as measured by an actuarial pretrial risk assessment instrument cannot wholly replace that system. Meanwhile, courts are beginning to require jurisdictions to show rationality and non-arbitrariness at bail. This means that all jurisdictions will likely have to start from scratch by articulating and adequately defining whom they intend to release and whom they intend to detain pretrial. Then, using the pretrial research to date, those jurisdictions can create rational, fair, and transparent release/detain dichotomies that can survive judicial scrutiny for as long as possible.

This entire paper has been leading to an answer to the question, "If we change, to what do we change?" As evidenced by the length of the discussion so far, the answer depends on knowing a variety of things about bail. And those things, from the proper definition of bail to base rates and false positives, naturally lead to a model pretrial release/detain dichotomy designed to answer the underlying questions of, "whom do we release, whom do we detain, and how do we do it?" But any model of line drawing must be justified, and so this author proposes holding up whatever model a state might create to three separate but overlapping analyses to help with that justification. At the end of this paper, the reader will see this author's model release/detain dichotomy and process, which is then held up to these same three analyses. It is advised that any state desiring to come up with its own model – for example, one with a wider detention eligibility net or a slightly different limiting process – hold that model up to the same three analyses so

that it can survive judicial scrutiny. It is not necessary to analyze any particular model in the order presented, and indeed the overall analysis will likely be a combination of all three together. The three are placed in this particular order solely due to personal preference.

The first analysis is a somewhat general analysis based on the history, the law, the research, and the national standards that requires us constantly to consider narrowing detention to further fundamental American principles. Thus, even when a detention scheme might pass muster under so-called strict scrutiny analysis in the law, we must still consider whether there are other factors that warrant *further narrowing* detention, thus embracing risk and erring on the side of release.

The second analysis is a purely legal analysis, which can be achieved primarily by holding up the detention scheme to *United States v. Salerno*. This involves making sure the scheme survives not only a somewhat more lenient analysis to determine whether it would be deemed punishment by the courts, but also the "heightened" analysis required under general due process principles in addition to concerns potentially leading to equal protection and excessive bail claims.

The third analysis is based upon Andrew von Hirsch's articulation of three threshold requirements for any preventive detention scheme, which includes: (1) the need for precise legal standards of dangerousness; (2) the need to subject prediction methods to careful and continuous validation; and (3) the need for certain minimal procedural safeguards.[403] While there is some overlap between this third analysis and the others, its importance lies primarily in the discussion concerning precise standards and definitions, a concept that has been lacking in American bail law for both dangerousness and flight. Each of these analyses is discussed briefly below.

Analysis Based on General Narrowing Principles Gleaned from the History, the Law, the Research, and the National Standards

Throughout this paper, this author has summarized what jurisdictions must remember when re-drawing the line between release and detention. They include the need to remember: that historically and legally speaking, bail is release, and that the right to bail is technically the right to release; that the

[403] *See* von Hirsch, *supra* note 281, at 725.

reason we have bail, or pretrial release, in America is due to the law and certain fundamental legal traditions, such as using the moral deterrence of the law to guide our actions and acknowledging the presumption of innocence throughout the criminal process; that jurisdictions must not be risk averse; that they must instead embrace the risk of release at bail, and therefore accept some level of pretrial failure, just as we have "failure" to the extent that people might not generally follow the law in a free society.

They include the need to remember: that the history of bail illustrates that any interference with "bail" as release or "no bail" as detention leads to bail reform; that because secured money bonds have been interfering with both release and detention since the mid-1800s, dealing with secured money at bail is likely a prerequisite to complete reform; that the law points to clearly identifying the threats that we hope to address, to limit detention to a justifiable eligibility net with a process designed to further limit detention of persons within the net to those with identifiable and articulable risks of either flight or serious danger; that jurisdictions must create detention schemes that work within the fundamental balance of bail, which involves maximizing release while maximizing public safety and court appearance; that jurisdictions must remain mindful of fundamental legal principles that have, until recently, been largely ignored at bail; that while it may be admirable to aim for an appropriate release to detention ratio, such a ratio will perhaps more appropriately evolve out of a fair and rational release and detention process.

They include the need to remember: that American differences with English bail were due to our fundamental notions of freedom and liberty, which led to broad rights to bail (or release) in virtually every jurisdiction; that America's struggle with both unintentional and intentional detention was exacerbated by fundamental flaws in our release and detention systems, including allowing secured financial conditions of bonds to cause detention; that when America began purposefully detaining noncapital defendants for either flight or public safety, it was done only in "extreme and unusual circumstances" shown by unique facts surrounding individual defendants and potential victims; that America's "big fix" involved a rational and purposeful in-or-out process, with a broad right to release and a narrow detention net, and that also eliminated money's ability to detain; that this fix, while admirable in theory, has grown unacceptably broad in the federal system and has not been adequately adopted by the states; and that after *Salerno,* most state detention provisions are constitutionally vulnerable.

They include the need to remember: that the research surrounding the creation of actuarial pretrial risk assessment instruments tends to undermine many of our old assumptions about risk, such as the assumption that high charge equals high risk (indeed, a defendant charged with an extremely serious crime might be "low" risk just as a defendant charged with a non-serious crime, like trespass, might be "high risk"); that the research on risk, in fact, tells us that most defendants are simply not as risky as we think, that vastly more defendants succeed pretrial than fail, and that, accordingly, there are many more people in jail than necessary; that the research on risk also points to different outcomes than we are used to when analyzing bail claims based on due process, equal protection, and excessive bail; and, indeed, that the research on risk likely makes it hard to justify anything but the narrowest detention eligibility net.

They include the need to remember: that actuarial pretrial risk assessment instruments are exceptionally good at what they tell us, and can be used for 99% of everything we care about in bail, but they do not tell us individual risk, what to do with risk, and details concerning "risk of what" to the extent necessary to justify pretrial detention by themselves; most importantly, that those instruments label all defendants as risky, which means that we must consider charge-based floors below which no detention – and possibly below which no assessment – may occur; finally, that those instruments provide no adequate definitions or explanations of the type of conduct necessary to avoid pretrial detention.

Finally, they include the need to remember the lessons learned from the evolution of the national standards on pretrial release and detention, which provide a good framework for an in-or-out process, unhindered by secured money conditions. Specifically, jurisdictions must remember that the ABA Standards attempt to limit detention in a variety of ways, recommend a charge-based detention eligibility net, and provide at least some justification for recommending release of higher risk persons facing relatively minor charges.

Each of these notions, and certainly all of them together, point to pretrial release being very broad – likely broader than we are used to – and to pretrial detention being extremely narrow – likely much narrower than the minimum required by law. Accordingly, these notions suggest that any detention provision should be assessed for whether it can be *further*

narrowed, beyond what is the minimum necessary to survive legal claims. Thus, for example, if a state declares its detention eligibility net to consist of persons charged with "all violent felonies," the state should nonetheless ask whether a narrower net might not work as well and might be better supported by the history, law, and research. At the very least, jurisdictions exploring changes should add narrower options into their lists for discussion purposes when re-drawing the line between pretrial release and detention.

Analysis Based on the Current Law

As noted previously, jurisdictions re-drawing the line between release and detention will need that line to survive legal scrutiny, especially under the Equal Protection Clause, the Excessive Bail Clause, and the Due Process Clause.[404] The legal analyses under these three clauses are somewhat overlapping, and thus certain government decisions might be dispositive of elements under each theory. Nevertheless, jurisdictions should remember the following overarching idea governing the need to justify any release or detention model: "A state may constitutionally provide that bail be granted in some cases as a matter of right and denied in others, provided that the power is exercised rationally, reasonably, and without discrimination."[405] Reasonableness, in turn, will likely often be shown by the pretrial research. For example, if the pretrial research shows that there is no link between a certain charge and higher risk, it would not be reasonable to single that charge out for potential detention without some further justification. Once again, jurisdictions should not be so concerned with articulating a ratio of released to detained defendants up front. If any proposed release and detention model can be adequately justified, then the ratio will determine itself.

Equal protection, excessive bail, and due process would all require the government to adequately justify bail laws, and yet this justification has been sorely lacking in previous decades. This is exacerbated by the fact that many of our previous justifications for release and detention simply do not hold up today. Where once we could create a detention eligibility net based on the idea that defendant facing a felony was more risky than one facing a misdemeanor, now we must face research showing that this assumption is

[404] This paper focuses primarily on federal law. Any legal analysis would require scrutiny under state law as well, which would include analysis under any right to bail provision.
[405] *United States ex rel Covington v. Coparo*, 297 F. Supp. 203, 206 (S.D.N.Y. 1969) (*quoted in Hunt v Roth,* 648 F.2d 1148, at 1161 (8th Cir. 1981), judgment vacated for mootness, 455 U.S. 478, (1982).

not necessarily true. Accordingly, new justifications may be necessary today to survive scrutiny under these three clauses. And thus, in this generation of bail reform, it is imperative that we continually force jurisdictions to demonstrate why any particular person or groups of persons should be detained pretrial. And if detention cannot be adequately justified for certain defendants, as a society we must be ready for the inevitable conclusion that those defendants must therefore be released. This may lead to somewhat of a culture shock by moving from a society that is anathema to risk to one that understands the need to embrace risk and the associated failures inherent in bail. Any other conclusion, however, would be contrary to our fundamental American principles of limited government and personal freedom.

In a comprehensive article on preventive detention written for the Harvard National Security Journal, authors Adam Klein and Benjamin Wittes analyzed this country's history and practices surrounding preventive detention and concluded that it is false to believe that the notion of preventive detention is repugnant to America. Instead, the authors concluded, "Congress and state legislatures create preventive detention authorities without apology where they deem them necessary, and the courts uphold them where judges find that the statutes, or their application, allow only so much detention as is actually necessary to address a pressing public danger."[406] After surveying the various types of preventive detention in America, the authors correctly note that "the unifying theme is that the law unsentimentally permits preventive detention where necessary but insists upon adequate means . . . of insuring both the accuracy of individual detention judgments and the necessity of those detentions."[407] In the law, this sort of balancing of means and ends goes to the overall rationale of the detention scheme, which requires states to provide justifications for who should be detained and how that detention is done.

Narrowing (based on the first analysis) and justification (a prerequisite of the second analysis) come together in the law through levels of scrutiny that courts impose upon government action, and jurisdictions must keep these levels in mind when constructing any new detention model. Generally speaking, courts tend to use balancing tests for due process, equal protection, and excessive bail (the three most likely theories to be used to assess release and detention models), in which the courts weigh the means and ends behind

[406] Klein & Wittes, *supra* note 230, at 186.
[407] *Id*. at 187.

the laws. Balancing tests, in turn, fall into categories based on the levels of scrutiny assigned to certain disputes. When the law being reviewed involves a suspect classification or fundamental right such as liberty, courts typically apply so-called "strict scrutiny," which requires the government to show that the law is necessary to achieve a compelling or overriding government purpose. "Intermediate scrutiny," which is typically used when a classification is made along gender or legitimacy lines, requires the government to show that the law is substantially related to an important government purpose. "Minimum scrutiny" (often called "rational basis") is used whenever the other two levels are not triggered, and it requires the government to show only that the law is rationally related to a legitimate government interest. The first and third levels are particularly important. Strict scrutiny is likely necessary for any provision affecting the fundamental interest of liberty. Nevertheless, many bail provisions, policies, and practices also lack the kind of rational justification to survive even minimum scrutiny.

Excessive Bail

Any new or existing line drawn between release and detention will have to survive excessive bail analysis. As noted previously, the current excessive bail test is one of balance, as articulated by the United States Supreme Court in *Salerno:*

> The only arguable substantive limitation of the [Excessive] 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.[408]

Explaining this language, the Eleventh Circuit Court of Appeals noted that "the test for excessiveness is whether the terms of release [or detention] are designed to ensure a compelling interest of the government, and no more," thus implicating strict scrutiny.[409] While other courts have merely re-stated the *Salerno* test as one in which an appellate court should review conditions of release to determine whether they were "excessive in light of the purpose

[408] *United States v. Salerno*, 481 U.S. 739, 754 (1987).
[409] *Campbell v. Johnson*, 586 F.3d 835, 842 (11th Cir. 2009).

for which it is set,"[410] these restatements do not provide the guidance necessary for deciding "excessiveness." A test based on levels of scrutiny, however, would provide that guidance. For example, the government might argue that a condition was non-excessive, but if that condition was not rationally related to a legitimate purpose, it would fail under even the most lenient balancing test. Because *Salerno* itself described the defendant's liberty interest as "fundamental" and the government's interest in preventing crime as "compelling in that case," the fact that the Court now uses a balancing test for excessive bail likely means that the method for assessing that balance should be one akin to strict scrutiny, as all conditions impinge to some extent upon a defendant's liberty interest.[411]

Excessive bail analysis has been somewhat derailed in America, due largely to an unfortunate line of cases declaring that persons do not necessarily have a right to "bail" that they can afford.[412] Nevertheless, this line of cases does not mean that excessive bail analysis cannot be applied to a state's determination of where to re-draw its line between release and detention. In addition to requiring adequate justification through articulating a compelling interest, the test requires assessing the means of achieving that interest. This provides a brake, of sorts, on states desiring to use pretrial detention as the blunt instrument for all crime control. As noted by LaFave, et al., "[T]here exists in *Salerno* at least the suggestion that under the Eighth Amendment the risk of future crimes by certain types of arrestees could be so insubstantial as to make preventive detention of such persons excessive."[413]

Using excessive bail analysis in this way has obvious implications for a purely risk-based system (states would have a difficult time justifying detention for "low" or "medium" risk defendants when they have relatively high statistical probabilities of success), but it should also affect a state's decision to create a more appropriate charge-based detention eligibility net. Specifically, in addition to adequate justification, excessive bail analysis should put limits on detaining certain defendants facing relatively low level charges who are nonetheless deemed "high risk." In short, some offenses – perhaps misdemeanors or non-violent property offenses – are simply not serious enough to trigger the blunt hammer of detention no matter how risky

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[410] *See e.g., Galen v. County of Los Angeles,* 477 F.3d 652, 661 (2007).
[411] *See Salerno*, 481 U.S. at 749, 750 ("The government's interest in preventing crime by arrestees is both legitimate and compelling;" "On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right.").
[412] *See* NIC *Money*, *supra* note 30, at notes 73-82 and accompanying text.
[413] LaFave et al., *supra* note 52, § 12.3(c), at 71-72.

some defendants may seem to be based on aggregate prediction. This is the essence of excessive bail analysis.

For example, even if a state could provide a justification for including defendants charged with trespass in its detention eligibility net, detaining trespass defendants might be successfully challenged on Eighth Amendment grounds because detention based on prediction is simply an overwhelming and likely unnecessary response to such a minor crime. This is true especially given our lack of knowledge about individual risk and details concerning "risk of what," combined with our ability to address virtually all levels of risk by using less restrictive release conditions as well as bond revocation for unmanageable defendants. As a society, we would likely never condone detaining stop light violators, and so the question is simply one of line drawing by creating a floor, below which we feel no detention should be sought. In other words, at some point certain charges simply do not warrant initial detention, no matter what the risk. This line drawing, in turn, is shaped by excessive bail analysis.

Equal Protection

Equal protection, too, is relevant to the release/detain discussion even though, like excessive bail, it is less likely than due process to provide an overall guide to re-drawing lines. In *Schilb v. Kuebel,* the Supreme Court wrote that, "[A] statutory classification based upon suspect criteria or affecting 'fundamental rights' will encounter equal protection difficulties unless justified by a compelling governmental interest."[414] Because liberty is a fundamental right, traditional equal protection analysis will, once again, require the government to show that its new law does not treat similar persons dissimilarly and is necessary to achieve a compelling or overriding government purpose.

Very recently, civil rights organizations have begun suing cities and counties in federal court on the theory that local bail laws are treating similar persons dissimilarly based on their wealth (which can be tied to race). These equal protection suits are relatively novel – while highly relevant, they are extremely rare in historic bail jurisprudence – but they are a reminder that bail laws must be justified along equal protection lines.

[414] *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

And, indeed, historic (and broader) criminal justice examples illustrate how a government detention scheme might violate the clause in either a charge-based or a risk-based system. For example, prior to the Fair Sentencing Act of 2010, crack cocaine sentencing laws and policies had long been criticized as violating equal protection by disproportionately impacting racial minorities (who were perceived as using crack more than powder cocaine).[415] Similarly, a detention eligibility net containing arrests for possession of crack versus powder cocaine could lead to equal protection claims based on the same underlying arguments and assumptions. Likewise, under a risk-based or risk-informed system, jurisdictions must ensure that detention provisions calling for either detention or increased supervision for "dangerous" defendants are not based on instruments capable of racial bias or provisions that would likely be subject to claims under the Equal Protection Clause.

Due Process

By far, however, the most relevant legal analysis for re-drawing the line between release and detention is due process analysis flowing from the U.S. Supreme Court's opinion in *United States v. Salerno,* in which the Court reviewed the Bail Reform Act of 1984.[416] Pursuant to that analysis, there would likely be two balancing tests: one designed to ensure the provision is not punishment, and one designed to assess the provision under general due process principles. Scrutiny under the first test – which combines a "rational basis" element with an excessiveness element – appears far less exacting than scrutiny under the second, but it still contains relevant criteria for judging any release and detention model. And while the Court in *Salerno* did not expressly label its analysis under the second test "strict scrutiny," at least one federal court of appeals has correctly concluded that *Salerno's* due process test for detention is one of "heightened" scrutiny due to its focus on liberty as a fundamental right.[417] As the Ninth Circuit noted in that case, "If there was any doubt about the level of scrutiny applied in *Salerno,* it has been resolved in subsequent Supreme Court decisions, which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny."[418] Basic primers on bail reform now confidently and

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[415] See Paul Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 Harv. J. of L. & Pub. Pol'y, 241 (2013), found at http://www.harvard-jlpp.com/wp-content/uploads/2014/01/37_1_241_Larkin.pdf.
[416] *See United States v. Salerno,* 481 U.S. 789 (1987).
[417] *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779 (2014).
[418] *Id*. at 780 (citations omitted).

correctly state that,"[A]s a threshold requirement, any system providing for pretrial detention must be narrowly tailored to the compelling government interest put forward to justify detention."[419] We will look at each of these two tests – punishment and general substantive due process – briefly.

Test for Punishment

To determine whether a detention provision is impermissible punishment before trial, the *Salerno* Court used the two-part test articulated in *Bell v. Wolfish,* decided in 1979.[420] Under the first part, a reviewing court first looks for government intent to punish. Finding none, under the second part the reviewing court looks merely to "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."[421] Overall, the test is similar to a "rational basis" balancing test under due process, combined with language similar to excessive bail analysis, above.

The Court in *Salerno* found no evidence of intent to punish under the Bail Reform Act, but such intent is not beyond the realm of possibility. Indeed, in *Lopez-Valenzuela v. Arpaio*, discussed previously, the Ninth Circuit reviewed an Arizona "no bail" provision and noted its concern over "the considerable evidence of punitive intent found in this record."[422] In his concurrence in that case, Judge Nguyen wrote separately "to address the extraordinary record of legislative intent, which I believe demonstrates that [the detention provision] was intentionally drafted to punish . . ."[423] Obviously, intent to punish some group of defendants regardless of their risk for flight or public safety will invalidate any detention provision.

Instead, the Court in *Salerno* found that Congress had authorized detention for "the legitimate regulatory goal" of protecting the community from danger.[424] Under the balancing test, the Court found that the incidents of pretrial detention were not excessive to the articulated regulatory goal

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[419] Harvard Law School *Primer*, *supra* note 3, at 8.
[420] 441 U.S. 520, 535 (1979).
[421] *Salerno,* 481 U.S. at 747 (quoting *Kennedy v. Mendoza Martinez*, 372 U.S. 144, 168-79 (1963)).
[422] 770 F.3d 772, 79 and n. 14.
[423] *Id.* at 792.
[424] 481 U.S. at 747. Pursuant to the test in *Bell*, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Bell v. Wolfish*, 441

"because: (1) the Act 'carefully limits the circumstances under which detention may be sought to the most serious of crimes,' including 'crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders'; (2) '[t]he arrestee is entitled to a prompt detention hearing' at which the arrestee could seek bail; and (3) 'the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.'"[425]

Accordingly, the analysis under this test points to limiting through the use of a charge-based detention eligibility net as well as to generally assuring that the means of achieving public safety or court appearance are not excessive, which obviously overlaps somewhat with excessive bail analysis, above. Nevertheless, the rationality component also implicates even more basic notions of due process as expressed by the Court's opinion in in *Jackson v. Indiana,* in which the Court wrote, "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the person is committed."[426] *Jackson* was a case dealing with pretrial commitment of incompetent defendants, but the Court's "reasonable relation" requirement is highly relevant to ordinary pretrial detention cases, and has been argued by noted law professor Christopher Slobogin to mean that, "If a liberty deprivation pursuant to a prediction fails to adhere to the logic of preventive detention . . . then it can become punishment."[427] Previously, arguments against relying on *Jackson* in detention scenarios were based on an assumption that "it is rational for a legislative body to conclude that those charged with a particular type of offense are likely to repeat their crimes and thus to authorize preventive detention as to persons so charged."[428] Today, however, the research on risk may make even that assumption potentially illogical and thus unreasonable.

To Slobogin, the general limitation articulated in *Jackson* "suggests three specific restrictions on preventive detention," including that: (1) its duration must be reasonably related to the harm predicted, (2) its nature must bear a reasonable relation to the harm feared (which, in turn, requires the government to pursue the least restrictive means of achieving its goals), and

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U.S. 520, 539 (internal footnote omitted). Creating a detention provision – a process that necessarily involves articulating a proper purpose – is less likely to be arbitrary than imposing individual release conditions, such as money, which often seem to have little legitimate purpose.

[425] *Lopez-Valenzuela* , 770 F.3d 772, 779 (2014) (quoting *Salerno*, 381 U.S. at 748).

[426] *Jackson v Indiana*, 406 U.S. 715, 738 (1972).

[427] Slobogin *Dangerousness*, *supra* note 321, at 13.

[428] *See* LaFave, et al., *supra* note 52, at 75.

(3) it is periodically reviewed to assure the need for continued confinement.[429] Slobogin's second restriction most directly concerns jurisdictions' ability to lawfully re-draw their lines between release and detention, and likely means that, in addition to a need for adequate justification of a detention eligibility net, jurisdictions must further ensure that alternatives to incarceration are considered to purposefully further narrow that net to some smaller set of detained persons who represent unmanageable defendants who present the risk they seek to address. In short, it means that jurisdictions must constantly concern themselves with reducing, if not eliminating the false positives, for when "the paucity of . . . alternatives results in incarceration of those who don't need to be confined, the detention becomes punishment."[430]

Test for General Substantive Due Process

While the test for punishment includes some substantive hurdles, it is far less exacting than the test following general due process principles as articulated in *Salerno*. As correctly summarized by the court in *Lopez-Valenzuela,* the 1984 Bail Reform Act's detention provision survived heightened, or strict scrutiny,

> because it both served a 'compelling' and 'overwhelming' governmental interest 'in preventing crime by arrestees' and was 'carefully limited' to achieve that purpose. The Act was sufficiently tailored because it 'careful[ly] delineat[ed] . . . the circumstances under which detention will be permitted.' It: (1) 'narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming,' (2) 'operate[d] only on individuals who have been arrested for a specific category of extremely serious offenses' – individuals that 'Congress specifically found' were 'far more likely to be responsible for dangerous acts in the community after arrest,'; and (3) afforded arrestees 'a full-blown adversary hearing' at which the government was required to 'convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can

[429] Slobogin *Dangerousness*, *supra* note 321, at 14-16.
[430] *Id*. at 14-16.

> reasonably assure the safety of the community or any person.' It satisfied heightened scrutiny because it was a 'carefully limited exception,' not a 'scattershot attempt' at preventing crime by arrestees.[431]

These are the most important elements of a lawful detention provision to survive substantive due process analysis, including justification for the provision (an "acute problem" reflecting a compelling government interest, which is required under any balancing test but arguably requiring a stronger government showing here due to the heightened scrutiny), a charge-based detention eligibility net (required under both this test as well as the test for punishment), and a process designed to further limit that net to individuals demonstrably unmanageable in the community. Importantly, while not argued in *Salerno,* detention due to risk of flight should be reviewed under the same analysis.

The need for a charge-based net is clear from current law, and the prior analysis would suggest that it remain charge-based – no matter how good our risk prediction becomes – due to other legal principles (such as excessive bail and due process fair notice) as well as certain unavoidable limitations surrounding prediction in general.

In addition to establishing any other justification for any particular detention provision, showing an "acute problem" of pretrial crime or flight today, while likely made more difficult by current research, is not impossible. When the District of Columbia Court of Appeals ruled on the constitutionality of the District of Columbia Court Reform and Criminal Procedure Act of 1970, it summed up Congress's showing of a need for pretrial detention based on dangerousness:

> Congress considered (1) the alarming increase in street crime in the District of Columbia since 1966; (2) statistical studies involving recidivism by persons while on pretrial release; (3) recommendations by the President's Commission on Crime in the District of Columbia (1966), and the Judicial Council Committee to Study the Operation of the Bail Reform Act in

[431] *Lopez-Valenzuela,* 770 F.3d at 772, at 779-80 (quoting *Salerno,* 481 U.S. at 748-755, internal citations omitted).

> the District of Columbia (1969); and (4) pretrial release and detention practices in England and other countries.[432]

Reading the congressional report accompanying the 1970 Act, however, one can quickly see two things: (1) there was strong support to address rising crime in the District in multiple ways, including the use of pretrial detention, and yet (2) there was actually very little evidence to support Congress's declaration that a "significant percentage" of violent crime was caused by persons on pretrial release.[433] Indeed, in that report, Congress twice pointed out the *lack* of precise statistics or other data on pretrial crime, relying instead on relatively hyperbolic narrative and a handpicked list of ten case histories, with each illustrating a defendant committing an additional crime while on bail.[434] Nevertheless, this justification was enough for the D.C. Court of Appeals even in the face of conflicting evidence presented during the appellate process. The court wrote: "Appellant attempts to litigate what are essentially legislative findings, i.e., the extent of crime committed by persons released pending trial and the predictability of criminal conduct, citing studies which reached different statistical results than those relied upon by Congress. These are matters properly committed to the legislative process."[435]

Similarly, in *United States v. Salerno,* the Supreme Court noted that in passing the Bail Reform Act of 1984, Congress perceived pretrial detention as a potential solution to a pressing problem ("the alarming problem of crimes committed by persons on release") and based that solution on findings that persons arrested for certain serious crimes were "far more likely to be responsible for dangerous acts in the community after arrest."[436] Compared to the 1970 D.C. Act, the main committee report accompanying the 1984 Act had a more robust body of empirical evidence in addition to general governmental or organizational support, including a study of release practices in eight jurisdictions as well as a similar study done in the District of Columbia.[437] As noted previously, however, no empirical evidence was

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[432] *United States v. Edwards,* 430 A.2d 1321, 1341 (D.C. Ct. App. 1981) (citing H.R.Rep.No.91-907, 91st Cong., 2d Sess. 87-94 (1970)).
[433] *See* H. Rep. 91-907, at 82.
[434] *See id.,* at 79-104.
[435] 430 A.2d at 1341.
[436] *Salerno*, 481 U.S. at 742, 750.
[437] *See* S. Rep. 98-225 at 6 (citing Lazar Institute, *Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact*, 48 (Wash. D.C., Aug. 1981); Institute for Law and Social Research, *Pretrial Release and Misconduct in the District of Columbia*, 41 (April, 1980)).

given for detention based on flight, as Congress appeared to consider that authority to be inherent or implicit.

In this generation of bail reform, we have more empirical research than ever before on pretrial misconduct, to the point where there is virtually no excuse for using it to help justify release and detention provisions.[438] Nevertheless, during the legislative process (or any other process hoping to craft release and detention provisions based on the research), drafters will be faced with the issues raised previously in this paper – including issues of true versus perceived defendant risk and with certain limitations of actuarial pretrial risk assessment instruments – all of which likely point toward a much narrower charge-based detention eligibility net and a more robust limiting process. Overall, good research will lead to good legislative findings, which, in turn, will lead to good laws.

Analysis Based on Threshold Requirements for Predictive Models

In addition to analyses based on general narrowing principles and the law to shape and justify any particular element of a detention model, the model itself should also satisfy certain pre-requisites to find legitimacy within the larger sphere of criminal justice. In 1971, the well-known legal philosopher and theorist Andrew von Hirsch published an article based upon a staff paper written for the Committee for the Study of Incarceration, made up of eminent policy makers and professors of law, criminology and criminal justice, sociology, history, psychiatry, and economics.[439] In that paper, von Hirsch took on broad philosophical questions concerning the appropriateness of a model of detention based on prediction of dangerousness, discussing many of the issues raised in this paper. While tempting to say that his analysis has been largely ignored as shown by America's increased use of preventive detention despite its seemingly obvious conflict with American laws and values,[440] through the decades scholars have correctly relied on von Hirsch's articulation of the prerequisites for any preventive model whenever

[438] In *Lopez-Valenzuela v. Arpaio,* the Ninth Circuit Court of Appeals chided the Arizona Legislature, which created a detention provision with "no findings, studies, statistics, or other evidence (whether or not part of the legislative record) showing" the problem that it sought to address. 770 F.3d 772, 783.
[439] *See* von Hirsch, *supra* note 281.
[440] *See generally* Klein & Wittes, *supra* note 230.

those scholars were required, as now, to question fundamental aspects of pretrial release and detention.[441]

Andrew von Hirsch wrote:

> To have any possible merit, the model should satisfy three important threshold requirements: (1) there must be reasonably precise legal standards of dangerousness; (2) the prediction methods used must be subjected to careful and continuous validation; and (3) the procedure for [preventive] commitment must provide the defendant with certain minimal procedural safeguards. These requirements, however, are seldom met by current practices of preventive confinement.[442]

It is precisely because these requirements continue to be seldom met that they are included in this paper's overall justification of a detention model using three separate analyses.

Precise Definitions

As von Hirsch and others have correctly noted, a person should not be detained preventively unless that person has a risk of sufficient likelihood and gravity to warrant detention, and articulating how those two notions should or should not lead to detention – that is, in the field of bail, how risky a defendant needs to be and what, exactly, he or she is risky for – is a value judgment reserved for the law. Moreover, unless the law defines these two notions with precision, "the entire preventive model may well be unconstitutional on grounds of vagueness."[443] In the past, scholars have noted America's utter failure to adequately define terms such as danger or public safety. "Even when 'danger' or 'public safety' concerns are explicit, most states fail to provide operational standards or definitions for these constructs."[444] This has been a fundamental flaw with American detention provisions crafted throughout the twentieth century,[445] and so any jurisdictions creating new detention provisions should seek to remedy it by

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[441] *See, e.g.,* Goldkamp, *supra* note 3, at 16; Fagan & Guggenheim, *supra* note 3, at 419-20; Shima Baradaran & Frank L. McIntyre, *Predicting Violence,* 90 Tex. L. Rev. 497, 506-07 (2012) [hereinafter Baradaran & McIntyre].
[442] von Hirsch, *supra* note 281, at 725.
[443] *Id.* at 726.
[444] Fagan & Guggenheim, *supra* note 3, at 420.
[445] Goldkamp, *supra* note 3, at 16-29.

adequately defining "what kind of future criminal conduct, and what degree of likelihood of that conduct, warrants preventive confinement."[446]

As noted previously, simply because the public discussion over preventive detention in America began through attempts to detain for purposes of public safety and danger does not mean that preventive detention does not now apply to flight. Accordingly, jurisdictions should be equally concerned with adequately defining the risk they are trying to address surrounding court appearance.

Prediction Validation

Von Hirsch's second threshold requirement – to subject the prediction method to careful and continuous validation – is necessary to check the accuracy of the predictions. "Adequate validation studies of the predictive technique in the model are required, regardless of whether the predictive method is purely statistical, purely clinical, or a mixture of the two."[447] This involves not only making sure the instruments are accurate; it also involves making sure they are unbiased and nondiscriminatory, that they include good data to begin with, and that they measure what we want to know.[448] In bail, where we are arguably always leaning toward release, we should be careful to continuously check our methods of prediction – looking under the hood of various techniques and instruments, so to speak – so that we do not allow those instruments to become instruments of detention based simply on our own ignorance. Releasing so-called "high risk" defendants (as measured by an actuarial pretrial risk assessment instrument) may seem anathema to some in the criminal justice system, but given what we know about risk and bail, it is likely warranted and can ultimately lead to a better understanding of risk overall.

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[446] von Hirsch, *supra* note 281, at 726.
[447] *Id.* at 728.
[448] The need for caution in using statistically-derived risk assessment instruments should by no means be interpreted as a call to keep the status quo – which uses a combination of charge and money as a proxy to determine risk. The use of actuarial pretrial risk assessment instruments is considered to be a legal and evidence-based practice, whereas the traditional money-based bail system is one that is utterly unsupported by both the law and the research. Moreover, the primary call for caution within this paper is *only* when jurisdictions attempt to use those tools *solely* to determine whether to detain in the first instance (i.e., based on pure prediction using aggregate risk).

Procedural Safeguards

Andrew von Hirsch's third threshold requirement – to include certain minimum procedural safeguards – is likely met simply by following the Supreme Court's guidance in *United States v. Salerno,* which approved of the federal preventive detention statute, in part, because that statute provided adequate procedural due process protections to further narrow the detention eligibility net.

These threshold requirements, coupled with legal requirements and the need to constantly seek to narrow and justify elements in the preventive model, become heightened in this generation of bail reform. With more exacting judicial scrutiny, many of this country's longstanding detention schemes will likely fail when held up to these analyses. Accordingly, jurisdictions attempting to re-draw the line between release and detention must take all these things into consideration when crafting their own release and detention models.

Part III – A "Model" Release and Detention Process

The following is this author's model release and detention process. Jurisdictions may disagree with the model, but they should nonetheless subject any alternative models to the same scrutiny and analysis as outlined in this paper.

Articulating Generally Whom to Release and Whom to Detain[449]

Based on the totality of legal, historical, and empirical evidence documented throughout this paper, the model release and detention process is crafted to release all defendants except for those who pose an extremely high and unmanageable risk either to willfully fail to appear for court to avoid prosecution or to commit serious or violent offenses against reasonably identifiable persons while on pretrial release. "Extremely high and unmanageable risk" and other terms will be further defined and operationalized, but for now the fundamental point should be that as a society, we should reserve secure detention only for defendants posing unmanageable pretrial risks of an extremely rare and serious nature.

Articulating the Detention Eligibility Net

This paper has already explained why it would be wrong to base a detention eligibility net on actuarial risk alone. Thus, any model release and detention process will likely include a charge-based net, and the only question becomes which charges or crimes to include in that net.

In this generation of bail reform, we must wrestle with the pretrial research showing that persons committing all different kinds of crimes pose all different kinds of risks. Knowing that everyone coming in the jail door is potentially a "high risk" defendant may make it tempting to hold all defendants, assess them, and potentially detain them, but this paper illustrates why that cannot be the way that we administer bail in America. And while it is understandable for states to be concerned with *all* failures to appear and *all* pretrial crime, this concern over any and all failures cannot form the basis for creating the eligibility net for detention in the first

[449] As an initial matter, this author recommends eliminating the words "bail" and "sufficient sureties" whenever possible from existing legal schemes. The confusion surrounding these terms and phrases is largely avoidable by merely referring to "release" and "detention," as has been done in the D.C. and federal statutes as well as in many states.

instance based solely on prediction. American bail law requires jurisdictions to embrace risk and thus to expect some failure. Requiring jurisdictions to embrace risk and expect some failure, in turn, means that jurisdictions must differentiate among cases. Because that differentiation must be done in advance (in both the substantive criminal law and in pretrial release and detention American law relies on the moral deterrence of rules used to guide personal conduct), we have to use methods with which Americans are comfortable. Fortunately, the law supports making these differentiations based on seriousness of the criminal case, and people in America seem comfortable with using seriousness as a guide.[450]

For example, as a society, we are concerned with all crime, but we are more concerned with certain, more serious crimes to the extent that we can be comfortable with imposing higher penalties, such as life imprisonment and possibly even the death penalty, in extremely limited cases. Likewise, in bail, we are concerned with all crime, but we are more concerned with certain, more serious crimes to the extent that we can be comfortable with using pretrial detention in extremely limited cases in the first instance based solely on prediction. We simply would not be as comfortable with detaining persons charged with traffic offenses while they wait for their trials as we would with a defendant on trial for murder. Moreover, while we care about all crime committed during pretrial release, we are simply more concerned when a defendant commits a new crime while on pretrial release during a trial for a more serious case.

This is not to say that we are not concerned when a defendant commits a serious crime while released on a minor crime. We are, but we must remember that we can never completely predict that crime, and that we are differentiating in advance by using the law and our own comfort levels concerning criminal justice policy. When differentiating in advance, we are likely more comfortable with the possibility of detaining a person who poses a risk to commit a crime while on release for a serious crime than we are a person who poses a risk to commit a crime while on release for a less-than-serious crime (just as we are comfortable with the fact that persons not accused of any crime might walk the streets even though they may pose some risk to act in a criminal manner). Generally speaking, then, just as life imprisonment or the death penalty are the last step on a continuum of

[450] These two things are intertwined. Of course, the law (created to reflect American notions of justice) can trump aberrations in personal belief, such as when a person is comfortable with using the death penalty for minor crimes. Like many areas of criminal justice, bail laws must be crafted for aggregate use.

responses as punishment to crimes, pretrial detention in the first instance based on prediction is the last step on a continuum of responses to risks associated with more and more serious cases. Thus, overall, the less serious the case, the less we should entertain the idea of pretrial detention based on prediction of risk.

As another example, as a society, we are concerned with all failures to appear for court, but we are more concerned with multiple, willful failures to appear – the act of flight to avoid prosecution – to the extent that we can be comfortable with using pretrial detention for court appearance in the first instance based on prediction.[451] Moreover, we are more concerned when these failures to appear occur during prosecution for extremely serious crimes; indeed, it is fairly safe to say that as a society, we are simply less concerned with failure to appear for court generally than with pretrial crime, but that those concerns grow closer together when we are looking at certain extremely serious crimes. Thus, a charge-based net encompassing higher levels of criminal cases is appropriate, too, when seeking to detain persons in the first instance based on risk of failure to appear for court.

States should be able to articulate their own charge-based detention eligibility nets, but based on the issues raised in this paper, this author would suggest reserving detention in the first instance based on prediction only for those defendants charged with "violent crimes" or "violent offenses," which would encompass both violent felonies and misdemeanors, which, in turn, often include instances of domestic violence. As will be shown, this is due to the fact that detention can be at least initially justified for this group as showing a higher risk to do the things we seek to potentially address through detention. Until we have much more nuanced research – and it is not clear that we ever will have research to the extent necessary to completely overcome certain risk limitations – the various arguments for creating the narrowest possible net (which include arguments that criminal charge is only a part of risk assessment, and that we can never completely predict individual risk for danger or flight, and legal or even policy reasons concerning the undesirability of detaining certain defendants charged with "lower level" crimes based solely on prediction) likely preclude

[451] An interesting turn in the national conversation on pretrial justice involves whether willful flight to avoid prosecution should even be considered to be equal to concerns over public safety. Most defendants are simply too poor to flee, and advances in policing in America have led to the ability to track defendants even to distant countries (when we decide to do so). This conversation might lead, interestingly, to re-adopting America's initial stance on pretrial detention based on flight, which was that virtually no defendant should be initially held purposefully to avoid failure to appear for court.

consideration of non-violent crimes, including crimes involving high amounts of property damage, such as motor vehicle theft,[452] or even felony drug offenses.[453] Moreover, while it appears that the commission of violent crimes while on pretrial release even among persons charged with violent crimes is relatively rare, it must be remembered that we are only creating the net; a further limiting process will likely be the key to making the detention provision constitutionally acceptable. Nets broader than "violent crimes or offenses" are not necessarily justified by either the law or the research, and will require a more robust use of the further limiting process (requiring increased resources for hearings).[454]

Nevertheless, there is some empirical justification for a net based on violent charges. In 2006, the Bureau of Justice Statistics released "Violent Felons in Large Urban Counties," in which it concluded that "an estimated 70% of violent felons … had been arrested previously," "sixty percent of violent felons had multiple prior arrest charges," "a majority (57%) of violent felons had been arrested previously for a felony," and "thirty-six percent of violent felons had an active criminal justice status at the time of their arrest [which included] 18% on probation, 12% on release pending disposition of a prior case, and 7% on parole." Specifically, the report found, "about 1 in 4 released violent felons committed one or more types of misconduct while in a release status. This misconduct usually involved a re-arrest for a new offense (14%) or a failure to appear for court."[455] "Violent" felonies in that study was defined as murder, rape, robbery, and assault (all with certain inclusions and limitations) as well as "other violent offenses," which included vehicular manslaughter, involuntary manslaughter, negligent or

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[452] This represents a policy choice based on the law and the research. As will be shown later in this paper, while no justification might exist to use these crimes in the net, failures for these types of crimes will be eligible for detention in a secondary net based on pretrial failure. Motor vehicle theft may actually pose some slightly elevated risk of re-arrest, but because we do not know individual risk or "risk of what," and because that overall risk is still quite rare, the policy choice involves erring on the side of initial release. Overall, the net is less important than the further limiting process, also discussed *infra*.

[453] Historically, we have assumed that "drug dealers" pose a heightened risk for flight, but that has not been borne out by the research; indeed, most people charged with "dealing" drugs are not the high profile dealers we occasionally see on television fleeing justice, and as to public safety the research has shown that "though defendants with drug felonies are presumed to be dangerous, they are among the *least* likely to be arrested for a violent crime." Baradaran et al., *supra* note 441, at 558. If states are concerned that certain drug offenses should be in the net, they might define the term "violent crimes" to include them, but jurisdictions must then justify that inclusion through the history, the law, research, or other reasonable legislative findings. Even then, the limiting process might preclude individual detention by making a normative decision that the risk posed by drug defendants is not necessarily the risk we seek to address through detention.

[454] Likewise, nets that define "violent crimes" broader than the research will also need to be justified.

[455] Brian A. Reaves, *Violent Felons in Large Urban Counties*, at 1, 3-4, 6 (BJS, 2006).

reckless homicide, nonviolent or non-forcible sexual assault, kidnapping, unlawful imprisonment, child or spouse abuse, cruelty to a child, reckless endangerment, hit-and-run with bodily injury, intimidation, and extortion.

Similarly, in a comprehensive review and study of prediction of pretrial crime in 2011, authors Shima Baradaran and Frank McIntyre found that while those charged with violent crimes are not necessarily more likely to be arrested pretrial,[456] "those *originally* charged with violent crimes, particularly murder, were much more likely to be rearrested pretrial for violent crimes."[457] Moreover, the authors found, because defendants charged with all crimes except murder, rape, and robbery were generally only about 1%-3% likely to commit a violent crime while on pretrial release, persons "charged with violent crimes are more likely [at 3% to 6%] to be rearrested for violent crimes than those charged with nonviolent crimes."[458] This study used the Bureau of Justice Statistic's State Court Processing Statistics dataset and its definitions of violent crimes.

Additionally, in a research brief published by the New York City Criminal Justice Agency, the author examined a large group of New York City defendants arrested in 2001 and found (similar to the above study by Baradaran, et al.) that while defendants facing violent felony charges were less likely be re-arrested overall, "violent felony [defendants] – when they were re-arrested – tended to be re-arrested for similar offenses."[459]

Moreover, in a publication discussing the re-validation of the federal pretrial risk assessment instrument (PTRA), the authors concluded, among other things, that the validation research refined earlier contradictory findings by "showing violent defendants [failed] at higher rates than other defendant offense categories."[460]

Finally, the Laura and John Arnold Foundation's PSA Court risk assessment instrument includes a "violence flag," which was created to help

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[456] Baradaran & McIntyre, *supra* note 441, at 528 ("The highest pretrial arrest rates were for defendants charged with drug sales or robbery [classified as both a violent and a property crime] (21%), followed by motor vehicle theft (20%), and burglary (19%). Those released who were charged with the 'more dangerous crimes,' such as murder, rape, and felony assault, had much lower overall rates of pretrial arrest at 12%, 9%, and 12% respectively.").
[457] *Id.*
[458] *Id.* at 528-29.
[459] Qudsia Siddiqi, *Pretrial Re-Arrest for Violent Felony Offenses,* at 6 (NYCCJA, 2008).
[460] Timothy P. Cadigan, James L. Johnson, & Christopher T. Lowenkamp, *The Re-Validation of the Federal Pretrial Risk Assessment (PTRA)*, 76 Fed. Prob. 3, at 6 (AOC, UMKC, 2012).

jurisdictions to distinguish among defendants (facing felonies and misdemeanors) based on their likelihood to commit crimes of violence. According to the Foundation, "the goal of most criminal justice decisionmakers is to detain defendants who pose a risk to public safety – particularly those who appear likely to commit crimes of violence – and to release those who do not."[461] The violence flag is derived from looking at five variables, including whether the current offense is violent and whether the defendant has had a prior violent conviction, indicating, as well, that there exist empirical data for drawing the line between release and detention at "violent offenses."[462] Observations on using the instrument in the field to identify defendants likely to commit violent crimes have illustrated the tool's utility. As Milgram and others have written, "[T]he tool helped judges identify the small number of defendants – approximately 8 percent – who were far more likely to commit violent crime than average defendants. Defendants flagged by the tool as being at an elevated risk of violence who were released pretrial were, in fact, re-arrested at a rate of 17 times higher than that of other defendants."[463]

Each of these studies provides at least some empirical justification for a detention eligibility net consisting of "violent offenses." Jurisdictions must remember, however, that in America we start with the notion that all defendants should be released pretrial. A detention eligibility net simply recognizes that the Supreme Court has said jurisdictions can, in advance, articulate that defendants facing certain crimes have the potential for pretrial detention. Until now, these nets have had very little justification, or they have been justified based on false assumptions. To the extent that states desire to carve out any exception to release, then, the fundamental point is that exceptions may not be created arbitrarily or by whim, but must instead be justified in some lawful manner.

Articulating the "Secondary Net"

There appears to be very little empirical evidence[464] for expanding the eligibility net for detention in the first instance based solely on prediction beyond "violent crimes." This notion is bolstered by American principles of liberty and freedom, the risk that America has historically sought to address,

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[461] *Developing a National Model For Pretrial Risk Assessment*, at 1 (LJAF, 2013).
[462] *See Public Safety Assessment: Risk Factors and Formula*, at 2 (LJAF, 2016).
[463] Milgram, et al., *supra* note 231, at 220.
[464] Nets might be justified on legislative findings using something other than empirical evidence, but those findings will undoubtedly be scrutinized by the courts for rationality and reasonableness.

general legal standards and norms, and the inherent limitations of assessing risk. Moreover, historically American jurisdictions have had less difficulty in coming to near consensus when defining the term "violent" versus "serious" or "dangerous,"[465] which also suggests using the term "violent" over the more nebulous terms. Nevertheless, the net could be justifiably expanded to include persons who are charged with jailable offenses or who willfully fail to appear *while on pretrial release*, including release pending sentencing or during appeal, for any offense.[466] This net could be more limited – for example, only triggered by a defendant committing only a "serious" crime while on pretrial release – but it does not have to be. In this model, the willful failure to appear for court or the commission of any jailable offense while on pretrial release may trigger the secondary net, and the further limiting process for that net will serve to keep detention within constitutional limits.

This author calls this net the "secondary net" rather than bond revocation for one primary reason. Throughout the history of bail in America, courts have not provided the sort of procedural due process that is constitutionally required to detain in the first instance based solely on prediction, and bond revocation hearings are often even more perfunctory. Accordingly, rather than have courts see a pretrial violation as something that automatically leads to a revocation of release, this author hopes jurisdictions will look upon the new circumstances as creating a new, secondary eligibility net for detention, which requires an equal amount of due process protection as is required for initial detention. In short, rather than merely denying release based on a new allegation, courts will be trying, once again, to determine if the failure was willful, and whether the risk of what we fear in the future is unmanageable.

The need for this sort of secondary net is acute in America. In a risk-based system, it is the one instance where we have potential proof of individual

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[465] The United States Code defines "crime of violence" to mean "(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or (C) any felony under chapter 109A, 110, or 117." 18 U.S.C. § 3156.

[466] There is probably no need to include any provision dealing with crimes that somehow affect the administration of justice, or protect witnesses or jurors, as some states have done. As noted previously, the Court in *Salerno* largely did away with the distinction of danger in and out of the justice system. To the extent that a defendant obstructs justice by committing a crime (such as threatening a witness or bribing a juror), this model would apply. Moreover, the model does not eliminate traditional notions of incarceration for contempt.

risk. The pretrial release and detain decision is, generally speaking, an attempt by judges to predict who will fail out of some group of defendants. When defendants actually fail after release, the decision is made simpler because now there is evidence of the one thing we are unable to determine for defendants before initial bail settings – that is, whether this particular defendant, whether "low," "medium," or "high" risk, will be the defendant who actually fails by doing the sort of thing we wish to avoid.[467] The need is acute, legally speaking, only because there is not always agreement among the states on whether a bailable defendant can have his bail revoked and release denied after he flees or is accused of another crime, or whether courts must instead continually release him (or at least "set bail") so long as the underlying crime or the new crime is a "bailable" offense.[468]

Inclusion into the secondary net should not be based on so-called technical violations of bond, unless violating those conditions is made unlawful by statute.[469] In a theoretically pure release and detention system, the only two constitutionally valid purposes for limiting pretrial freedom are court appearance and public safety. Accordingly, willful failure to appear and new criminal activity – and not things such as missed check-in meetings – are the only two things that should trigger eligibility for detention. Nevertheless, this net allows jurisdictions to decide when violations of conditions of bond might rise to the point of criminal prosecution.

Overall, this net is larger than the initial net; for example, any new crime and willful failure to appear for court for any charge can trigger the detention process. This net should be small (and no larger than any bond revocation net), however, simply due to the relatively low numbers of failures pretrial. Moreover, the further limiting process, described below, will keep from over-detaining individuals who are not high risk to continue to willfully fail to appear or to commit additional crimes in the future. While some persons argue that courts should wait for several missed court dates before allowing the initiation of a detention hearing, this author believes that because the

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[467] Occasionally, there have been arguments raised in the literature that committing a new crime while on pretrial release should not lead to detention due to the fact that the second crime, like the first, is merely an unproven allegation. However, concerns surrounding this issue are softened by knowing that the second charge leads only to detention eligibility – not automatic detention – and will not eliminate the need for a further limiting process with the various procedural due process safeguards.

[468] *See* LaFave, et al., *supra* note 52, § 12.3 (b), at 63-67.

[469] There is a trend in the pretrial field toward measuring technical violations as outcomes, but technical violations should never trigger pretrial detention. Moreover, the crime of "violation of bond conditions," has been misused in many jurisdictions, making this author conclude that jurisdictions should use extreme caution in using it as a basis for detention.

detention eligibility net for initial detention is narrow, this secondary net should allow judges to make a more detailed inquiry for flight after a single willful non-appearance. Finally, this proposed secondary net does not include detention beyond temporary detention for failure while on post-conviction release, relying instead on the existing processes to operate separately.

Comparing these two nets with the current American Bar Association Standards helps to understand the more-detailed mechanics. In doing so, it is also helpful to remember that when new crimes occur, there is the potential for detention under two separate cases: (1) the case involving the initial alleged crime; and (2) the case involving the crime alleged to have occurred while on pretrial release.

Recall that the ABA Standards' net allowed detention in the first instance for: (1) defendants facing violent or "dangerous" offenses; (2) defendants charged with "serious" offenses while on pretrial release for a "serious" offense, or on probation or parole for a violent or dangerous offense, or on other post-conviction release; (3) defendants charged with serious offenses posing a substantial risk of non-appearance; and (4) any offense with a showing of substantial risk of obstructing justice. Under the Standards, bond revocation [what this author calls the secondary net] may occur whenever a defendant willfully violates any condition of release.

This author's proposed model allows detention in the first instance based solely on prediction only for defendants charged with violent offenses. This is done for several reasons, which include the facts that: (1) the research, the law, and all other concepts addressed in this paper do not support any initial detention net beyond violent offenses for avoiding the harms we seek to address; (2) the research, instead, shows that most defendants overall are likely to succeed, and at rates better than expected if released on conditions; (3) the term "serious" is too loose a concept on which to base detention; (4) the fact that a defendant is currently on pretrial release for another charge is not enough, by itself, to allow detention in the first instance for anything less than a violent offense as the defendant is still un-convicted on both offenses, and detention might be authorized on the underlying charge under the secondary net; (5) if on probation, parole, or other post-conviction release, the system allows for detention for the underlying charge. For all the reasons outlined in this paper, unless a defendant is charged with a violent offense, there is simply no trigger for detention in the first instance based solely on

prediction. In the author's proposed model, the secondary net operates to detain a person in the first case who has willfully failed to appear for court or accused of committing a jailable offense while on pretrial release.[470] It will not allow detention based on willful violation of conditions that are neither criminal nor a willful failure to appear for court (although it will allow the defendant's decision to refuse lawful conditions by not signing the agreement to result in his or her detention). The proposed model has no provision dealing with "obstructing justice;" as noted previously, historically this concept has been folded into notions of public safety and court appearance and can be dealt with through judicial contempt power for serious cases in any event.

Like the American Bar Association Standards, the proposed model would include a provision for the *temporary* detention of persons charged with violent crimes (the primary net), persons charged with a new offense while those persons are on pretrial release, including release pending sentencing or during appeal (the secondary net), and persons currently on probation or parole for any offense. This temporary detention provision allows time for proper notifications, the implementation of revocation proceedings, and the lodging of detainers. Like the ABA Standards, there should be strict time limits and release on conditions if the hearing is not timely.

Finally, the use of actuarial risk assessment in the model can provide a crucial function by continually leading jurisdictions toward release under the model. While it should not be used solely to determine detention in the first instance, it can be used to systematically weed out defendants from detention eligibility based on aggregate risk, so long as courts understand the various limitations of aggregate versus individual risk.

Can We Create a Different Net?

Jurisdictions can certainly create their own detention eligibility nets. The fundamental point of this paper is that any net must be justified by the law or the research in at least some rational way – beyond unfounded assumptions – to survive court scrutiny.

[470] Limiting charges to ones carrying a potential jail term seems intuitively beneficial, and detention should never be ordered for a defendant who faces no possibility of jail, but many municipal codes have made a wide variety of offenses jailable, and even contain catch-all provisions providing for fines and jail terms in the event a specific provision is silent about punishment.

Articulating the "Further Narrowing Process" for Detention

Historically and legally, we require a process designed to individualize bail-setting and to further limit the detention eligibility net. In this proposed model, we will articulate two processes: one for detaining defendants in the first instance based solely on prediction (the primary net), and one for detaining defendants who have already failed while on pretrial release (the secondary net). Because of the concerns raised in this paper, the limiting process applied to the primary net is more stringent than the one applied to the secondary net.

For as long as America has been intentionally detaining defendants, the limiting process has suffered from a lack of adequate definitions, and yet this process should be considered the most important element of a release and detention system. Indeed, a proper limiting process can "cure" an overbroad net by fairly and adequately narrowing the numbers of actual pretrial detainees.

Historically, jurisdictions seeking to detain based on "risk" have primarily used (as noted previously, the states vary on the processes) a limiting process that allows detention when there is clear and convincing evidence that no condition or combination of conditions will suffice to provide adequate assurance of court appearance or public safety. This process, however, is subjective and resource driven. Moreover, without proper definitions, it is inadequate in telling judges how high a risk and what type of risk we seek to address. For all of the reasons outlined previously in this paper, we must consider changing this historic process to better reflect the law and the research. States that already have processes with elements described in this model process (such as a good statement defining the sort of risk they seek to address) will have less reason to change.

Accordingly, following general American notions of liberty and freedom, what America has historically sought to address and how to address it, general legal standards and norms, and the inherent limitations of assessing risk, this initial process to be used for detention in the first instance should require prosecutors to convince a neutral judicial official that there is clear and convincing evidence[471] as shown through specific facts and

[471] Because it was not expressly articulated in the Bail Reform Act of 1984, the federal law, quite counter-intuitively, has gradually settled on the "preponderance of the evidence" standard to show flight risk versus "clear and convincing evidence" to show risk of harm. This author has found no adequate rationale for the

circumstances that the defendant will flee or attempt to flee to willfully avoid prosecution or that the defendant will commit or attempt to commit a serious or violent crime while on pretrial release against a reasonably identifiable person, or groups of persons or their property, and that no condition or combination of conditions will suffice to manage the extremely high risk. An actuarial pretrial risk assessment instrument may be used as one factor in this process, but may not be used as the sole justification or basis for detention.[472]

At the very least, this narrowing process will be a vast improvement over prior language, and by avoiding over-consideration of aggregate risk, it will better follow the Supreme Court's suggestion that jurisdictions attempt to show "an identified and articulable threat to an individual or the community," while further requiring consideration of what, exactly, that threat should be.

This process must include the various procedural due process elements approved by the Supreme Court in *Salerno,* including: (1) the arrestee should be entitled to a prompt hearing and the maximum length of pretrial detention should be limited by stringent speedy trial time limitations; (2) the arrestee should be housed separately from those serving sentences or awaiting appeals; (4) after a finding of probable cause, the arrestee should be given a full-blown adversary hearing through which the limiting process is used, which would include a right to counsel and the right to testify or present information by proffer and to cross-examine witnesses who appear at the hearing; (5) objective statutory factors to guide judges in addition to the statistically-derived risk assessment that go to the more adequately defined risk, including factors such as the nature of the charge, other characteristics and statements of the defendant, and other facts and circumstances that are not necessarily addressed by an actuarial pretrial risk assessment instrument. Additionally, judges must make written findings of fact for orders of detention, which are to be given immediate appellate review.

For persons who fall within the secondary detention eligibility net by willfully failing to appear for court or being charged with a new crime, the process is the same except that the prosecutor must show clear and

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difference, and so in an attempt, once again, to make detention carefully limited, this proposed model uses "clear and convincing evidence" standard for both risk of flight and public safety.

[472] The same is true for other risk tools for other defendant populations, such as the Ontario Domestic Assault Risk Assessment.

convincing evidence as shown through specific facts and circumstances that the defendant will flee or attempt to flee to avoid prosecution or that the defendant will commit or attempt to commit any jailable offense while on pretrial release, and that no condition or combination of conditions will suffice to manage the extremely high risk. In this case, the evidence of a willful failure to appear or commission of a new crime, along with assessed risk from an actuarial pretrial risk assessment instrument, may be used as substantial evidence of the potential for unmanageable risk.

No rebuttable presumptions should be used in this model, for two reasons. First, the research (as well as various limitations of risk prediction) simply does not support any rebuttable presumption toward detention, and because of that, it is even more unfair to force defendants to attempt to prove they are not dangerous, that they will not do some unknown but forbidden act, and that they will not flee. Second, our country's history of using rebuttable presumptions has only led to their misuse, causing jurisdictions to treat them more like un-rebuttable presumptions. The only presumption should be a general presumption of release in all cases or more specific presumptions similarly guiding courts toward release that must be overcome by the government.

Part IV – Holding Up the Model to the Three Analyses

The Model Held Up to General Narrowing Principles

This particular model for pretrial detention largely succeeds when held up to the three analyses, discussed above. Based on the general narrowing principles gleaned from the history, the law, the research, the national standards, and the limitations of actuarial pretrial risk assessment, this model provides a good compromise between releasing virtually everyone – a position also supported from the concepts addressed in this paper – and the need for jurisdictions to have some ability to protect the public from rational and articulable risks. The model makes sense of the history of bail by taking into account historical notions of both risk for flight and danger. It makes sense of the law by creating a purposeful in-or-out release and detention process with nothing hindering the decision. It makes sense of the pretrial research by correcting various faulty assumptions and by "looking under the hood" of actuarial pretrial risk assessment instruments. And, finally, it makes sense of the national standards by largely following those recommendations (albeit with some modifications), which were, in turn, adopted in America's "big fix."

Potentially detaining only persons charged with violent offenses in the first instance based solely on prediction or after failing to appear or committing a crime while on pretrial release might lead to more *purposeful* detentions than America is currently used to, but overall the model should lead to far fewer detentions generally than those occurring through the use of money. Most importantly, the model appears to solve many of the problems that have historically led to bail reform while maintaining the overall American notion of a presumption of freedom and liberty, recognizing that most risk can be managed through conditions less restrictive than secured confinement, and allowing pretrial detention as an exception reserved for "extreme and unusual" cases.

Under this analysis, the model serves as a justifiable way to release and detain pretrial, but, like bail reform generally, it only re-emphasizes America's need to better embrace the risk of purposeful release at bail instead of relying on the somewhat random method of deciding release and detention based on wealth. Nevertheless, this is the way American bail is supposed to be – rational and purposeful. Moreover, by using a charge-based

detention eligibility net, articulating better definitions, and attempting to answer the question, "risk of what," the model is also superior to most current detention models and avoids many of the problems associated with basing detention solely on actuarial pretrial risk assessment.

This analysis also requires that jurisdictions constantly assess whether detention may be further narrowed, and indeed it could. For example, a state that chooses to leave its detention eligibility net at "capital offenses" (narrower than "violent offenses") would also be justified by the law and the research. Likewise, a jurisdiction making a policy decision to simply narrow the net from all violent crimes to only violent felonies would find ample justification for such a change. A much narrower net, however, might strain our current tolerance for risk, which appears lower than when America was founded. Likewise, jurisdictions could make various elements of the "further limiting process" narrower, and this narrowing, too, is justified by the history, the law, and the research. The fundamental point is that while narrower detention processes are justifiable, any broader process than that outlined in this paper does not appear today to be justifiable by the history, the law, or the pretrial research.

The Model Held Up to the Law

The model also largely succeeds when held up to the law. It is justifiable, rational, and seemingly fair, and would likely survive even strict scrutiny by the courts. First, by using a charge-based net, the model avoids problems with vagueness, which still theoretically plague any detention model based on risk or other subjective notions. Second, because it includes a floor, below which no detention would be allowed, it appears to satisfy even the most lenient view of excessive bail analysis. Third, it avoids equal protection problems largely by avoiding the use of money. Fourth, while the model likely easily surpasses the test to avoid punishment prior to trial, it also appears to hold up to *Salerno's* discussion of elements necessary to avoid due process violations. Specifically, it narrowly focuses on an acute problem that is identifiable and justifiable from the research, it only operates on defendants accused of "extremely serious offenses," and it contains a due process hearing elemental to any liberty deprivation.[473]

[473] It is clear that the law will be the primary guide to shaping America's detention provisions. Moreover, certain elements of the law – even elements not primarily discussed in this paper – may be persuasive, if not deciding of the issue. For example, in an unpublished manuscript by noted legal researcher Sandra G. Mayson, the author challenges the assumption that the government has constitutional, moral, or practical

The Model Held Up to von Hirsch's Threshold Requirements

Finally, the model succeeds when held up to von Hirsch's threshold requirements. First, as in the discussion under vagueness, above, the model better defines the risk that we are trying to address. Second, it uses certain advantages of statistical risk prediction while recognizing that the risk we seek to avoid is often something different from that assessed by an actuarial tool. Moreover, the further narrowing process, along with a procedure for dealing with failures while on release, should lead to a better understanding of risk, which is hindered and masked by our tendency to over-detain defendants today. Finally, as mentioned under the legal analysis, it has the sort of due process protections approved by the Court in *Salerno,* but largely missing from many state detention processes today.

The Model Applied to Difficult Hypotheticals

This particular model also works for some of the more common vexing hypotheticals that currently exist at bail. For example, within the net, it would allow for judges to detain persons charged with violent offenses who score extremely "low risk" on an actuarial pretrial risk assessment instrument, when there are facts and circumstances indicating the need for detention. Persons who are extremely high risk but outside of the net due to being arrested on a less serious charge are not initially detained as a purposeful choice based on American principles rooted in the history, the law, and the research, but would be eligible for detention if our initial prediction of risk was faulty. In short, it would eliminate many false positives, but would allow courts to deal with false negatives in a fair and transparent manner.

Other complex hypotheticals are also accounted for under the model, even if those hypotheticals raise problems with solutions ultimately found outside of bail. For example, a homeless person who has a long history of trespasses would never be detained under this model in the first instance based solely on prediction; instead, he or she might be detained after failing on release (something we would not have been able to predict initially in any event) if the requisite process is used. This outcome simply represents the model

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bases to exercise preventive restraint over defendants versus equally dangerous persons not accused of crimes. Among other things, the author concludes (as in this paper) that preventive detention requires far more justification than that given to date.

making a purposeful decision to limit detention in the first instance based on prediction alone to some identifiable group of extremely dangerous persons, the homeless trespasser not being one. Nevertheless, if that homeless person fails on release and poses a significant risk for either flight or public safety, he or she may be detained. Ultimately, though, the problem of a homeless person committing multiple trespasses is likely solved not through bail, but through other means, such as general sentencing considerations and innovative sentencing designs, evidence-based criminal prevention programs, programs to reduce homelessness, etc. The same is true for mentally ill persons, illegal immigrants, and other so-called "difficult groups" of persons, with whom jurisdictions have traditionally struggled.

This is an important point worth repeating. Jurisdictions must recognize that not every problem can be solved at bail. Accordingly, in addition to prevention and sentencing, various scholars, including LaFave, have offered other solutions to address some of these problems, including: a widening of the revocation procedure; innovative policing methods in addition to police simply releasing more persons rather than booking them into jail; triage procedures for addicts, alcoholics, and the seriously mentally ill into behavioral health pathways; still other triage procedures for minor offenses, and the overall reduction of delays in normal trials; using special dockets for even speedier trials for higher risk persons; and adding resources, such as pretrial services functions, to help with the release and detention process.[474]

Many of the vexing hypotheticals involve what are, in fact, aberrational cases. A fundamental principle underlying the model, however, is that just as we can never fix every conceivable problem through bail, we can also never base release and detention law or policy on aberrational cases. Occasionally, a person charged with drunk driving will drink and drive while on pretrial release, putting many persons at danger. But we can never know who that person will be, and the risk may not necessarily lead to actual harm – indeed, under many risk assessment instruments, the driver might be deemed high risk and fail by merely committing another, non-drinking infraction. To capture the single person who drinks, drives, and hurts someone on pretrial release, we would have to include all persons charged with drunk driving in the net, and, frankly, to detain every one of them to eliminate the risk. In

[474] *See* LaFave et al., *supra* note 52, § 12.3(g), at 88-89; *see also* John Jay, *supra* note 307, at 20 (Statement by Dr. Faye Taxman, George Mason Univ.), 23 (statement of Dr. Saurabh Bhargava, Carnegie Mellon Univ.), and 26 (statement by Dr. Mike Jones, Pretrial Just. Inst.). Many of these scholars articulate a need for criminal justice stakeholders to look for nontraditional solutions, or to "think outside of the box."

bail, we must work in aggregates, but use rational processes to individualize conditions and to manage risk. The law requires reasonable, and not complete assurance of public safety and court appearance, and this proposed model provides a mechanism to obtain that reasonable assurance.

Overall, the model attempts to answer the three big questions we have asked ever since a thing called the pretrial phase of a criminal case has been in existence – whom do we release, whom do we detain, and how do we do it? It does so by following the history, the law, and the research to adequately define the level of risk and the kind of risk we seek to address to justify secure detention prior to trial.

Part V – The Language of the Model

If adopted, the particular language of any model like the one expressed here will largely depend on a given state's current release and detention scheme as well as philosophical notions surrounding articulating constitutional or statutory rights of defendants. Nevertheless, it must be recognized that statistical risk assessment may one day be able to fully predict the kind of risk we fear, and might lessen the subjective and political aspects causing reluctance for use within (or to help determine) the detention eligibility net. Moreover, in the future, the risk research may show that we may be fully justified in detaining defendants for certain categories of crimes that we simply are not justified in detaining today. For these and other reasons, if language is inserted into a constitution to allow for detention based on this model, it should be broad enough to describe an overall release and detention process, but narrow enough to keep legislatures and courts from expanding detention beyond constitutional limits.

Every current constitutional right to bail provision has at least two parts: (1) a section, line, or clause concerning release; and (2) a section, line, or clause concerning detention. The most basic of these provisions are found in the so-called "broad right to bail" states, and those provisions read something like, "All persons have a right to bail, except for capital offenses (or other offenses), when the proof is evident and the presumption is great." In this example, the two clauses of the single sentence provide for the release/detain dichotomy. As mentioned previously, a jurisdiction operating under the above language need not change this language to implement the model, but in a moneyless (or otherwise intentional release/detain scheme), the jurisdiction would likely be required to release all "bailable" defendants, and thus the jurisdiction would need to be content with capital offenses as its detention eligibility net, and would need to be similarly content with releasing everyone – at least in the first instance – who is not charged with a capital offense. Other states with different nets (i.e., capital offenses, treason, persons facing life imprisonment) will likewise need to be comfortable with the existing nets or be prepared to change. States with broader preventive detention provisions likewise may not have to change (unless a court finds the net to be too broad), but they must be content with their expanded nets in an intentional system and be prepared to justify those nets pursuant to the law and the research today. States with no right to bail

provisions will need to work with these issues within their current statutory (or court rule) release and detention framework.[475]

In addition to these two parts, a third part to a model constitutional provision is contained in many states with preventive detention – that is, a provision giving direction to the legislature or the courts for carrying out the basic release and detention policy. While technically part of the release provision, many persons believe that a fourth part is also necessary, which is a line expressly articulating that no condition of release should lead to the detention of an otherwise bailable or releasable defendant.

Based on the fact that there are perhaps four main concepts to be contained in any release/detain provision (release, detention, possibly enabling language, and a "no condition shall detain" clause), and that these four concepts can have a variety of linguistic formulations, it is hard to anticipate the sort of language states will wish to adopt. Nevertheless, because this author believes that most states will want to change their basic in-or-out structure to take advantage of what we know in this century about risk, release, and detention, the following example templates are provided for guidance:

1. **Relatively Brief Model Provision**

   All persons charged with a criminal offense shall be released on the conditions that they return to court and abide by all laws. If needed, a court may impose such further and least restrictive conditions necessary to provide reasonable assurance of court appearance and public safety, except that a court may confine a person who is eligible for pretrial detention [*the detention eligibility net, which could be articulated here or elsewhere*] when the court finds, in addition: (1) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk of intentional flight to avoid prosecution; or (2) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk to commit or attempt to commit a serious or violent crime while on pretrial release against a reasonably identifiable person or groups or persons or their

[475] Of course, a state with no current right to bail provision in its constitution could add one.

property. In addition, a court may confine a person when the court finds: (a) probable cause that a person already on pretrial release for any jailable offense willfully failed to appear for court to avoid prosecution or has committed a new jailable offense; and (b) clear and convincing evidence as shown through relevant facts and circumstances that the person poses either an extremely high risk to willfully fail to appear for court to avoid prosecution or to commit or attempt to commit any new jailable offense against persons or their property.

For all persons eligible for pretrial detention under this provision, the court must also find clear and convincing evidence that no condition or combination of conditions will suffice to manage the person's extremely high level of risk. In considering the facts and circumstances to detain persons under (1) or (2), above, the court may consider the risk assessed through an actuarial pretrial risk assessment instrument, however the court may not detain based solely on the results of that instrument. In considering the facts and circumstances to detain persons who have willfully failed to appear for court or committed a new crime while on pretrial release, the court may rely substantially on the assessed risk from an actuarial pretrial risk assessment instrument. In all cases, the court may not impose a condition of release that results in the pretrial detention of the person. However, a person's willful refusal to agree to lawful conditions of release may result in the detention of that person.

The legislature shall enact laws designed to carry out these provisions, including specific and reasonable laws allowing for the temporary detention of defendants not to exceed three days, excluding Saturdays, Sundays, and holidays, with an additional two calendar days granted to the state upon a motion showing good cause and no fault for the delay by the state, and additional periods of time granted to the arrested person upon motion and for good cause shown. The legislature shall also enact laws to define the terms "serious" and "violent" crimes, to create a due process hearing required for pretrial detention, and to provide for speedy trials and immediate and expedited appeals for detained defendants. At a minimum, the detention

> hearing shall contain [insert procedural due process requirements from *Salerno* here].

Of course, jurisdictions could – and, indeed, may want to – include their detention eligibility nets in their version of this language. This model does not include it only to allow for changes in research that might affect the primary detention eligibility net in the future, but with certain limits designed to make sure only a small group of unmanageable defendants (extreme and unusual cases) may be detained no matter how broad the net. By stating the type of risk jurisdictions seek to address, the language subtly urges the risk research to design ways to better assess that particular risk. Of course, because a release and detention process will be reviewed by the appellate courts as to how all parts of it work together – constitution, statutes, rules, etc. – an even broader constitutional provision could be enacted to simply allow judges to detain extremely high risk persons so long as it was narrowed through implementing statutes or rules. Without some constitutional protection, however, this sort of extremely broad language could easily slip toward abuse if not significantly narrowed through the implementing laws. The more protections a jurisdiction wants, such as limiting the definition of violent offenses, etc., the more it can include into its constitutional provision. Of course, this language could be altered to accommodate states without constitutional right to bail provisions, although the reasons for including various terms and phrases are the same.

2. A More Detailed Provision

Release Provision

> Following fundamental American notions of due process and individual liberty, all persons arrested in the State of [insert state name here] shall be presumed eligible for release from jail or other confinement unless the State demonstrates extraordinary reasons for pretrial detention, subject to the guidelines contained herein. The people of the State of [insert state name here] find and declare that the right to release prior to trial is one that must be vigorously protected, that liberty during the pretrial phase of a criminal case is the American norm, that allowing conditions of release (including money) to cause pretrial detention violates fundamental legal principles and rights that are given to citizens under the United States and

____ Constitutions, and that defendants who are presumed innocent in a free society may be detained prior to trial only through a fair and transparent procedure with numerous procedural due process safeguards designed to detain only those persons absolutely necessary due to the risk associated with their release.

Detention Provision

Notwithstanding any particular defendant's presumptive right to release pretrial, the people of the state of [insert name of state here] also find and declare that to adequately protect the public safety and the integrity of the judicial system through assuring the appearance of the accused at court, a system for pretrial detention that is designed to measure and respond to pretrial risk shall be established. Accordingly, a court may confine a person who is charged with a violent crime when the court finds, in addition: (1) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk of intentional flight to avoid prosecution; or (2) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk that he or she will commit or attempt to commit a serious or violent crime while on pretrial release against a reasonably identifiable person or groups or persons or their property. In addition, a court may confine a person when the court finds: (a) probable cause that a person already on pretrial release for any jailable offense willfully failed to appear for court to avoid prosecution or has committed a new jailable offense; and (b) clear and convincing evidence as shown through relevant facts and circumstances that the person poses either an extremely high risk to willfully fail to appear for court to avoid prosecution or to commit or attempt to commit any new jailable offense against persons or their property. For all persons eligible for pretrial detention under these provisions, the court must also find clear and convincing evidence that no condition or combination of conditions will suffice to manage the person's extremely high level of risk. In considering the facts and circumstances to detain persons under (1) or (2), above, the court may consider the risk assessed through an actuarial

pretrial risk assessment instrument, however the court may not detain based solely on the results of that instrument. In considering the facts and circumstances to detain persons who have willfully failed to appear for court or committed a new crime while on pretrial release, the court may rely substantially on the assessed risk from an actuarial pretrial risk assessment instrument.

Enabling Provision

The legislature shall enact laws designed to carry out this provision, including specific and reasonable laws allowing for the temporary detention of defendants not to exceed three days, excluding Saturdays, Sundays, and holidays, with an additional two calendar days granted to the state upon a motion showing good cause and no fault for the delay by the state, and additional periods of time granted to the arrested person upon motion and for good cause shown. The legislature shall also enact laws to define the terms "serious" and "violent" crimes, to provide for a due process hearing required for pretrial detention, to provide for the use of an actuarial pretrial risk assessment instrument, to provide for speedy trials and immediate and expedited appeals for detained defendants, to create sanctions that are less restrictive than detention for violations of conditions of release, including for failure to appear for court or for the commission or new crimes while on pretrial release, to provide requirements for release and detention orders, and to allow credit for pre-sentence detention and provide for the periodic re-examination or review of the need for continued detention during the criminal case.

The legislature shall enact procedures for the release or detention hearing that uphold and protect the defendant's rights to procedural due process and that ensure that pretrial detention remains a carefully limited exception to the law favoring pretrial release. The detention hearing, at a minimum, shall be held before a neutral judge or magistrate, shall allow defendants the right to counsel, to testify, to cross-examine witnesses, and to present evidence. The rules governing admissibility of evidence shall not apply, the hearing shall be recorded, and the

> testimony of the defendant shall not be admissible in the case in chief, except for a prosecution for perjury based on that testimony or for the purposes of impeachment in any subsequent proceedings. If the hearing results in a decision to detain, the judicial official shall provide the reasons for the decision either orally or in writing within three days.
>
> Those defendants not detained pursuant to the process authorized by this amendment shall be released on those reasonable, least restrictive, and individually tailored conditions necessary to provide reasonable assurance of court appearance and public safety. Financial conditions may not be set to address issues of public safety, and no condition, including a financial condition, may result in the pretrial detention of an otherwise releasable defendant. However, a person's willful refusal to agree to lawful conditions of release may result in the detention of that person. The legislature shall enact such additional provisions as are necessary to effectuate a statewide pretrial release scheme, using the tools and resources of the various state courts, that maximizes court appearance and public safety rates for those defendants deemed eligible for release.

From these two examples, one can see that the various permutations are seemingly endless. Nevertheless, even now the various state constitutional provisions similarly range from relatively short to relatively long and more detailed. Of course, and again, states without a constitutional right to bail provision will be working on these issues in their statutes or court rules.

Under This Model, What Will Be Our Ratio of Released to Detained Defendants?

The answer to that question is unknown. As noted previously, however, it is better to enact a fair and rational process based on the law and the research first and let the ratio determine itself, than it is to come up with a ratio first and then attempt to design a process to reach that goal. Jurisdictions are reminded, however, that most actuarial pretrial risk assessment instruments only currently label approximately 10% of defendants "high" risk for failing to appear for *any* reason and for committing *any* new crime. Moreover, they

are reminded that the District of Columbia currently only detains approximately 5% of arrested defendants, and the entire justice system in that jurisdiction is relatively pleased with this number. Thus, jurisdictions should not be surprised if the ultimate number of detained defendants is 10% or even significantly lower.

What Will My "Failures" Be Under This Model?

The author cautions jurisdictions not to define "failures" pretrial as we have been defining them in America's recent history. By re-defining the risk that we hope to address – for example, by redefining failure for court appearance from any FTA to only willful FTAs with a purpose to avoid prosecution, our "failures" in the future should be extremely low.

Part VI – Essential Elements of Bail Statutes or Court Rules

As mentioned at the beginning of this paper, once a jurisdiction has done the difficult work of articulating its bail/no bail, or release/detain dichotomy based on the history, the law, the research, and the standards, the rest includes merely creating an in-or-out framework so that nothing interferes with either intentional release or detention. In short, once a jurisdiction has decided whom to release and whom to detain, model laws simply make this happen by using legal and evidence-based practices to achieve the constitutionally valid purposes of bail and no bail.

Nevertheless, there are certain fundamental themes or principles that likely should be included in any comprehensive bail scheme. The following list is derived from many sources, including: the Pretrial Justice Institute's *Key Features of Holistic Pretrial Justice Statutes and Court Rules*;[476] Harvard Law School's *Moving Beyond Money: A Primer on Bail Reform*;[477] NIC's *Fundamentals of Bail* and *Money as a Criminal Justice Stakeholder* papers;[478] the American Bar Association and National Association of Pretrial Services Agencies Standards; the D.C. and federal release and detention statutes; and conversations primarily with Alec Karakatsanis of Civil Rights Corps, John Clark of the Pretrial Justice Institute, Mike Jones of the Pretrial Justice Institute, Larry Schwartztol, of the Harvard Law School Criminal Justice Policy Program, Claire Brooker, independent pretrial consultant, and the Honorable Truman Morrison, III, Senior Judge on the District of Columbia Superior Court.

1. Provisions articulating the state's purposes and goals behind pretrial release and detention, and definitions of key terms and phrases.
2. As a part of those goals, provisions expressly articulating a strong presumption of release for all defendants and that no condition of release – particularly a financial condition – shall cause detention.
3. Provisions favoring release on citation and summons over arrest and arrest warrants, and expressing preferences of release through citation for all misdemeanors and nonviolent felony offenses.

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[476] *Key Features of Holistic Pretrial Justice Statutes and Court Rules* (PJI, 2016), found at https://university.pretrial.org/viewdocument/key-features-of-holi.
[477] *See* Harvard Law School *Primer, supra* note 3.
[478] *See* NIC *Fundamentals, supra* note 6; NIC *Money, supra* note 30.

4. Provisions allowing for evidence-based pretrial diversion of appropriate defendants.
5. Provisions eliminating all financial conditions at bail, including amounts on warrants.
6. Provisions allowing or mandating pretrial services agency functions (assessment, recommendations, and supervision) based on the law and the research.
7. Provisions articulating prompt first appearances.
8. Provisions giving defendants a meaningful right to counsel at first appearance.
9. If not already in a constitution, release provisions, including presumptions of release on a promise to appear; the use of least restrictive and individualized conditions designed to provide reasonable assurance of court appearance and public safety; various factors to be used by judges relevant to the release decision; contents of the release order; provisions articulating the procedure for dealing with violations of conditions, including those violations that result in the defendant being considered for pretrial detention; provisions expressly encouraging or mandating the use of actuarial pretrial risk assessment instruments for released defendants by favoring the assessment over pure clinical assessment, but by balancing the tool with other elements of risk relevant to flight and the danger we seek to address; provisions encouraging or mandating the use of research-based least restrictive conditions of release.
10. If not already in a constitution, detention provisions, including provisions articulating the detention eligibility net, further limiting process, and procedural due process hearing for detention; various factors judges should use in making the detention determination using principles articulated in this paper; other details made necessary by the enabling language from the main right to release provision.
11. If not already in the constitution, the requirement that judges provide written records of the reasons for imposing any and all limitations on pretrial freedom, up to and including detention.
12. If not already in the constitution, provisions dealing with speedy trial, periodic review of detained defendants, and with physically separating defendants from sentenced offenders.

13. If not already in the constitution, provisions dealing with victims and victim's rights, so long as they do not interfere with defendant rights.[479]
14. Provisions mandating data collection and performance measures by all persons in the justice system to help assure that the underlying purposes of bail are met as well as fostering conversations over the proper context for pretrial release and detention within a state.

Conclusion

While this generation of bail reform is leading to change, even jurisdictions desiring not to change nonetheless have an obligation to continually justify their current release and detention schemes based on the law and the research or face the probability of having them declared unlawful by the courts. This paper provides a detailed justification for a proposed model for release and detention in America, which is designed to follow the history, law, research and national standards at bail while attempting to fix certain longstanding problems that have plagued America's desire to create a rational and fair release and detention system. Importantly, it answers the three fundamental questions associated with the pretrial phase of the criminal case: (1) whom should we release?; (2) whom should we detain?; and (3) how should we do it?

As demonstrated in this paper, the desire to move from a "charge-based" system to one that is "risk-based" or "risk-informed," while understandable, is simply more complex than it outwardly appears. This paper attempts to illuminate those complexities and to find justifiable solutions that balance the variables found in such an undertaking. Jurisdictions might reasonably disagree with the proposed model, but they cannot disagree with the need to provide the same or similar justification for whatever model they ultimately adopt or retain.

[479] Because the person is un-convicted and at the center of a government prosecution on behalf of both individual victims as well as all persons within the state, victim's rights must never interfere with defendant rights.

Appendix One

"For instance, now," she went on, sticking a large piece of plaster on her fingers as she spoke, "there's the King's Messenger. He's in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all."

"Suppose he never commits the crime?" said Alice.

"That would be all the better, wouldn't it?" the Queen said as she bound the plaster round her finger with a bit of ribbon.

Lewis Carroll, Through the Looking Glass, at 88 (Harper & Bros. ed. 1902).

Appendix Two – A Hypothetical

John Quizzacious Public was driving down the street when he ran a red light. He was stopped and the officer quickly realized that he was driving without insurance. After using an actuarial pretrial risk assessment instrument designed to help officers in the field, the officer informed John that he scored as a "high risk," and that, therefore, he would be taken to jail and detained until his trial.

"Wait a minute," John said. "I'm going to jail for a traffic violation?"

"Yes," responded the officer. Our constitution allows detention of high risk defendants and this tool indicates that you are high risk."

"What does 'high' risk mean?"

"It means that you look like a group of similar defendants who failed to show up for court or committed a crime while on pretrial release."

"Well, I'm not one of those people," John said. "I'll come to court and stay out of trouble."

"The instrument doesn't measure individual risk," replied the officer, "so we understand that you *might* come to court and stay out of trouble, but we can't really take that chance."

"I've heard about these things," John said. "But I heard they only use risk factors; they don't use any protective factors – like, having insurance or a car that works."

"Look, we use the tool they give us. Most don't measure those things."

"Who created this risk tool?" John asked.

"Researchers," said the officer. "They decided who was risky and not risky based on a quartile method, which divided up failures into quarters. Then a group appointed by the Governor decided that the 'high' risk category didn't have enough people in it, so they changed that cutoff to include more people."

“So people can change these things whenever they want?”

“Oh sure. In fact, we’re thinking of meeting next week to shrink the ‘low risk’ category a bit more. I think people are getting riskier, don’t you?”

“Does everyone have one of these risk tools?” John asked.

“Well, not everyone,” the officer replied, “but they use them around this state, and they’re different wherever you go. Over in Kansas they still only look at your risk if you commit some serious or violent crime. They call the right to bail a right to release. Can you believe that?”

“Well, I remember seeing a case once, called *Salerno*, and it specifically said that detention was okay because it was limited to a certain class of extremely serious offenses.”

“That old case? Look, Mr. Big Brain, that case happened way back in 1987, and nobody has really taken it seriously. Besides, if the Court saw that we were detaining only high risk people, it would definitely find that to be a much more rational way to do things than by looking at charge. Get with the times, dude.”

Exasperated, John asked, “What, exactly, does this tool say I’m risky for?”

“Well, that’s an interesting question,” said the officer. “You could be risky to commit murder, or risky to get another traffic ticket. You could be risky to miss a court date, but we’ll never know if it’s willful or not. We don’t really distinguish between types of risk.”

“That seems crazy. Isn’t that what you should be doing?”

“Well, yeah, over in Kentucky they have a violence ‘flag’ that tells them that you are at an elevated risk for violence if they release you. That’s because about 1% of high risk defendants will commit a violent offense if we let them out. But Kentucky is still concerned about every crime, so just because you don’t have a flag in Kentucky doesn’t mean you aren’t high risk. The flag is more like a guarantee that you won’t get out. Plus, that flag is only based on just a few cases. You see, it’s hard to create a tool to predict something that simply doesn’t happen that much. Anyway, you aren’t in Kentucky.”

“Look,” John said, “if 99% of defendants don’t commit a violent crime on pretrial release, and if violent crime is what you really care about, by releasing everyone you’ll be right 99% of the time. Does your risk instrument do what well?”

“Don’t be a smart-ass, Professor Cranium. We’ve always had base rate problems and nobody but you seems to care.”

“I’ve never, ever, skipped a court date in my life,” John said. “Does that tool tell you that?”

“Well, no, this particular tool doesn’t even include prior FTAs on it. That’s a long story, but these things are only as good as the data we put into them. Oh, and remember, they only have risk factors in them.”

“What do you do with low risk people?”

“Well, the other day, I stopped as guy from strangling his wife. She was really messed up – went the hospital in a coma. But I ran the assessment and the guy was ‘low’ risk. He kept telling me he was going to kill her, but you can’t ignore the risk assessment. So I gave him a summons. I don’t know what happened after that.”

“Do high risk people always fail?”

“Oh, no. In fact, about 60% of high risk people will succeed if we let them out. Also, if we let out high risk people and put a bit of supervision on them, they’ll perform like medium risk people. It’s all kind of confusing. But it’s like your snarky base rate comment. Nobody cares about the details.”

“So, if I’m more likely to succeed than fail, why do you lock me up?”

“Well, we can’t be sure you won’t be the one who fails. Everyone we’ve locked up so far hasn’t failed, though, so we must be doing something right.”

“So,” John asked, “when you release somebody and they fail, what do you do?”

“We lock them up.”

“And when you detain people, they don’t fail, right?”

“Right.”

“That’s crazy. If someone fails on release, you say release didn’t work. And you assume release won’t work for everyone you detain. Doesn’t that just lead to more and more detention?”

“Oh, I don’t know. I saw a federal district recently that had an 80% detention rate. But they had hardly any failures to appear or new crimes, so I guess it evens out. Anyway, that reminds me that we’re building a new jail. While you’re there, you can donate.”

“So if our constitution says I can be locked up for being high risk,” John asked, “what in the world am I supposed to do to keep from being locked up?”

“You need to try not to be high risk,” the officer replied. “You know, stop being dangerous, and don’t do anything wrong while you’re high risk.”

“I never felt risky before,” said John. “What’s changed?”

“Well, I never thought people were all that risky either, until I saw that everyone was risky on the tool. I mean, *everybody is risky*! Who knew? Good thing we know now.”

“I noticed some of these other police keep stopping people and letting them go,” John said. “What’s with that?”

“Well,” the officer replied, “it’s just like the old days with broken tail lights. We’ve learned that if we stop a lot of cars and assess risk, we can take a lot of dangerous people off the street. Once they’re in jail, it takes a while before they get out. And then – here’s the beauty part – taking them to jail actually makes them higher risk for the next time I get them. The whole thing makes everyone safer.”

“I want to see my lawyer,” said John.

“Oh, you want your lawyer? Well, okay, we’ll get your lawyer, but he’ll just tell you that the Supreme Court just recently said that ‘detention is the norm, and pretrial release is the carefully limited exception.’ Now get in the car.”

CHANGING BAIL LAWS

Moving From Charge to "Risk:" Guidance for Jurisdictions Seeking to Change Pretrial Release and Detention Laws

Timothy R. Schnacke
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American law requires a broad right to pretrial release, but allows jurisdictions to create rational and fair laws allowing pretrial detention in narrow categories of cases. When jurisdictions declare who is eligible for release and detention, they create a "release/detain" dichotomy, a notion extending back hundreds of years in both America and England. Until now, virtually all jurisdictions have expressly declared most persons eligible for release, but with limited exceptions articulated through detention eligibility laws based primarily on criminal charge as a proxy for pretrial risk. These release/detain dichotomies have been clouded through the use of money, which has led to the unwise release or (far more frequently) the unlawful detention of people accused of crimes. For a number of reasons, including increased focus upon the use of money as a condition of release or a mechanism of detention, many jurisdictions are now either choosing or being forced to craft new laws articulating – upfront and on purpose – which defendants are to be released, and which are to be eligible for, and ultimately held through, pretrial detention. In most cases, jurisdictions crafting these new laws have articulated a desire to move from a charge-based system to a "risk-based" or "risk-informed" system of release and detention.

Actuarial pretrial assessment instruments are a large reason for the desire to craft new laws based on "risk," as they provide enormous benefits when compared to the traditional money bail system. Among other things, these tools have sparked this generation of bail reform by shining a bright light on our previous, inadequate, and often extremely biased methods of risk assessment (such as by charge through a bail schedule, through non-predictive and unweighted statutory factors, or through the subjective notions of bail setters) and by allowing us to see the results of those methods when assessment is used to illuminate and evaluate jail populations. They appear to be the catalyst for moving from essentially a random and discriminatory money bail system, to a system of release and detention that is done (as all of criminal justice should be done) intentionally. In addition, these tools have proven better than clinical experience (indeed, as the current end product of a long evolution of risk assessment, they are better than any other risk prediction methods we have attempted in the history of bail), are evidence-based, can provide standardization and transparency, help judges follow both the risk principle and the law, and are likely a prerequisite to other bail reform efforts.

They can guide courts and justice systems with virtually all issues concerning release (including providing rationales for quick or early release, prioritizing resources through structuring and evaluating supervision strategies, crafting responses to violations, assessing the efficacy of bond types, helping to encourage more summonses and citations, changing or eliminating nonpredictive statutory or rule-based individualizing factors, and even providing some rationale for emergency releases, when necessary), and they can assist with detention. Using them can even lead to creating more confidence in data processes and systems policies. Finally, and most relevant to this paper, these tools – and the research used to create them – can be extremely helpful for jurisdictions seeking to re-draw the line between purposeful pretrial release and detention through changes to statutes, court rules, and constitutions. Indeed, it is those tools and that research which, together, reinforce the notion that pretrial detention be more "carefully limited" than we ever thought, simply because they amply illustrate that defendants are far less "risky" than we ever thought.

Due to these tremendous benefits, jurisdictions are rightfully asking whether actuarial pretrial assessment instruments may also be used

exclusively to determine initial pretrial detention based solely on risk rather than charge. Essentially, jurisdictions are asking about the interplay between actuarial assessment tools and charge in the pretrial detention decision. This paper raises a variety of issues jurisdictions must consider as they answer that question. Some of these issues highlight the fact that actuarial pretrial assessments can easily be *misused*, a fact requiring certain legal solutions when moving from "charge" to "risk." To address various concerns surrounding the misuse of actuarial pretrial assessment (as well as other general issues and concerns raised by the law and the history of bail), this author recommends meaningful legal backstops to rein in pretrial detention based on actuarial prediction alone. These backstops include, most importantly, the creation and justification of charge-based detention eligibility nets, along with a new and improved (over existing American processes) "further limiting process" designed to further limit purposeful pretrial incarceration only to defendants posing the sort of extreme risk manageable only through secure detention. The author provides a template of language articulating a model detention eligibility net and further limiting process at the end of this paper, which is further explained and justified in a longer paper titled, *Model Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* (found at www.clebp.org). Finally, the author lists other fundamental provisions and principles that likely should be included in any comprehensive bail scheme.

The Primary Question – "If We Change, To What Do We Change?"

America is currently immersed in the so-called "third generation" of bail reform.[1] This generation, like previous generations, seeks to adopt an array of improvements to the bail system using the best available research and a

[1] *See* Nat'l Ctr. For State Courts, *2017 Trends in State Courts: Fines, Fees, and Bail Practices,* at 8, found at https://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx. *See generally,* National Institute of Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* [hereinafter NIC *Fundamentals*] (NIC, 2014); National Institute of Corrections, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial* [hereinafter NIC *Money*] (NIC, 2014). The two latter papers suggest that many of the concepts discussed within them will likely cause jurisdictions to recognize the need to change their release/detain dichotomies, but neither paper expressly articulates in detail exactly what those changes should be. Many of the concepts discussed in the present paper rely on the reader's comprehension (or at least familiarity) of the fundamentals of bail; accordingly, the author strongly recommends reading NIC *Fundamentals* and NIC *Money* as a prerequisite to reading this paper.

clear understanding of the law. In making these improvements, jurisdictions often articulate that they are using current research about defendant risk and money at bail to change from a mostly "charge-and-money-based" pretrial release and detention system to one that is mostly "risk-based" or "risk-informed." One of the hallmarks of this overall change is the adoption of strategies designed to help jurisdictions do pretrial release and detention without money. Another is the adoption and use of actuarial pretrial assessment instruments to help predict a defendant's probability of success or failure to appear for court and new criminal activity during release, rather than to rely solely on criminal charge as a proxy for defendant prediction.

These assessment tools, which represent evidence-based methods of determining certain aspects of defendant risk and of sorting defendants onto a success continuum, are the products of groundbreaking research on pretrial risk that has, in turn, formed the genesis of the entire bail reform movement. Through these instruments, jurisdictions often observe many "lower" and "medium" risk defendants in jail as well as certain "higher" risk defendants out of jail, a phenomenon that has been the catalyst of bail reform movements throughout history. Indeed, the groundbreaking nature of these tools cannot be understated; it is the tools themselves that call into question whether we should even use the word "risk" at bail at all.

At the same time, jurisdictions are recognizing that current bail laws hinder their ability to make what they believe to be evidence-based decisions during the pretrial phase of a criminal case. In particular, bail laws across America were created based on certain assumptions, including the assumption that if one is arrested on a certain serious charge, he or she is likely a "high risk" to commit the same or similar charge if released through the bail process. The current research on pretrial success and failure, however, highlights the errors of many of our historic assumptions about pretrial misbehavior. This has naturally led many jurisdictions in America to believe that their existing charge-based detention laws are either too broad or too narrow, and that therefore they do not necessarily reflect whom those jurisdictions might choose to release or detain if done more purposefully and based on current research.

Accordingly, jurisdictions across America are beginning to make changes to those laws to better facilitate purposeful release and detention using current research on pretrial success and failure. In some cases, jurisdictions hope to completely replace most or all remnants of a charge-based scheme with a

process based solely on defendant risk as measured by an actuarial pretrial assessment instrument. In its most simplistic articulation, this would allow jurisdictions to "detain all higher risk persons" as measured by an assessment tool. Detention based on prediction, however, is extremely complex, and thus the primary issue facing America today is how charge and "risk" must combine to reflect basic American principles surrounding liberty, public safety, and judicial effectiveness. In sum, as presented in a single question facing all American jurisdictions today, the issue is as follows: "If we change, to what do we change?"

Change

There is now good reason to believe that all American jurisdictions will, in fact, change their laws, policies, and practices in some manner to reflect the pillars underlying this generation of reform. Some of this change will be voluntary; indeed, from California to Maine, from Alaska to Florida, and from large jurisdictions like New York City to small ones like Mesa County, Colorado, criminal justice leaders are seeking to change by creating rational, fair, and effective release and detention systems to better follow the law and the research. For example, after studying both bail (release) and no bail (detention) for over one year, New Jersey voluntarily changed its entire pretrial system, including its constitutional right to bail provision and guiding statutes. Formal criminal justice demonstration projects, like the National Institute of Correction's (NIC's) Evidence-Based Decision Making Initiative or the Pretrial Justice Institute's Smart Pretrial Demonstration Initiative, are helping dozens of jurisdictions and several whole states through the process of voluntary change. Most recently, the Laura and John Arnold Foundation released its Public Safety Assessment for mass use, with supporting documents indicating that the tools will be used to support jurisdictions' voluntary attempts to make more purposeful release and detention decisions.[2] Many more informal efforts to voluntarily improve the bail process are too numerous to count.

Some of this change, however, will likely be forced. For example, while some jurisdictions are currently fighting lawsuits designed to eliminate secured money bonds based on federal equal protection claims, many other jurisdictions have settled those suits by implementing significant changes to their pretrial processes. In one such case, a federal judge wrote: "No person

[2] *See* materials found at https://www.psapretrial.org/.

may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond."[3] In another ongoing case, the judge wrote: "Certainly, keeping individuals in jail because they cannot pay for their release, whether via fines, fees, or a cash bond, is impermissible."[4] In yet another case, the United States Department of Justice filed a statement of interest arguing that bail practices that incarcerate indigent persons before trial solely because of their inability to pay for their release violates the Fourteenth Amendment.[5] In still another, a federal judge in Louisiana wrote that due process includes, at a minimum, a judge's consideration of a defendant's ability to pay a financial condition and findings under a clear and convincing standard as to why a defendant might not qualify for alternative conditions of release, thus making the use of money bail as a means of detention much more difficult.[6]

Finally, in another ongoing case, a federal district court judge issued a preliminary injunction against Harris County, Texas (a county that had been setting bail in ways similar to counties across America), concluding that the plaintiffs were likely to succeed on the merits of their equal protection and due process claims as to how the County used money at bail.[7] A panel of the Fifth Circuit Court of Appeals largely upheld that order, with reference to a familiar hypothetical:

> In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way – same charge, same criminal backgrounds, same circumstances, etc., – except that one is wealthy and one is indigent. Applying this County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to

[3] *Pierce v. City of Velda City*, 2015 WL 10013006, at *1 (E.D. Mo., June 3, 2015) (declaratory judgment).
[4] *Walker v. Calhoun, Georgia,* No. 4: 15-CV-0170-HLM, 2016 WL 36162 (N.D. Ga. Jan. 28, 2016) (order granting preliminary injunction) (the order was vacated and remanded on procedural grounds; the statement is used for example only).
[5] *See* United States Statement of Interest, *Varden v. City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015).
[6] *See Caliste v. Cantrell,* No. 17-6197 (Order on Summary Judgment) (E.D. La. Aug. 6, 2018).
[7] *See O'Donnell v. Harris County, Texas,* Civ. No. H-16-1414 (S.D. Tex. Apr. 28, 2017) (memorandum and opinion on motion for preliminary injunction).

> post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.[8]

All of this language is significant, and, if fully adopted by the courts, has the potential to force most jurisdictions to rapidly change their laws, policies, and practices to accommodate purposeful release and detention without money.

Federal equal protection and due process cases, however, are not the only means of forcing change. In *Lopez-Valenzuela v. Arpaio*,[9] the Ninth Circuit Court of Appeals reviewed an Arizona detention provision by merely holding it up to the United States Supreme Court's opinion in *United States v. Salerno,*[10] the 1987 opinion describing essential elements underlying any valid pretrial detention provision. After doing so, the Ninth Circuit held that the Arizona detention provision violated the federal constitution because that provision was not "carefully limited," as *Salerno* requires. Similarly, the Arizona Supreme Court recently declared another Arizona detention provision unconstitutional as violating *Salerno's* requirement that detention provisions be narrowly focused on accomplishing the government's objectives.[11] Like the money bail cases, these cases are significant precisely because most, if not all, detention provisions currently found in American bail laws have one or more constitutional vulnerabilities when held up to the requirements or guidance of *Salerno.*

Change can be forced through a catalyst within a state criminal justice system, as well. In New Mexico, for example, the state supreme court declared that a $250,000 financial condition causing the detention of a bailable defendant accused of murder was arbitrary, unsupported by the evidence, and unlawful, and, accordingly, ordered the defendant released on

[8] *O'Donnell v. Harris County, Texas,* No. 17-20333, slip op. at 20 (5th Cir., June 1, 2018).
[9] *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 782 (9th Cir. 2014).
[10] *United States v. Salerno*, 481 U.S. 739 (1987).
[11] *Simpson v. Miller,* 387 P. 3d 1270 (Ariz. 2017). Most recently, using the same basic analysis as was used in *Simpson,* the Arizona Supreme Court concluded that yet another state "no bail" provision was facially unconstitutional in *Arizona v. Wein and Goodman,* No. CR 17-0221-PR (Ariz., May 25, 2018).

nonmonetary conditions.[12] Essentially, the New Mexico Supreme Court held that the bail-setting judge was not following *existing state law*, a routine occurrence happening in virtually all states. Indeed, the New Mexico Court expressly recognized this phenomenon in that state, writing as follows:

> We understand that this case may not be an isolated instance and that other judges may be imposing bonds based solely on the nature of the charged offense without regard to individual determinations of flight risk or continued danger to the community. We also recognize that some members of the public may have the mistaken impression that money bonds should be imposed based solely on the nature of the charged crime or that the courts should deny bond altogether to one accused of a serious crime. We are not oblivious to the pressures on our judges who face election difficulties, media attacks, and other adverse consequences if they faithfully honor the rule of law when it dictates an action that is not politically popular, particularly when there is no way to absolutely guarantee that any defendant released on any pretrial conditions will not commit another offense. The inescapable reality is that no judge can predict the future with certainty or guarantee that a person will appear in court or refrain from committing future crimes. In every case, a defendant *may* commit an offense while out on bond, just as any person who has never committed a crime *may* commit one. As Justices Jackson and Frankfurter explained in reversing a high bond set by a federal district court, '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.' *Stack v. Boyle*, 342 U.S. at 8 (Jackson, J., joined by Frankfurter, J., specially concurring).[13]

This single opinion – addressing a claim raised by a public defender through the typical criminal appeals process – ultimately led to significant changes for New Mexico, including a new constitutional right to bail provision as well as an overhaul of the court rules used to provide the boundaries of bail practice.

[12] *See State v. Brown*, 338 P.3d 1276, 1278 (N.M. 2014).
[13] *Id*. at 1292-93.

Like all important issues, the bail issue will likely generate conflicting cases.[14] So far, however, all of these cases – almost regardless of the outcome – illustrate pressure to change. Moreover, jurisdictions should realize that change can be triggered for a variety of reasons beyond court opinions dealing exclusively with equal protection and due process.

In sum, if one looks at the history of bail in America, one sees that American states frequently use money to detain persons they believe are too high risk to release. This use of money as a detention mechanism allows states to ignore their current release/detain dichotomies (typically articulated in their right to bail provisions) for doing bail and no bail on purpose. Certainly, any court opinion telling states they cannot use money to detain based on equal protection or due process notions will force those states to change and to consider their dichotomies. Nevertheless, change can also be triggered by a number of other catalysts forcing states to retreat from using money as a detention mechanism, from other federal claims attacking money (such as federal excessive bail analysis), to state claims (such as right to bail), to jurisdictions merely deciding to do release and detention on purpose.[15]

The fundamental point is that America's use of money at bail is changing, and this change automatically forces states to consider moneyless pretrial release and detention models. The above examples merely reinforce the notion that jurisdictions are facing increasing challenges to their bail practices and existing laws from multiple sources. As more entities formulate national bail litigation strategies based on these and other legal theories, and as more jurisdictions recognize the inherent shortcomings of the traditional money bail system, it is unlikely that any jurisdiction will be immune from the need to change.

[14] Courts are currently struggling with discrete elements of the various injunctions, but also with basic issues over appropriate levels of scrutiny and when to apply them.

[15] Indeed, the Laura and John Arnold Foundation recently released its Public Safety Assessment to the general public, along with certain informational and training materials based on the underlying assumption that jurisdictions using the tool will want to make release and detention decisions on purpose. *See* materials at https://www.psapretrial.org/. It is often only when jurisdictions decide to do pretrial release/detention on purpose that they understand the deficiencies of their laws.

How Legal Challenges Forcing Change Affect the Primary Question

The legal challenges also illustrate that neither past nor future bail laws are immune from legal scrutiny of their rationales. Accordingly, when jurisdictions ask the primary question at bail – "if we change, to what do we change?" – the answer is not simply to replace charge with "risk" because it seems more rational to do so. Indeed, the legal challenges forcing jurisdictions to change are also requiring those jurisdictions to adequately justify their release and detention provisions, something that has not been done in America for decades. And thus, the answer to the primary question is that a jurisdiction can replace charge with risk, but only to the extent that the courts will declare it lawful. This issue is one of primary significance in the pretrial field. In 2007, the National Institute of Corrections (NIC) published a paper in which Dr. Marie VanNostrand coined the term, "legal and evidence-based practices" – versus simply "evidence-based practices" – when discussing the pretrial field and bail processes.[16] The new term was intentionally designed to remind jurisdictions that changes based on the research or evidence could only be adopted so long as they adhered to certain fundamental legal principles. The law, in short, is a check on the evidence.

Nevertheless, the evidence is also a check on the law. If a release or detention provision is based on certain assumptions, and if the research or evidence causes us to see that those assumptions are now faulty, then the laws must be changed. This is where jurisdictions find themselves today. Most of America's bail laws were built on assumptions about risk associated with charge – for the most part, that the more serious the charge, the higher the risk – without decent empirical evidence to support them, and now recent risk research is showing that many of these assumptions are flawed. Indeed, in many cases, persons facing much less serious charges are often higher risk for pretrial misbehavior than those facing more serious charges.

Thus, jurisdictions are faced not only with justifying new laws, but also with justifying old ones. The fundamental point is that all bail laws – past or present – must be justified to survive legal scrutiny by the courts. Jurisdictions cannot simply assume that the particulars of pretrial detention

[16] Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services,* at 17-18 [hereinafter VanNostrand] (NIC/CJI, 2007).

are currently lawful simply because they were once declared lawful. This generation of bail reform means that states must likely start with a clean slate, so to speak, and hold up both current and future laws to fundamental legal principles and to the most recent pretrial research to assess their legality. It is a process that must be done without any shortcut.

Unfortunately, many states are apparently tempted to take the significant shortcut of simply replacing "charge" with "risk" without adequate justification. Such a shortcut is tempting primarily because it appears logical: if jurisdictions can adequately determine defendant risk using an actuarial pretrial assessment instrument, then it makes sense to change their constitutions and statutes to allow for detention broadly based on risk and then to let the actuarial tool sort people out. But can a constitution be changed to include a broad detention eligibility net? Should actuarial risk assessment ever be used to determine detention eligibility or detention itself? These are questions that must be answered prior to the creation of any new detention law because the courts will undoubtedly require it at some later time. With the kind of justification that answers these questions, jurisdictions can create "model" bail laws and corresponding practices, which are based on fundamental legal principles and the most recent empirical research, and which lead to a purposeful in-or-out decision with nothing hindering it. Without that justification, however, bail laws and practices are likely to violate the constitutional rights of countless defendants until an appellate court can rectify the error.

In 2014, the National Institute of Corrections (NIC) published a paper written by this author titled, *Fundamentals of Bail,* which describes certain essential topics jurisdictions must know and understand to make meaningful changes to the pretrial phase of a criminal case.[17] The process of justifying both current and future bail laws requires knowing how those fundamentals should be used to guide jurisdictions in re-drawing the line between pretrial release and detention. The process of justification involves thinking through the various issues through the lens of lessons from the fundamentals so that answers to certain foundational questions at bail – "whom do we release, whom do we detain, and how do we do it" – are legally justifiable.

[17] *See* NIC *Fundamentals*, *supra* note 1. The fundamentals include: (1) why we need pretrial justice; (2) the history of bail; (3) the legal foundations of bail; (4) the pretrial research; (5) the national standards on pretrial release and detention; and (6) universally true definitions of terms and phrases at bail.

In 2016, NIC partnered with the Center for Legal and Evidence-Based Practices (CLEBP) to research model bail laws, legal and empirical justification, and the interplay between actuarial risk and charge to determine the issues jurisdictions will face if they must justify or make changes to current detention eligibility laws. This paper incorporates that research to describe those issues and to articulate potential solutions, focusing on broad concepts that jurisdictions will need to consider during the process of change.

Another paper, published by CLEBP in 2017, provides a more in-depth and detailed inquiry leading to the creation of this author's own release and detention model, which is then justified through a three-part analysis incorporating the fundamentals of bail.[18] That more detailed paper essentially argues that a model bail law is merely one that is legally justified in the way that it initially draws the line between purposeful release and detention. Once that line is drawn, it is a relatively simple exercise to make sure the persons who should be released actually get released, and the persons who should be detained are detained through a fair and transparent process. By recognizing the important issues as presented in the instant paper, and perhaps by looking at the more in-depth analysis leading to one author's "model" detention process, jurisdictions will begin to understand the need to engage in the difficult but necessary work of justifying their own laws so as not to violate fundamental legal principles. In sum, this shorter paper mostly just raises the issues (albeit with some tilting toward answers for the most important ones); the longer paper provides a template for how American states might analyze and respond with justification to those issues in their own "models."

Prerequisites to Understanding the Issues

There are certain prerequisites in the form of foundational principles or truths that jurisdictions must know before understanding the various issues and lessons from the fundamentals of bail presented in this paper. Virtually all of these principles are covered somewhat in the two previous NIC papers, *Fundamentals of Bail* and *Money as a Criminal Justice Stakeholder.* Moreover, they are explored in depth in the longer CLEBP *Model Bail Laws* document released in 2017. They are condensed and re-ordered for relevance

[18] *See* Timothy R. Schnacke, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention* [hereinafter *Model Bail Laws*], found at www.clebp.org.

in this paper to help the reader fully understand the issues facing jurisdictions seeking to change their release/detain dichotomies. In this author's opinion, they are fundamental notions that address areas of confusion, and they must be understood (and hopefully embraced as true) in order to know how to resolve the various issues raised in this paper.

For example, it is crucial to know a foundational principle that preventive detention addresses both public safety and flight (versus the misconception that it only deals with danger), which is gleaned from various sources such as the history of bail. Knowledge of this basic truth helps the reader to better understand lessons from a more in-depth look at the history of bail, which raises issues surrounding intentional and unintentional detention for both flight and public safety. This, in turn, helps jurisdictions to change. Likewise, it is crucial to know that throughout history American law has required (or at least adopted) both "detention eligibility nets" and "further limiting processes"[19] designed to narrow those nets to persons of such high risk as to require pretrial detention. Knowing that basic truth helps the reader to better understand the lessons from a more in-depth look at the law, which provides more detailed legal justifications for crafting both nets and processes. The various foundational prerequisite principles are as follows.

1. There Has Always Been Both "Bail" and "No Bail"

First, ever since there was a thing that remotely resembled bail or pretrial release in America today, there was also "no bail," or pretrial detention. Jurisdictions may not impose excessive bail (i.e., conditions of release or detention that are excessive in relation to the government's lawful purposes), but they are free to determine – within proper legal boundaries – which classes of defendants might be denied bail or release altogether.[20]

[19] These quoted phrases were adopted by the author to best describe their functions. Historically, they have apparently not been so labeled, a fact that has slowed reform. Nevertheless, understanding a "no bail" provision to contain, first, a "detention eligibility net" is crucial for understanding why state courts do not (and should not) allow intentional detention outside of a net; if a defendant is ineligible for detention, then detaining him negates the net and thus an entire constitutional provision. The "further limiting process" (which can be articulated broadly, as "proof evident, presumption great" or narrowly, as "but only when a judge finds clear and convincing evidence of substantial risk of harm . . . etc.), recognizes that this author has never seen any state allow automatic detention based on charge alone. In sum, America has always required a process that allows some way out of the net, even if the findings in that process seem minimal. In his dissent in *Salerno,* Justice Marshall noted that even an exception to the right to bail as ingrained in American history as capital crimes, if made irrebuttable, would likely violate due process. *See Salerno,* 481 U.S. 739, 765 n. 6 (1987).

[20] While not explicit, and while receiving relatively sparse attention in the bail literature, this notion is typically gleaned from a reading of *Salerno,* 481 U.S. 739, and cases cited therein. Over the decades many

2. All "No Bail" Provisions Are Preventive Detention Provisions

Second, all "no bail" or detention provisions should be viewed as preventive detention provisions. Preventive detention is simply lawfully detaining someone to prevent some stated behavior. In bail, the only two lawful purposes for detaining someone are to manage extreme risks of flight or dangerousness during the pretrial phase of the criminal case. Accordingly, even the earliest American formulations of the release/detain dichotomy, which often provided a right to bail for all persons except those facing capital crimes, singled out that small category of cases for potential detention based on the fear that defendants facing death would flee.[21]

For a number of somewhat complicated reasons, when preventive detention for noncapital defendants was being debated in the 1960s through the 1990s, it was debated primarily in the context of public safety, which led persons to erroneously conclude that preventive detention involves only danger. Moreover, the fact that *United States v. Salerno,* the Supreme Court case addressing pretrial detention in the Bail Reform Act of 1984, focused solely on arguments concerning public safety only added to the confusion. Nevertheless, jurisdictions should realize that the *Salerno* Court discussed preventive detention in the context of public safety only because those particular provisions were being argued before the Court; although the Act also included flight as a basis for detention, flight simply was not at issue, and detention based on risk of flight had been conceded and justified through other legal avenues. Accordingly, jurisdictions should understand that preventive detention involves purposefully detaining a defendant "without bail" based on a prediction of either flight or dangerousness – the two constitutionally valid purposes for limiting pretrial freedom.

3. All "No Bail" Provisions Are Made Up of "Detention Eligibility Nets" and "Further Limiting Processes"

Third, throughout American history, virtually all, if not literally all, "no bail" or detention provisions have included a detention eligibility net, from which certain defendants might potentially be confined pretrial, and a further

American states have relied on the *Salerno* opinion's analysis to designate classes of defendants who are "unbailable" or "detainable." Other states adopted detention laws prior to *Salerno,* which, in some ways, makes those laws even more vulnerable to constitutional attack.

[21] *See United States v. Edwards,* 430 A.2d 1321, 1326 (D.C. Ct. App. 1981) (quoting Laurence H. Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell,* 56 Va. L. Rev. 371, 377-79, 397, 400-02 (1970)) [hereinafter Tribe].

limiting process, which weeds out only the riskiest defendants within the net for actual pretrial detention. The earliest of these net/process formulations comprised of a net consisting of capital defendants and a limiting process requiring judges to determine whether the "proof was evident or presumption great" as to the charge (i.e., if the proof was not evident or the presumption not great, the person would be released). Even the so-called detention cases, a series of cases that struggled to find rationales for detaining noncapital defendants on purpose (and outside of enacted law) in the 1960s and 1970s in America, often included an implicit net of "persons already participating in a trial," as well as a further limiting process that required judges to only allow detention in "extreme and unusual circumstances."[22]

More recent articulations of detention eligibility nets involve listing other crimes, such as treason, or classes of crimes, such as violent felonies. More recent "further limiting processes" have included language mirroring the federal law requiring judges to determine whether "no condition or combination of conditions" suffice to provide reasonable assurance of court appearance or public safety. Nets vary widely among the states (from capital offenses to a wide variety of charges, groups of charges, charges with preconditions, and even seemingly limitless nets that are likely too broad to survive constitutional challenge in all cases). Moreover, limiting processes other than the "no condition" process, listed above, exist (from "proof evident, presumption great" for an alleged charge to processes even more rigorous than the one approved in *Salerno*). Overall, net/process combinations are gleaned only by examining the entirety of any particular state's bail law.

Students of American federal bail law will recall that the Bail Reform Act of 1984 expanded pretrial detention greatly, and, in doing so, created a virtually unlimited net for flight by allowing judges to detain defendants in any case upon a motion by the prosecutor alleging the defendant posed "a serious risk that [he would] flee."[23] This was a significant shift, and yet it was a shift that had scant justification in the legislative history of the 1984 Act, was likely based on a flawed reading of the Bail Reform Act of 1966, and was never

[22] *See, e.g., United States v. Abrahams,* 575 F.2d 3, at 8 (1st Cir. 1978) ("This is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail."); *United States v. Schiavo*, 587 F.2d 532, 533 (1st Cir. 1978) ("Only in the rarest of circumstances can bail be denied altogether in cases governed by § 3146.") (internal citations omitted). These detention cases are explained in detail in *Model Bail Laws, supra* note 18.
[23] 18 U.S.C. § 3142 (f) (2) (A) (1984).

reviewed by the Supreme Court. Indeed, had the Court reviewed detention based on flight for *any* case, it likely would have balked at the fact that the provision was not limited by charge (a requirement of the danger provision), and likely would have at least mentioned that the only justification for pretrial detention based on flight rested on dubious authority.

Specifically, when enacting the Bail Reform Act of 1984, Congress used *United States v. Abrahams*[24] as its singular precedent for "codify[ing] existing authority to detain persons who are serious flight risks."[25] Congress did so despite the fact that *Abrahams* rested on dicta from a federal district court opinion, which, in fact, refused to detain defendants based on flight. Moreover, the *Abrahams* holding never found its way beyond mere mention within the First Circuit Court of Appeals.[26] Indeed, among the cases cited within the *Abrahams* opinion, those that dealt with intentional detention with no conditions whatsoever were concerned almost exclusively with a court's authority only to purposefully detain to protect witnesses.[27] Purposeful detention for flight for noncapital defendants was a historical aberration as well as novel to even modern American justice. In sum, *Abrahams* was clearly aberrant, and yet it served as Congress' somewhat perverted foothold for pretrial detention based on flight. The fundamental point is that purposeful pretrial detention for risk of flight by noncapital defendants was not some deeply rooted American tradition when Congress began codifying it without any net. The release of all noncapital defendants was. The better practice, by far, is to rely on the same principles of justice that require a detention eligibility net for danger to require a similar net for flight.[28]

[24] *United States v. Abrahams*, 575 F.2d 3 (1st Cir. 1978).
[25] S. Rep. No. 98-225, at 18, 1983 WL 25404, at *8 (1984).
[26] The panel in *Abrahams* reviewed several cases for guidance, but was ultimately persuaded by three sentences from a 1969 district court opinion surmising, without support, that "it has been thought generally that there are cases in which no workable set of conditions can supply the requisite reasonable assurance of appearance at trial." *United States v. Melville*, 306 F. Supp. 124, 127 (S.D.N.Y. 1969). A review of all cases citing to *Abrahams* reveals that other circuits avoided the argument altogether or mentioned *Abrahams* in passing (including a fairly long list of New York Federal District Court cases extending beyond the Bail Reform Act of 1984); it was only the First Circuit that ever cited to *Stack v. Boyle* and *Abrahams* as twin authority for the proposition that courts could detain bailable defendants facing noncapital charges through some extra-statutory "inherent" authority when "no condition or combination of conditions" under the Bail Reform Act of 1966 would suffice to provide reasonable assurance of court appearance.
[27] For a lengthy discussion tracing the detention of bailable defendants through American history as well as research indicating the aberrational nature of *Abrahams*, *see Model Bail Laws*, *supra* note 18.
[28] Those principles include due process and excessive bail as articulated in *Salerno* (*Abrahams* was decided before *Salerno*) as well as principles gleaned from the research, which indicates that very few defendants willfully flee to avoid prosecution, and that the vast majority of court appearance issues for less serious cases can be addressed with less restrictive release conditions and bond revocation.

Thus, overall (and as further discussed *infra* in the sections raising other issues gleaned from the history and the law), it is correct to say that both the history of bail and the law likely require limiting the possibility of pretrial detention to some group of persons through the creation of a detention eligibility net, and then winnowing down that number through some further limiting process. American federal law has never allowed a truly unlimited net for danger, and its allowance of a virtually unlimited net for flight is significantly flawed. Moreover, and importantly, the federal law has never allowed any part of a net automatically to lead to detention. This is also true in virtually all states, even though the issue is clouded by a variety of complicating factors, including states using money to detain, a scarcity of case law providing the appropriate boundaries, and the continued use of limiting processes such as "proof evident presumption great" for so-called "categorical" no bail provisions.

From a release standpoint, a detention eligibility net should be viewed as a carefully limited, justifiable exception to an overall purposeful process that requires pretrial release. From a detention standpoint, a detention eligibility net should be viewed only as an initial, rational limit to unlimited potential pretrial detention based on a legitimate finding of presumed risk. It allows some small number of defendants to be considered for detention, but then requires a defendant's release if the government cannot show a further, higher level of individual risk to do the things traditionally leading to pretrial detention. Simply put, because America has never been, and should never be, a place where pretrial detention is potentially available to everyone in every case, jurisdictions must draw purposeful lines between release and detention by using legally justified and limited detention eligibility nets and further limiting processes.

4. Nets and Limiting Processes Require Legal Justification

Fourth, throughout history, both detention eligibility nets and further limiting processes required legal justification through fundamental legal principles mandating at least some findings indicating the need for the provisions. For example, in the detention cases of the 1960s and 1970s, noted above, court opinions articulated justifications and limits for various individual instances of detention. Similarly, in 1970, the District of Columbia Court Reform and Criminal Procedure Act (the first law to allow pretrial detention based on danger) articulated a net designed to allow

examination for potential detention of "selected defendants, in categories of offenses characterized by violence," "the most dangerous" of defendants who commit crimes while on bail, and "dangerous defendants in certain limited circumstances."[29] This detention eligibility net was further narrowed by a limiting process, which included a due process-laden hearing from which a judge was required to conclude that: (1) there was clear and convincing evidence that the person was eligible for detention; (2) based on the relevant factors, there was "no condition or combination of conditions of release which [would] reasonably assure the safety of any other person or the community;" and (3) except for persons believed to be obstructing justice, there was substantial probability that the defendant committed the offense charged.[30] In 1981, the D.C. Court of Appeals reviewed the 1970 Act for constitutionality and, in addition to general analyses based on principles of due process and excessive bail, the court specifically listed the various studies, statistics, and reports used to justify that particular net and further limiting process.[31]

As another example, the Bail Reform Act of 1984 copied, in the main, the limiting process articulated by the 1970 D.C. Act (albeit adding certain rebuttable presumptions) but significantly widened the detention eligibility net. Nevertheless, Congress justified that wider net through legislative findings that those within the net were a "small but identifiable group of particularly dangerous defendants" who posed an "especially grave risk" to the community and for whom neither conditions nor the prospect of revocation sufficed to protect the public.[32] In *United States v. Salerno,* the United States Supreme Court reviewed both the Act's net and the process under traditional legal principles, but also specifically noted that the law:

[29] H. Rep. No. 91-907, at 82, 83, 91, 181 (1970). The net included defendants charged with "dangerous crimes," "violent crimes," (more expansive than dangerous crimes), and any crime in which the defendant threatened to harm a witness or juror during the criminal proceeding. This latter category should not be seen as an "unlimited net," as it was significantly narrowed by the witness/juror distinction. Indeed, until then, detaining persons accused of threatening witnesses and jurors had been accepted as a part of a judge's inherent or contempt power, and the provision was drafted merely to reflect that fact.
[30] *See* D.C. Code Ann. § 23-1322 (b) (1970).
[31] *See United States v. Edwards,* 430 A.2d 1321, 1326 (D.C. Ct. App. 1981).
[32] S. Rep. No. 98-225 at 6-7, 10, 20, 1983 WL 25404 (1984). The 1984 Act had six categories of detention eligible defendants: (1) those charged with "violent" crimes; (2) those charged with a crime punishable by life in prison or death; (3) those charged with drug offenses punishable by 10 years or more in prison; (4) those charged with any crime in which they posed a serious risk of obstructing justice via witnesses and jurors (like the 1970 Act); (5) those charged with any felony after two or more convictions of crimes found in the first three categories; and (6) those charged with any crime posing a serious risk that the defendant would flee. This final category represents a virtually unlimited net for flight, but, as noted previously, the provision was never reviewed by the Supreme Court, had no decent rationale, and was based on a strained reading of the law at the time.

"(1) 'narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming,' [and] (2) 'operate[d] only on individuals who have been arrested for a specific category of extremely serious offenses' – individuals that 'Congress specifically found' were 'far more likely to be responsible for dangerous acts in the community after arrest.'"[33] Once again, the fundamental point is that jurisdictions may not simply create new nets and processes without justification, and they may not even assume that old bail laws are currently lawful prior to justification based on better pretrial research in this generation of reform.

5. Most Nets and Processes Have Not Been Adequately Justified and Virtually All Have Also Been Ignored Due to the Use of Money

Fifth, most jurisdictions have not adequately justified their current detention eligibility nets and limiting processes, and have ignored even the best ones by opting, instead, to allow the use of money to make release and detention decisions. More importantly, jurisdictions appear to be largely unaware that bypassing a lawfully created detention eligibility net by using money to detain defendants on purpose is unconstitutional.

This lack of knowledge often surfaces through a pervasive question concerning the legality of money as an intentional detention mechanism. That question deals with the right to bail, and the fact that this author (as well as the United States Supreme Court)[34] equates the right to bail to a right to release, and also teaches that, historically speaking, whenever one sees bailable defendants in jail, it is a marker and a cause of bail reform. In response, people understandably ask, *"Wait, I see bailable defendants in jail all the time. In fact, people are 'held on bail' routinely. That's not unlawful or I would have heard about it, and it's been going on for as long as I have been alive without any sort of meaningful reform to fix it. Why is that?"*
The answer is fairly simple, but relies on a bit of history to understand.

Early American formulations of the right to bail were largely attempts to eliminate the discretion left in the English bail system, and thus the earliest constitutional provisions (which were later copied by most American states)

[33] *Lopez-Valenzuela v. Arpaio,* 770 F.3d at 772, at 779-80 (9th Cir. 2014) (quoting *Salerno,* 481 U.S. at 748-755) (internal citations omitted).
[34] *See Stack v. Boyle,* 342 U.S. 1, 4 (1951) (equating the right to bail with "the right to freedom before conviction" and "the right to release before trial").

created a broad and absolute right to bail for noncapital defendants.[35] Bright line bailabilty (in the form of "all persons are bailable except," the exceptions being articulated in detention eligibility nets and further limiting processes) was an attempt to set forth, up front, who would be released and who would be potentially detained. Bailable defendants were expected to be released, and the release of bailable defendants was effectuated by using personal sureties and "recognizances," meaning that the sureties (and sometimes the defendant) would promise to pay an amount to be assessed only upon default, akin to what we call "unsecured" bonds today. There were no commercial bail bondsmen charging fees or taking collateral, and so as long as a defendant could offer up persons as sureties, they were typically released. This all worked well until the 1800s.[36]

In the 1800s, America started running out of the once-plentiful personal sureties. This lack of sureties led to the detention of bailable defendants, which, as it always had before in England, led to efforts at reform simply because bailable defendants were expected to be released. Before judges turned to commercial sureties around 1900, however, those judges first tried to see if the defendants could "self-pay" the financial conditions. They could not, and so defendants lacking sureties began bringing legal claims arguing that the amounts were excessive. It was precisely at that moment in time that the Excessive Bail Clause of the United States Constitution (and similar clauses in state laws) could have come into play for judges to declare a right to a financial condition that one could afford. Instead, however, judges crafting excessive bail jurisprudence held the opposite: the defendant did not have the right to an amount of bail he could "make." This line of cases is routinely cited today by the commercial bail industry, as it relies on unaffordable financial conditions to justify its insertion into the criminal justice system. [37]

[35] *See* Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139, 1162 (1971-1972).
[36] This history has been detailed in *Fundamentals* and with copious citations in *Money, supra* note 1, as well as reviewed and further explained in *Model Bail Laws, supra* note 18.
[37] This excessive bail jurisprudence is discussed as "the unfortunate line of cases" in NIC *Money, supra* note 1, at 32. Jurisdictions such as the federal system and the District of Columbia have largely erased these cases by declaring, legislatively, that a financial condition may not be set that causes the detention of a defendant. The claims in the current equal protection cases are based on 14th Amendment jurisprudence, and could also effectively erase the unfortunate line of cases based on excessive bail. Two scholars have dissected the federal cases comprising this "unfortunate line" (which are most frequently used by the for-profit bail industry to argue for keeping money bail), and have found them to be "illegitimate." *See* Colin

Importantly, however, this jurisprudence only applied to so-called "unintentional detention." Unintentional detention happens when a judge sets bail, signs a release order, and picks an amount but *does not make any record of wanting the defendant to remain in jail*. When this happens, the law assumes the judge meant to release the defendant and treats the resulting detention as simply the unfortunate byproduct of a conditional release system.

Nevertheless, this jurisprudence did not apply to *"intentional detention."* Indeed, whenever judges would refuse to set bail for a bailable defendant, or whenever judges would set bail but make a record indicating they intended the defendant to stay in jail, both state and federal appellate courts would declare the practices unlawful.[38] The rationales – especially in state courts – include the unlawfulness or dishonesty of judges adding an exception to the right to bail as well as articulating that purposeful detention outside of the eligibility net negates the exception clause altogether. In deciding a recent motion for preliminary injunction in Harris County, Texas, the federal judge indicated that detaining otherwise bailable defendants outside of a detention eligibility net on purpose was "doing an end run" around Texas' constitutional exception to bail for misdemeanor defendants.[39]

There are significant problems with drawing a line between unintentional versus intentional detention of bailable defendants – for example, once a

Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail,* 26 Wm. & Mary Bill Rts. J. 589 (2018).

[38] For state cases, *see, e.g., Locke v. Jenkins*, 253 N.E. 2d 757 (Ohio 1969) (ordering judge to set bail for bailable defendant); *Simms v. Oedekoven*, 839 P.2d 381 (Wyo. 1992) ("The State, in effect, is seeking to invoke an exception to what is a clear extension to the right to bail. . . . There is a clear exception for capital offenses only when the proof is evident or the presumption great, and there is no indication that there is an exception to be found with respect to the right to bail if the only sufficient surety is detention."); *State v. Brown* 338 P.3d 1276, 1292 (N.M. 2014) ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release."). For federal cases, *see, e.g., Galen v. County of Los Angeles,* 477 F.3d 652, 660 (9th Cir. 2007) ("The court may not set bail to achieve invalid interests.") (citing *Wagenmann v. Adams,* 829 F.2d 196, 213 (1st Cir.1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent an arrestee from posting bail); *see also Stack v. Boyle* 342 U.S. 1 (1951) (in addition to equating the right to bail with the "right to release before trial," and the "right to freedom before conviction," Justice Jackson wrote in concurrence that setting a financial condition in order to intentionally detain a defendant pretrial "is contrary to the whole policy and philosophy of bail."). *Id.* at 4, 10.

[39] There are many compelling reasons based on federal and state law to never detain on purpose beyond a state's lawfully enacted "detention eligibility net." Perhaps the most compelling, however, is that by allowing purposeful detention outside of a net, a state is essentially allowing unlimited discretion to detain virtually any defendant into a process that was, when it was created, designed to dramatically limit discretion to detain. In short, purposeful detention outside of a net negates the net.

defendant is held for a day or two, does not the unintentional detention become intentional? But the most serious problem with what this author calls the "excessive bail loophole" (allowing unintentional detention through money) is that it has the result of allowing detention (de facto "no bail") for *any* charge through the bail process, thereby skipping whatever process for lawful purposeful detention a state may have enacted through exceptions to a bail clause. Based on current excessive bail jurisprudence today, if any particular judge desires to detain a defendant on purpose, that judge can do so simply by not making a record of intent to detain.

This situation is especially distressing given the history of bail because it allows unlimited discretion to detain back into a release and detention system designed initially to drastically reduce, if not eliminate, discretion at bail. Moreover, it masks the need for bail reform because it looks as though American law has erased the notion that bailable defendants must be released (a notion prompting bail reform when bailable defendants are detained) and has given the practice of detaining bailable defendants a gloss of legality.[40]

Thus, the answer to the question quoted in italics above is that one sees bailable defendants in jail today because of a loophole in American law that allows for the unintentional detention of bailable defendants. Even though it does not extend to intentional detention, intent to detain can be easily masked by judges simply not making a record of intent. The excessive bail loophole has confused bail practice, has masked the need for bail reform, and has led to the unfortunate impression that the right to bail is merely a right to have one's bail "set." Perhaps most importantly, it has given discretion to judges to detain virtually anyone they want – the opposite of what America intended when it initially crafted right to bail clauses. It is actually a paradox to "hold someone on bail" – it is absurd; a contradiction in terms. Historically, it was simply never supposed to happen.[41]

Today, there is also some movement toward jurisdictions creating "guidelines," "praxes," or "matrices," which provide system-approval of

[40] All of this is being rectified through the equal protection cases being brought by Civil Rights Corps and others. Those cases are showing constitutional violations that do not rely on whether the detention was intentional or unintentional. In short, if the money causes an equal protection violation, it must not be used, and if that money stands in the way of release, the defendant must then be released.
[41] *See* NIC *Fundamentals, supra* note 1, at 13 (introduction).

various responses to assessed risk (and often with a combination of charge and risk or probabilities of success). While these documents are helpful in many ways, and while they provide a needed, purposeful system response to a historically neglected area of the law, to the extent that they declare a category of defendants otherwise bailable by law "detainable" or "presumptively detainable," they are simply not following the law. This should be evident to those jurisdictions because detaining bailable defendants is only possible in those instances by using unattainable financial conditions, and, as noted above, using money to purposefully detain an otherwise bailable defendant (thereby bypassing the lawfully created detention eligibility net) is unconstitutional. The practice of allowing intentional detention of bailable defendants through matrices (and money) only bolsters the need for jurisdictions to recognize that money should be removed as a tool at bail. The history of bail illustrates that secured money bonds have interfered with both lawful pretrial release and detention ever since America began using them, and so it is likely that the elimination of secured financial conditions is a necessary requirement of meaningful bail reform.

Removing secured financial conditions at bail will force states to cease ignoring their existing nets and processes for purposeful detention. In some cases, this will cause states to seek to create new nets and processes. This can be done, but, again, those elements must be narrowed and justified legally. In this author's opinion, every element of a system of potential detention must be narrowed and justified *independently*. Thus, it should not be allowable to create an unjustified or overbroad detention eligibility net with the assumption that the limiting process alone will ultimately sort defendants within the net. Thus, for example, states should not be able to reserve for potential detention defendants arrested on "all charges," or even for "all felonies," without some justification for why all charges or all felonies should be considered for detention, and with only the hope that a further limiting process will save the overbroad or unjustified net. Also, in this author's opinion, presumptions toward detention can never be adequately justified.

6. Current Nets and Processes Are Flawed

Sixth, all current nets and processes contain certain flaws as illuminated by the history and the law. Historically, detention eligibility nets have always gradually been widened, likely due to the fact that detention proves itself;

that is, when a defendant fails while on release, jurisdictions believe that he should have been detained, and when a defendant does not fail while he is detained, jurisdictions believe that detention has worked.[42] Thus, there is a bias toward creating ever-wider nets, and yet those wider nets have typically not been justified by findings supported by any evidence. Instead, the nets are typically widened due to public opinion about crime generally, changes in attitudes concerning particular crimes in the news, and politics.

Indeed, current risk research contradicts many of the older justifications for inclusion of various charges within detention eligibility nets. Moreover, the further limiting processes currently found in American law are either ignored, or considered to be woefully inadequate to the detention decision. Indeed, the "proof evident" process is likely facially unconstitutional in any state, and the further limiting process most often used today for more recent preventive detention provisions – that "no condition or combination of conditions suffice to provide reasonable assurance," is subjective, resource driven (larger jurisdictions often have more resources, such as supervision techniques, to help with conditions than smaller ones), has never adequately defined certain key terms such as danger or flight, and has shown, in fact, to be insufficient in adequately limiting pretrial detention. In *Salerno,* the United States Supreme Court emphasized the need to determine the "nature and seriousness of the danger posed by the suspect's release,"[43] but most of America's current limiting processes do not do this. In sum, most current detention eligibility nets and further limiting processes are constitutionally vulnerable.[44]

[42] According to Professor Laurence Tribe, "The pretrial misconduct of [released] persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could safely have been released, its errors will be invisible." Tribe, *supra* note 21, at 375. In other words, "the degree to which judges wrongfully detain defendants is unknowable because their decisions are 'unfalsifiable.'" Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment,* 86 J. of Crim. L. and Criminology 415, 428 (1996) [hereinafter Fagan & Guggenheim] (quoting John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform,* 76 J. Crim. L. & Criminology 1, 28 (1985)); *see also* Harvard Law School Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform,* (2016) at 19 ("[I]f . . . almost all 'high risk' defendants are detained, it becomes impossible to test whether individuals who receive that designation actually have high rates of pretrial failure.") [hereinafter Harvard *Primer*].

[43] *Salerno*, 481 U.S. at 743.

[44] *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, *Criminal Procedure,* at 12.2 (4th ed., West Pub. Co. 2015) [hereinafter LaFave, et al.]. LaFave, et al., specifically point out the vulnerabilities from lack of procedural safeguards, but the provisions are equally vulnerable due to many other aspects found in the *Salerno* opinion, including lack of justification for the detention process to begin with. After reviewing some of the concepts in this paper, the reader will likely correctly conclude that some constitutional right to bail (and detention) provisions are worse than others, and thus some more likely than others to fail under judicial scrutiny.

7. These Flaws are Being Discovered by the Courts

Seventh, these flaws and vulnerabilities are now being more closely examined. While relatively few cases have been decided at the time of this writing, there is now the possibility of a wave of cases with courts holding up jurisdictions' current release and detention schemes to fundamental legal principles and declaring them unlawful. This is due not only to flaws that existed when the provisions were enacted, but also to flaws illuminated by the current pretrial research. When they examine detention provisions, the courts will look not only at a constitutional provision, but also to implementing statutes or rules to see if, overall, detention practices as implemented throughout the law are rational, limited, and fair. In many cases, courts will find flaws with practices that will suggest changes in the law. In other cases, courts will find flaws with the laws themselves. In some cases, these flaws will not be easily fixed.

8. States Should Thus Consider Starting With a Clean Slate

Accordingly, eighth, jurisdictions should recognize the possibility of needing to start with a clean slate when developing release and detention eligibility nets and processes. As noted previously, just because a detention eligibility net was once declared lawful does not mean it is currently lawful, and jurisdictions should not therefore think, for example, that certain charges found by a previous legislature to present a high pretrial risk would be found to present that same high risk today.

9. Addressing the Use of Money at Bail is Necessary For Change

Finally, ninth, all of this is academic if jurisdictions do not take precautions to address the things that are likely to interfere with actualizing any new release and detention provisions. As noted above, this necessarily requires jurisdictions to address the use of secured money bonds as a prerequisite to changing (or simply using) a release/detain framework or dichotomy, as secured money bonds interfere with both purposeful release and detention. Moreover, it may also require them to address the cultural or adaptive change necessary to create purposeful in-or-out processes, to embrace the risk of intentional release, and to fully understand the need for certain additional resources (such as pretrial services functions) required to make the release process work in a moneyless system.

Lessons From the History of Bail

When jurisdictions seek to change their bail laws, they must have some understanding of the history of bail for perspective.[45] Understanding bail's history means understanding that America chose to initially create a broad right to pretrial release – primarily to all but capital defendants – to further the country's fundamental notions of liberty and freedom. Additionally, America took traditional English factors going to discretionary bailability – nature of the charge, criminal history, and evidence of guilt – and relegated them merely to informing the adjustment of the financial condition.

Moreover, and importantly, these financial conditions were never supposed to lead to detention. Indeed, early America equated the right to bail to the "right to release before trial,"[46] and so it used England's system of personal sureties administering mostly what we call today unsecured bonds (requiring sureties only to promise to pay an amount of money if the defendant fled) to make sure that bailable defendants actually obtained release. This system worked until the 1800s, when America began running out of personal sureties. As noted previously, faced with this dilemma, judges attempted to allow defendants to self-pay, but quickly realized that requiring money upfront (i.e., in the form of so-called "secured bonds") also led to the detention of bailable defendants.

As more defendants were detained for lack of money, American law interacted with the history to allow so-called "unintentional detention," which happened whenever a judge ordered the defendant released but the defendant nonetheless remained detained due to lack of money. In sum, so long as a judge did not expressly articulate a purpose to detain the defendant intentionally, the law allowed detention due to lack of money.[47] America

[45] For a broad overview of bail's history, *see generally* NIC *Fundamentals, supra* note 1, at 32-56; NIC *Money*, *supra* note 1, at 13-37. *See also, A Brief History of Bail,* found in the American Bar Association's Judges' Journal, at https://www.americanbar.org/groups/judicial/publications/judges_journal/2018/summer.html (ABA, Summer 2018).

[46] *Stack v. Boyle,* 342 U.S. 1, 4 (1951). Likewise, the Court in *United States v. Salerno* has noted that "liberty" – a state obtained only through release – is the essence of the right. *See* 481 U.S. 739 at 755 (1987). It is only through the adoption of the "excessive bail loophole," discussed *infra* notes 36-40 and accompanying text, that America began slowly disassociating the right to bail with the right to release before trial.

[47] As explained previously, by making "unintentional detention" through the bail process legitimate, the law blurred that practice with the traditionally unlawful practice of "intentional detention" of bailable defendants, thus masking the need for bail reform over the last century. *See* discussion *infra* at notes 34-41 and accompanying text.

continued to struggle with unintentional detention through 1900 (with the creation of commercial sureties), through the 1920s – 1960s (with the so-called First Generation of Bail Reform), and still struggles today (as states still see many bailable defendants detained pretrial).

In the 1900s, judges also became gradually concerned that there were some bailable defendants whom they wanted to detain *intentionally*, often when noncapital defendants confined "unintentionally" (that is, ordered released, but detained due to money) came up with the sometimes staggering amounts of money set with hidden purposes to detain. Various detention cases decided in the 1960s and 1970s illustrated how American courts struggled with trying to justify detaining noncapital defendants based on the idea that no condition would suffice to keep those defendants from fleeing to avoid prosecution or to harm witnesses and jurors.[48] A review of those cases reveals that, overall, the courts were perplexed with how to deal with both unintentional and intentional detention, pretrial danger, and money at bail.

The struggles over both unintentional and intentional detention led to America's "big fix," as manifested in the 1970 District of Columbia Court Reform and Criminal Procedure Act and the Bail Reform Act of 1984.[49] Those two laws attempted to solve the various complex issues at bail by: (1) determining upfront who should be purposefully released and potentially detained through a detention eligibility net; (2) making sure intentional detention was further limited through a process (along with certain procedural due process protections) designed to focus on cases presenting extreme instances of risk ultimately for both flight and public safety; and (3) attempting to eliminate unintentional detention altogether by significantly limiting the use of secured money bonds. These elements came into existence only after years of debate in which persons argued, albeit unsuccessfully, that detaining a person based on a prediction of something he or she may or may not do in the future is unlawful and practically un-American.

[48] *Compare United States v. Leathers,* 412 F. 2d 169, 171 (D.C. Cir. 1969) (holding that setting an unreachable bond amount was "tantamount to setting no conditions at all" and a "thinly veiled cloak for preventive detention"), *with United States v. Gilbert,* 425 F. 2d 490, 491 (D.C. Cir. 1969) (approving a court's intentional preventive detention of a bailable defendant to avoid harm to future witnesses through that court's "inherent power").

[49] *See* District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, 84 Stat. 473 (1970) (codified at D.C. Code Ann. §§ 23-1321-1332); Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

Fully understanding the struggles leading to the extremely limited nature of pretrial detention when it was first enacted in America is helpful to understanding the meaning of the United States Supreme Court's 1987 statement that detention must be "carefully limited."[50] Nevertheless, even as this "big fix" attempted to create rational and fair detention procedures, it also involved a somewhat significant expansion of pretrial detention itself – a stark departure from earlier and much more limited release and detention notions.[51] Accordingly, narrowing detention to encompass only extremely serious public safety and flight risks through a detention eligibility net, a further limiting process, and other procedural due process safeguards theoretically lessening the overall use of detention as a response to risk, were pivotal parts of the solution. Unfortunately, however, the interrelated parts to this fix did not successfully spread to the states, and have become eroded to near unrecognizable levels in the federal system due to an ever-widening detention eligibility net, the use of rebuttable presumptions, and local cultures or policies. Overall, the primary lesson of perspective from the history of bail teaches that America only recently allowed purposeful pretrial detention of noncapital defendants. Even then, pretrial detention was intended to be used only in rare instances of extreme pretrial risk of flight to avoid prosecution or to commit a serious or violent crime while on pretrial release.

Lessons From the Law

When jurisdictions seek to change their bail laws, they must also have some understanding of current foundational legal principles, which provide the boundaries and parameters for both old and new release or detention provisions. Normally, analyzing a release or detention provision under current law would be sufficient. In this generation of bail reform, however, a complication is added by the pretrial research, which suggests new release/detain dichotomies that might lead to different analyses from current law. For example, when the United States Supreme Court decided *Salerno* in 1987, it based a portion of its due process analysis on the fact that the federal detention provision was limited to certain extremely serious charges. Today,

[50] *Salerno*, 481 U.S. 739, 755.

[51] In a comprehensive review of various modes of American preventive detention, the authors note that the expansion of adult criminal pretrial detention as manifested in the Bail Reform Act of 1984 tended not to follow the other modes, which greatly narrowed what had been traditionally broad common law powers to detain. *See* Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice,* 2 Harvard National Security J. 85 (2011).

persons are naturally wondering whether, in a similar case, the Supreme Court might hold that a "risk-based" net – for example, a detention scheme based solely on an actuarial pretrial assessment instrument – would also survive legal scrutiny. Thus, there are two issues dealing with the law: (a) what the *current* law requires for any release/detain scheme; and (b) whether fundamental principles underlying current law might also allow any new release/detain scheme based solely on actuarial risk.[52]

Current law broadly tells us how to do bail, or release, and no bail, or detention, and this lesson is somewhat simplified by the fact that we really only have two Supreme Court opinions to guide us on bail – one for release, and one for detention. The opinion in *Stack v. Boyle*[53] guides us through the release side of the equation. It does this by: (1) equating the right to bail with the "right to release before trial" and the "right to freedom before conviction;"[54] (2) telling us that this release is nonetheless conditional upon having "reasonable" and "adequate" assurance to further the legitimate purposes of bail (currently court appearance and, in virtually every jurisdiction, public safety);[55] (3) warning of the need for standards in bail-setting to avoid arbitrary government action;[56] (4) requiring those standards to be applied to every individual being assessed through the bail process and not allowing those standards to be replaced with blanket conditions based on charge alone (a warning that throws considerable doubt on the use of traditional money bail schedules);[57] (5) expressly articulating that the "spirit of the procedure" of bail is to release people;[58] and (6) further noting that setting a financial condition of release with a purpose to detain a bailable defendant is "contrary to the whole policy and philosophy of bail."[59]

If the United States Supreme Court's opinion in *Stack* guides us in matters of release, its opinion in *United States v. Salerno*[60] guides us in matters of detention. It does this by: (1) settling, at least for the time being, the debate

[52] The reader should note that even when an actuarial assessment tool is not used for purposes of detention, judges deciding whether to preventively detain a defendant pretrial purposefully without money are still assessing pretrial risk using prediction based on other facts and circumstances through whatever process is dictated by law.
[53] *Stack v. Boyle,* 342 U.S. 1 (1951).
[54] *Id.* at 4.
[55] *Id.* at 4-5.
[56] *Id.* at 5.
[57] *Id.*
[58] *Id.* at 7-8
[59] *Id.* at 10.
[60] *United States v. Salerno,* 481 U.S. 739 (1987).

as to whether the Eighth Amendment to the United States Constitution confers some federal right to bail thus affecting the states – it appears not to, even though the language of *Salerno* could be read to provide a basis for future decisions going either way;[61] (2) settling, once and for all, whether flight is the only permissible purpose for limiting pretrial freedom – it is not, and public safety is now equal to flight as a valid reason for conditions of release or detention;[62] (3) articulating liberty as a fundamental interest, which has led courts applying *Salerno* to use strict or at least heightened scrutiny in pretrial detention cases;[63] (4) allowing pretrial detention despite substantive due process concerns that it imposes punishment before trial;[64] and (5) allowing pretrial detention despite concerns that it is based on a prediction of risk of something a defendant may or may not do in the future.[65]

Because allowing detention based on prediction comes dangerously close to offending fundamental legal principles, however, the *Salerno* Court expressly articulated the need for detention to be "carefully limited."[66] To make sure that detention was carefully limited in the Bail Reform Act of 1984, the Court, in turn, emphasized three important requirements: (1) that the law addressed and focused on a "particularly acute problem in which the government interests [were] overwhelming;"[67] (2) that the law was limited to a "specific category of extremely serious offenses," which included persons found to be "far more likely to be responsible for dangerous acts in the community after arrest" (this goes to the detention eligibility net, which, as noted above, would now likely include legally justified classes of persons

[61] On the one hand, the Court quoted from *Carlson v. Landon,* 342 U.S. 524 (1952), which cited historical notions to provide support for Congress's ability to extend pretrial detention to noncapital cases. On the other hand, the Court said, "*Carlson v. Landon* was a civil case, and we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." *Id.* at 754. For the various arguments, *see* LaFave, et al., *supra* note 44, at § 12.3 (c). LaFave, in turn, points to *Hunt v. Roth,* 648 F.2d 1148 (8th Cir. 1981), which, though later vacated for mootness, noted that, "If a $1,000,000 bond set arbitrarily by legislative fiat [for defendants all facing the same charge] is excessive there is little logic to support the proposition that Congress could arbitrarily deny bail for any or all criminal charges whatsoever." *Id.* at 1160-61. An overall reading of the cases implies that legislatures can deny bail to certain classes of defendants so long as the denials have lawful justification and are carefully limited.

[62] *Salerno,* 481 U.S. 739, *passim.* Notably, New York does not allow consideration of dangerousness at bail, and the debate over whether to allow it has endured for decades.

[63] *See, e.g., Lopez-Valenzuela v. Arpaio,* 770 F.3d 772 (9th Cir. 2014).

[64] *Salerno,* 481 U.S. at 746-51.

[65] *Id.* at 751.

[66] *Id.*

[67] *Id.* at 750.

tied to extreme risk of flight);[68] and (3) that the law included a further limiting process designed to individualize bail setting to provide important procedural due process protections as well as to focus only on the kind of extreme and unmanageable pretrial risk necessary to trigger detention.[69]

Beyond the specific lessons of *Stack* and *Salerno,* jurisdictions should also recognize that broader notions of fundamental legal principles will likely also have some impact on creating new release and detention provisions. For example, the legal tests for excessive bail, due process, and equal protection all require courts to balance the means and ends of government action. Because pretrial liberty is a fundamental interest, these balancing tests will likely include "strict" or "heightened" scrutiny,[70] requiring the government to show that various components of any new laws are necessary to protect a compelling interest. In this generation of bail reform, it is becoming harder for jurisdictions to make this showing when, overall, the pretrial research illustrates high levels of pretrial success even for those deemed to be "high risk" as well as an overall inability to associate risk to particular charges.[71]

Apart from balancing issues, the current pretrial research also raises additional legal concerns with bail provisions that are not carefully drafted and thoughtfully justified. For example, state supreme courts often call non-excessive bail "reasonable" bail based on a finding that some condition provides "reasonable assurance" of public safety or court appearance.[72]

[68] *Id.*

[69] *See id* at 742-43, 751-52. While courts have looked to *Salerno* to guide them on what the phrase "carefully limited" means, *see Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (2014), other courts have begun to employ the Supreme Court's test in *Matthews v. Eldridge*, 424 U.S. 319 (1976), which was cited by the Court in *Salerno,* in determining the particular boundaries of procedural due process. Of course, *Salerno* provides guidance for both substantive and procedural due process claims.

[70] *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (2014) (applying heightened scrutiny and noting that "if there was any doubt about the level of scrutiny applied in *Salerno,* it has been resolved in subsequent Supreme Court decisions which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny.").

[71] Indeed, the same research is causing bail scholars to question use of the term "risk" altogether in the field of pretrial release and detention.

[72] *See Stack v. Boyle,* 342 U.S. 1, 10 (1951). Most state courts define non-excessive bail as "reasonable bail" and excessive bail as "unreasonable bail." *See, e.g., In re Losasso,* 24 P. 1080, 1082 (Colo. 1890) ("bail must be reasonably sufficient to secure the prisoner's presence at the trial"); *People v. Lanzieri,* 25 P.3d 1170, 1175 (Colo. 2001) ("The right to reasonable bail . . . following arrest lessen[s] the impact of an unlawful arrest."); *Ex parte Ryan,* 44 C. 555, 558 (Cal. 1872) (Bail is excessive when it is "unreasonably great, and clearly disproportionate to the offense involved, or the peculiar circumstances appearing must show it to be so in the particular case."). Use of "reasonableness" as a standard has allowed courts to compare factual elements with amounts of money to assess whether a particular financial condition is "out of line" with typical amounts. These courts, however, apparently never question the logic or arbitrariness of the amounts themselves.

Accordingly, if the research shows that a court cannot adequately predict individual risk of relatively rare events like willful flight or the commission of a serious or violent crime while, at the same time, it shows that the aggregate risk from an actuarial tool indicates a high level of success when attempting to predict for those events, is it not reasonable to release all defendants? Thinking about excessive bail generally, jurisdictions will likely (and correctly) conclude that some offenses – perhaps misdemeanors or non-violent property offenses – are simply not serious enough to trigger the blunt hammer of detention (or even assessment) no matter how risky some defendants may be. This is the essence of excessive bail analysis, which says that certain responses are simply too harsh for certain triggering events.[73]

As another example, if due process and equal protection are concerned with fairness, is it not unfair to detain persons based on certain charge-based nets that are no longer justified by the pretrial research? Similarly, if due process also requires jurisdictions to articulate, in advance, the kind of conduct that might lead to detention so as to provide fair notice to persons seeking to conduct themselves in ways to stay out of jail, can jurisdictions base detention on a nebulous concept like "dangerousness" or "risky" without a charge-based boundary?

This latter concept is so important that it warrants further discussion surrounding the second legal issue – that is, whether fundamental legal principles might allow an entirely new release/detain scheme based solely on actuarial assessment. Overall, jurisdictions seeking to change from charge to risk by creating a risk-based detention eligibility net (i.e., likely a virtually unlimited charge-based net) or otherwise using an assessment tool as the sole basis for detention would likely violate due process based on the fundamental premise that in America, "we insist upon limiting the criminal law to enforceable rules about the specific conduct in which men may or may not engage rather than confining all persons with criminal propensities before their deeds are done."[74] Put another way, "[i]t is important, especially in a society that likes to describe itself as 'free' and 'open,' that a government should be empowered to coerce people for what they do and not

[73] This is not academic. Most persons would agree that a jurisdiction allowing the detention of persons stopped on routine traffic offenses for trials occurring some three weeks later would be an excessive response to whatever risk those defendants posed. Thus, the question only becomes at what point a jurisdiction draws the line in making the potential assessment and detention determinations.
[74] Tribe, *supra* note 21, at 394-95.

for what they are."[75] Accordingly, "'the criminal law ought to be presented to the citizen in such a form that he can mold his conduct by it, that he can, in short, obey it.' Due process forbids punishment that one has no assured way to avoid."[76] In sum, people must be allowed to manage their lives so as to be able to stay out of jail, and the law should be written in clear ways to discourage discriminatory enforcement. Author Christopher Slobogin writes as follows:

> The constitutional version of this principle is vagueness doctrine, which as a matter of due process requires invalidation of statutes that do not sufficiently define the offending conduct. The purposes of vagueness doctrine are to ensure citizens have notice of the government's power to deprive them of liberty and concomitantly to protect against the official abuses and the chilling of innocent behavior that can occur if government power is not clearly demarcated.[77]

This concern should be foremost in our minds even though the Supreme Court has labeled preventive detention "regulatory restraint" and not "punishment" in the traditional sense.[78] In short, "Vagueness doctrine should govern the scope of preventive detention laws even if it is assumed . . . that such laws are not 'criminal' in nature."[79] This is in accordance with the analyses by other legal scholars, who have commented on the Court's application of "fair notice" outside of the criminal law.[80] Indeed, Eugene Volokh writes that at least one recent Supreme Court opinion likely means that "fair notice" might apply "whenever there's any legal effect, even a modest one that falls far short of criminal punishment."[81]

[75] Christopher Slobogin, *Defending Preventive Detention*, at 70 (quoting Herbert Packer, *The Limits of the Criminal Sanction*, 74 (1968)), in *Criminal Law Conversations* (Eds. Paul H. Robinson, Stephen P. Garvey, Kimberly Kessler Ferzan) (Oxford Press, 2011).
[76] Tribe, *supra* note 21, at 395 (quoting L. Fuller, *The Morality of Law*, 105 (1964)).
[77] Christopher Slobogin, *A Jurisprudence of Dangerousness,* 98 N.W. U. L. Rev. 2, 18 (2003) (internal footnotes omitted).
[78] Slobogin writes that despite a logical syllogism that preventive detention is not punishment (i.e., punishment occurs after conviction; with preventive detention there is no conviction; accordingly, there is no punishment), "[I]f a liberty deprivation pursuant to a prediction fails to adhere to the logic of preventive detention . . . then it can become punishment" when held up to the general due process requirement that "'the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" *Id*. at 13 (quoting *Jackson v. Indiana,* 406 U.S. 715 (1972)).
[79] *Id.* at 18.
[80] *See, e.g.,* Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of "Fair Notice,"* 86 So. Cal. L. Rev. 193 (2013).
[81] Eugene Volokh, The Void-for-Vagueness/Fair Notice Doctrine and Civil Cases (June 21, 2012), found at http://volokh.com/2012/06/21/the-void-for-vagueness-fair-notice-doctrine-and-civil-cases/, accessed on 09-

Vagueness has been largely ignored in the past when bail schemes were designed to detain persons based, in part, on terms such as "dangerousness" and "community safety," but it is highly relevant today as jurisdictions try to make sense of the risk research and how that research applies to making an initial determination about release and detention. In sum, the notion of adequately describing triggering conduct is crucial to the substantive criminal law, and equally crucial to pretrial detention. Indeed, the fact that we have laws on the books describing failure to appear for court or committing new crimes while on release is a way of giving advance notice to persons that those things will bring some governmental response. Under a theoretically pure charge-based detention eligibility net, a person may reasonably believe that he or she will not be detained pretrial unless he or she commits a crime within the net. That reasonableness evaporates with detention schemes based solely on aggregate risk[82] as well as somewhat subjectively broad definitions and labels of "risk," "public safety," and "flight," when there is nothing a person can do to avoid being labeled. While the Supreme Court has said that "there is nothing inherently unattainable about a prediction of future criminal conduct,"[83] it wrote that statement in a case in which prediction was buffered by the significant legal backstop of a charge-based detention eligibility net.

Accordingly, due process (including fair notice) as well as equal protection and excessive bail jurisprudence place critical limits on a jurisdiction's ability to craft release and detention provisions, and so justifying current bail laws as well as any changes to them requires thinking about those limits in advance.

Overall, the lesson from studying the current law at bail is that jurisdictions must justify not only new release and detention provisions, but old ones as

22-2018. In that opinion, from the case of *FCC v. Fox Television Stations,* 132 S. Ct. 2307 (2012), the Court applied the fair notice doctrine to a regulated entity, and even mentioned "reputational injury" – beyond even regulatory "punishment" – as a basis for relief. *Id.* at 2318-19. Vagueness applies both to ensure that affected persons know what is required of them so they may act accordingly as well as to ensure that "those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 2309. A "risk-based" detention eligibility net (or an extremely wide or unlimited charge-based net limited by risk) implicates both concerns: persons will not be able to assess how to keep from being "risky," and the arbitrary nature of the risk assessments scoring categories themselves (along with the ability for overrides) can easily lead to arbitrary enforcement.

[82] As noted in the Harvard *Primer*, *supra* note 42, at 22-23, and n. 195, "While an individual's conduct is within his control, that individual cannot control the aggregate conduct of others who share some characteristic deemed relevant for the risk assessment instrument."

[83] *United States* v. *Salerno,* 481 U.S. 739, 751 (1987) (quoting *Schall v. Martin,* 467 U.S. 253, 278 (1984)).

well. Current law places firm boundaries on all bail laws – e.g., they must be fair, they must be reasonable, and they must follow, in the main, what the Supreme Court has said about them – and thus, jurisdictions are cautioned to carefully consider those boundaries, especially when crafting detention provisions. Nevertheless, jurisdictions must also recognize the complexity arising from the research that is causing many current laws to lose their legal justification. Creating new and justifiable detention provisions thus requires knowledge of the current law, albeit bolstered by knowledge of how the Supreme Court might respond to a different model than the one presented in *Salerno*. Finally, and perhaps most importantly, given the many issues raised in this paper, jurisdictions should carefully weigh using any current provisions from other jurisdictions as "models," as those provisions are now likely vulnerable to constitutional attacks under a variety of legal theories.

Lessons From the National Standards on Pretrial Release and Detention

The national standards on pretrial release and detention – primarily the American Bar Association's (ABA's) Standards on Pretrial Release – provide jurisdictions with legal and evidence-based recommendations for creating new (or retaining existing) bail laws.[84] For the most part, the current Standards follow America's big fix by recommending: (1) a purposeful release/detain process consisting of a charge-based detention eligibility net; (2) a further limiting process capable of dealing with extreme cases of flight and public safety; and (3) methods for eliminating unintentional detention altogether by significantly limiting the use of secured money bonds. The current set of Standards, however, did not appear from nothing. Beginning in 1968, the Standards largely mirrored the federal law by slowly progressing toward more opportunities for purposeful detention, primarily by widening the eligibility net, but without major revision to the primary limiting process. In the current Standards, that process involves allowing pretrial detention only after a due process hearing in which "the government proves by clear and convincing evidence that no condition or combination of conditions of

[84] *See* NIC *Fundamentals, supra* note 1, at 108-110; *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* [hereinafter ABA Standards] (2007). The National Association of Pretrial Services Agencies has standards similar to the ABA Standards, but at the time of this writing they were in the process of being revised.

release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person."[85]

Like the big fix, however, these Standards are now slightly out of date. For example, the black letter ABA Standards, published in 2002, (1) still retain many of the assumptions concerning risk associated with serious charges, (2) note only in commentary the first of what is now many multi-jurisdictional actuarial pretrial assessment instruments,[86] and (3) retain elements concerning money bail that would likely be changed today from a reading of the pretrial literature. And while those Standards briefly mention the conundrum concerning a high-risk defendant facing a relatively minor crime,[87] they do not wrestle with the fundamental question of whether the law would ever allow detention based solely on actuarial assessment, or how the limiting process might be re-worded to better focus on the "risk" necessary to detain.

The lesson from the ABA Standards is that while they provide invaluable guidance for jurisdictions seeking overall justification for a more rational and fair release and detention process, they may not provide a definitive answer on how to craft a workable detention eligibility net and limiting process based on today's research.

Lessons From the Pretrial Research

Pretrial research in all its forms (e.g., historical, legal, opinion, observational, social science) drives the field, but in this generation of bail reform, social science research – and particularly research concerning defendant success and failure while on pretrial release – provides jurisdictions with compelling data to help in determining aspects of the release and detention decision. Indeed, it is the notion of empirical pretrial assessment, as measured by an actuarial pretrial assessment instrument, which has sparked much of bail reform today. While perhaps oversimplifying the concept, jurisdictions are rightfully alarmed by having empirical proof that certain "low risk" persons are in jail pretrial, while

[85] *Id.* Std. 10-5.7, at 124. As discussed previously, this "no condition" limiting process is subjective, resource-driven, and has proven ineffectual at limiting detention in the federal system.
[86] *See id.* Std. 10-1.10 (b) (i) (commentary) at 57, note 22.
[87] *Id.* Std. 10-5.1 (commentary), at 104.

certain "high risk" persons are not in jail, often due to money.[88] As noted previously, having the "wrong" people in or out of jail, historically speaking, inevitably leads to eras of bail reform.

Looking at "risk" historically, one sees that there is nothing new about assessing it; ever since England had something resembling a pretrial period of a criminal case, officials have been concerned with defendant risk, and thus they have found ways to gauge whether a defendant is risky. Moreover, throughout history, judicial officials in both England and America have improved on answers to the two overarching questions designed to address defendant risk: "How risky is this defendant? and "Risk of what?" Even today, once a jurisdiction articulates the type of risk it seeks to address, the answers to these two questions make release and detention decisions simpler.

As America began grappling with defendant risk in the twentieth century, it also gradually began to articulate the two types of risks it wanted to address through pretrial detention, which were: (1) the risk that a defendant would willfully fail to appear for court to avoid prosecution; and, later, (2) the risk that a defendant might commit a new serious or violent crime while on pretrial release. Those articulations were found in the so-called detention cases of the 1960s and 1970s, in the legislative histories of the 1970 D.C. Act and 1984 Bail Reform Act, and in the national standards on pretrial release and detention. Indeed, they are still typically articulated today whenever someone is asked to answer the question "Risk of what?" in the context of pretrial detention. This is an important point to repeat. History – and the law intertwined with that history – has shown us that although we care about all missed court dates and all new crimes committed while on pretrial release, it is the risk of willful flight to avoid prosecution and the risk of committing a serious or violent crime that should guide our laws and policies on the drastic response of pretrial detention based on prediction.

Until very recently, jurisdictions have attempted to employ the answers to the two overarching questions addressing risk ("How risky?" and "Risk of what?") to create bail systems by making certain assumptions about criminal

[88] Prior to being shown empirical "proof" of having the wrong people in and out of jail, most jurisdictions declared that they were releasing and detaining all the right people by using bail schedules, unpredictive and unweighted statutory factors, and subjective experience. In this author's own jurisdiction, a prior elected district attorney actually argued that there was no such thing as "unnecessary pretrial detention;" the mere fact of being in jail, he argued, was proof that the detention was necessary.

charges. For example, and as noted previously, when early America narrowed the eligibility for detention to mostly capital offenses, it did so not to protect the community, but instead to protect against flight from a defendant charged with a capital crime; it was commonly assumed that a person facing death would flee to avoid the punishment.[89] Later, jurisdictions assumed that persons facing certain "serious" or "high" charges were likely to flee or to commit the same or similar serious charges while on pretrial release, even when there was virtually no decent empirical evidence to confirm the assumptions.

Today's pretrial research is now providing jurisdictions with the knowledge necessary to make rational release and detention decisions based not on assumptions, but on empirical data. Thus, to the extent that our current methods of actuarial assessment measure how likely a particular defendant is to succeed or fail at something we seek to address, those methods are crucial to the bail determination. And, indeed, if using actuarial pretrial assessment instruments do not otherwise offend fundamental legal principles underlying the bail decision, then they might, in fact, form the basis for a massive overhaul of America's bail laws based on prediction of defendant success and failure by crafting new nets and processes for detention. Pretrial assessment tools and the research used to create them are invaluable to this process because, overall, they tend to show that defendants are far less "risky" than we think, that they are certainly not very risky to do the things (willful flight or commit a serious or violent crime) that might lead to detention, and that those relatively rare detention-triggering things are difficult to predict in any event. Knowing this, in turn, allows us to create legally justified and carefully limited detention provisions based on the reality illuminated by the pretrial research.

Thus, as noted previously, a fundamental question facing America today is whether it can simply switch from mostly charge-based detention eligibility nets to mostly risk-based ones. For example, in a purely risk-based process, a jurisdiction might change its right to bail provision to create a much more expansive net – perhaps a nearly limitless net – by articulating broadly that courts have the ability to detain all so-called "high risk" persons. In implementing legislation, that jurisdiction might then create a "further limiting process" that uses an actuarial pretrial assessment instrument to help officials make the release and detention determinations. By strictly

[89] *See* Tribe, *supra* note 21.

following the current law, a court might declare such a process unlawful because it is not limited by charge. Moreover, in as-applied claims, courts might also declare the use of detention based on risk for certain "low level" offenses to be excessive. As noted previously, however, complications in this generation of bail reform require us to look beyond literal application of the current law to fundamental legal principles that can be applied to new risk-based schemes.

Accordingly, the question is whether such a pure risk-based or risk-informed system is legally justifiable, and perhaps more rational than a charge-based one. Because *Salerno*[90] does not dictate any discreet elements for detention provisions (instead, as mentioned above, jurisdictions should focus more on *Salerno's* broad principles in justifying and applying detention), the more specific question is whether the Supreme Court might find a "pure risk" model (as measured by a tool) to be equally fair and lawful as the charge and risk (as measured by the federal limiting process) model reviewed in *Salerno*. The idea that the Court might indeed approve of such a pure risk-based detention process is enticing, but it is complicated by the risk research itself in several ways.

These complications are shown by looking deeper within the risk research and, specifically, by looking at the research used to create actuarial pretrial assessment instruments. After doing so, jurisdictions will likely recognize the following concerns:

1. As noted above, ever since America began articulating the type of risk it sought to address through pretrial detention, that risk has always been defined to encompass only "extreme and unusual" cases presenting the risk to willfully fail to appear for court to avoid prosecution or to commit a serious or violent crime while on pretrial release.[91] Generally speaking, today's

[90] 481 U.S. 739 (1987).

[91] For flight, *see, e.g., United States v. Abrahams,* 575 F.2d 3, at 8 (1st Cir. 1978) ("This is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail."); *United States v. Schiavo*, 587 F.2d 532, 533 (1st Cir. 1978) ("Only in the rarest of circumstances can bail be denied altogether in cases governed by § 3146."). For danger, *see, e.g.*, H. Rep. 91-907, at 82-83 (1970) (articulating Congress' desire to "reduce violent crime" during the pretrial period, committed by "the most dangerous of … defendants;" S. Rep. 98-225, at 5-6, 12-13 (1984) (articulating Congress' desire only to use detention for a "small but identifiable group of particularly dangerous defendants" who pose "an especially grave risk to the safety of the community."). The Court in *Salerno* also mentioned the necessity of factors designed to gauge the "nature and seriousness of the danger posed by the suspect's release." *Salerno,* 481 U.S. 739, at 743.

actuarial pretrial assessment instruments do not clearly measure the risk of flight that might lead to preventive detention; instead, they typically measure the risk of all failures to appear for court (sometimes, but not always with some finding of willfulness), and do not clearly measure the risk of serious or violent crime, but instead measure the risk of all new criminal activity, which, depending on the tool, can range from traffic offenses to murder. In sum, the instruments do not adequately tell us "risk of what" – i.e., the risk that we seek to address through detention – and thus they likely do not adequately distinguish between defendants at risk for either flight or safety to the extent that we can use them solely to detain.[92]

This issue is not unknown to the pretrial field; in 2007, Dr. Marie VanNostrand noted that, "Although pretrial risk assessment instruments in most instances do well in predicting the likelihood of danger to the community (often measured by new arrest pending trial) there is no known research that explores the nature and severity of the new arrest."[93] Although we are likely getting closer to exploring that nature and severity – the Arnold Foundation's Public Safety Assessment tool separates risk for failure to appear from risk to public safety, and includes a violence flag, which "flags defendants presenting an elevated risk of committing a violent crime"[94] –

[92] Professor Lauryn Gouldin makes a compelling argument for more nuance and precision in defining the risk surrounding court appearance. *See* Lauryn Gouldin, *Defining Flight Risk,* 85 U. Chi. L. Rev. 677 (2018). This author makes the same point throughout the *Model Bail Laws* paper. The instant summary paper focuses primarily on issues surrounding the use of actuarial pretrial assessment instrument as the sole basis to determine detention through a nearly limitless charge-based net or as the net itself. Again, in this author's opinion, these tools can possibly be used as one minor part (or could also be avoided altogether) of an overall decision to detain within a lawful net, but they provide a superior method of assessing pretrial success and failure in all aspects of release. Even without a tool, judges asked to detain a person pretrial are necessarily assessing risk, but they are doing so through other means.

[93] VanNostrand, *supra* note 16, at 17-18; *see also* Charles Summers & Tim Willis, *Pretrial Risk Assessment: Research Summary,* at 4 (BJA, 2010) [hereinafter Summers & Willis] ("For a full evaluation of the risk to community safety posed by an offender, research is needed on the severity or type of risk identified by PRAIs."); Harvard *Primer, supra* note 42, at 22 ("Even when tools make that basic distinction [between risk of flight versus new crimes], a simple designation of 'high risk' may not tell a decision-maker whether that reflects risk of arrest for a serious violent crime"). Finally, risk instruments "vary in whether or not technical violations are considered pretrial failure," which can have a profound effect on judicial behavior assessing risk. Summers & Willis, *supra,* at 4.

[94] Public Safety Assessment: Risk Factors and Formula, at 1 (Arnold Found. 2016), found at http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf, accessed on 09-22-2018. Practitioners are warned to use extreme caution about reading too much into the "violence flag," as it represents such a rare event.

we are still far from the kind of research that would settle nagging doubts about using actuarial assessment tools for certain functions, like detention based purely on an actuarial tool's prediction of either flight or danger before any individual triggering event.

2. While based on empirical science (thus making the calculations within the tools inherently objective), elements of actuarial pretrial assessment instruments can later become somewhat subjective and sometimes political – with scoring categories created by researchers and changed by policy stakeholders to reflect who they think is "risky." Once created, the cutoffs distinguishing between "low," "medium," and "high" risk can be changed for any reason, and sometimes merely for political reasons.[95]

3. Actuarial pretrial assessment instruments do not tell us individual risk, only aggregate risk. Thus, while an actuarial tool can give us some indication of how a particular defendant might perform by comparing him or her to other, similar defendants described in the aggregate, the tool can never tell us if he or she is actually one of the individuals predicted to succeed or fail. This leads to problems with base rates (for example, when there are few failures in a given defendant population – i.e., when base rates are low – it is unlikely that using a tool solely to predict the risk of those failures can do better than by simply releasing everyone, which would at least reduce or eliminate certain fundamental legal issues),[96] and

[95] In Colorado, for example, the Colorado Pretrial Assessment Tool was initially divided into risk categories based on quartiles; those cutoffs were later changed by criminal justice stakeholders to better reflect their own perceptions of risk and risk tolerance.

[96] As Gottfredson explains, when base rates are low, prediction is only good if it improves upon the base rate. *See* Stephen D. Gottfredson, *Prediction: An Overview of Selected Methodological Issues,* at 25, in 9 *Prediction and Classification: Criminal Justice Decision Making* (U. of Chicago Press, 1987). One reason why today's actuarial pretrial assessment instruments are good at predicting pretrial misbehavior is because they predict conduct (such as any FTA and any new alleged crime) that occurs more frequently than flight or serious and violent crime while on pretrial release. As noted previously, however, these more frequently occurring behaviors are not necessarily the kinds of risks America seeks to address through pretrial detention. Very recently researchers have begun to surmise that unequal base rates among groups can lead to unequal error rates and ultimately to unfair prediction, even when fairness may be deemed satisfied through predictive parity. *See, e.g.,* Alexandra Chouldechova, *Fair Prediction With Disparate Impact: A Study of Bias in Recidivism Prediction Instruments* (Cornell Univ. Oct. 2016), found at

false positives (people detained based on risk who will never fail if released).[97] In short, actuarial pretrial assessment instruments likely significantly over-estimate risk in order to capture the types of risk we seek to address. Indeed, many jurisdictions have learned that they can release so-called "high risk" persons with minimal supervision and see them perform as well as "medium risk" persons.[98] As noted above, we cannot easily assess this phenomenon because detention proves itself – its errors remain invisible.[99] Because actuarial pretrial assessment instruments do not measure individual risk, using those tools solely to determine release and detention will undoubtedly lead to detaining persons deemed "high risk" who will not fail, and releasing persons deemed "low risk" who will fail.

4. Most actuarial pretrial assessment instruments do not consider so-called "protective factors," which are "variables that can be

https://arxiv.org/abs/1610.07524, accessed on 09-22-2018. While unfair prediction can lead to higher bond amounts and conditions of release, it is most disturbing when it leads to pretrial detention.

[97] Generally speaking, if predicting risk of violence, for example, a true positive would be a person predicted as violent who subsequently commits a violent offense. A true negative would be a person predicted to be nonviolent who does not subsequently commit a violent offense. A false positive would be a person predicted as violent who proves to be nonviolent (a prediction that is largely unfalsifiable if that person is detained), and a false negative would be a person predicted to be nonviolent who subsequently commits a violent offense. While false negatives are also important in bail, they are not unfalsifiable because the defendants are released. See Dean J. Champion, *Measuring Offender Risk: A Criminal Justice Sourcebook*, at 73 (Greenwood Press, 1994). Caleb Foote called the people we allow to be in the category of false positives, "a dehumanized second-class category of persons" who are, in fact, "expendable." Caleb Foote, *Comments on Preventive Detention,* 23 J. of Legal Ed. 48, 52 (1970). Authors Jeffrey Fagan and Martin Guggenheim write that it is helpful to view false positives as "individuals deprived of their liberty for utilitarian purposes" – that is, persons "jailed not to stop them from any wrongdoing but in order to throw a wide enough net to cover others, who, if not stopped, would endanger society." Fagan & Guggenheim, *supra* note 42, at 428. Nevertheless, and as those authors also suggest, while decisions diminishing the rights of *convicted* persons for the collective good might in some instances be acceptable, at bail they are decidedly less so. Moreover, as explained by Andrew von Hirsch, false positives still pose a serious problem – even when detention is not considered punishment – because if we confine a defendant who is not dangerous merely for precautionary purposes, "what we have left is gratuitous suffering imposed upon a harmless individual." Andrew von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons,* 21 Buff. L. Rev. 717, 743, n. 74 (1971-72) [hereinafter von Hirsch].

[98] Denver Dept. of Pub. Safety, Denver Pretrial Servs. Prog. CY15 Ann, Rep. at 7, available from the author. This is consistent with national research showing that general supervision can increase court appearance and public safety rates for released defendants showing moderate and high risk in significant numbers compared to defendants without such supervision. *See* Harvard *Primer, supra* note 42, at 16-17.

[99] *See Model Bail Laws, supra* note 18, at 13-14. Indeed, there are four outcomes in any given prediction based on what was predicted and whether the prediction was correct. Three of these outcomes, true positives, false negatives, and false positives tend to result in and/or confirm detention. Accordingly, we must use extraordinary caution in using prediction to detain.

shown to decrease the likelihood of failure," and which can help to better determine individual versus aggregate risk.[100]

5. Actuarial pretrial assessment instruments can vary jurisdiction to jurisdiction, although this phenomenon is also seen through existing bail laws.

6. Many actuarial pretrial assessment instruments tend to send a subtle message that all defendants are "risky" simply by labeling them so. Again, the pretrial research illustrates that defendants are simply not very risky during the pretrial period, are certainly not very risky to actually flee or to commit a serious or violent crime while on pretrial release, and those things are difficult to predict in any event.[101] Indeed, if one looks at the research behind any particular pretrial assessment instrument, one will quickly see that lower risk defendants are highly successful, as illustrated by predicted risk categories with success rates in the 90th percentiles.[102] Moreover, "high" or "higher" risk defendants in most instruments are often predicted to succeed more than half of the time, even when those tools score as "failures" any and all failures to appear for court and any and all new criminal activity.[103] The consequences of calling all relatively non-risky persons "risky" are so damaging that the field has even begun discussing ways to articulate defendant pretrial behavior without using the word "risk" at all.

[100] Summers & Willis, *supra* note 93, at 4-5; *see also* John Jay College Prisoner Re-Entry Institute, *Pretrial Practice: Building a National Research Agenda for the Front End of the Criminal Justice System*, at 29 (statement of the Vera Institute of Justice describing the need for some assessment of strengths instead of just risks) (Oct. 26-27, 2015). This document provides an invaluable overview of pretrial research, including what is currently available and what is still needed as of the date of publication. In Maine, researchers created "one of the very few" pretrial assessments to include protective as well as risk factors. *See* Two Rivers Reg. Jail/USM Muskie School of Pub. Serv./Vols. of America, *M Risk: Pre-trial Risk Assessment, Maine Demonstration Project,* 2 (BJA, 2011).

[101] This can be due to many reasons, including, logically, the shorter periods of time defendants are under pretrial supervision. The need only to assess risk during the pretrial period is nonetheless one reason why jurisdictions should use caution when looking at research that examines outcomes beyond the pretrial window.

[102] *See, e.g.,* Pretrial Justice Institute/JFA Institute, *The Colorado Pretrial Assessment Tool,* at 18 (PJI/JFA, 2012) [hereinafter PJI/JFA].

[103] *See* Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants*, at 4 (PJI, 2015) [hereinafter PJI Issue Brief] (showing even Kentucky's overall success rate for level 5 (higher risk) defendants is 64 %. A risk instrument could be created to include a "high risk" category in which defendants failed at, say, 80% levels, but the number of defendants covered by that category would be significantly lowered).

7. Actuarial pretrial assessment instruments can make good predictions about all failures to appear and all new criminal activity simply because the base rates for those things are higher than for flight and new serious or violent crime while on pretrial release.[104] It is likely that actuarial pretrial assessment instruments will continue to have a difficult time predicting these latter behaviors because they are so rare, and perhaps these tools may never be able to predict them sufficiently to overcome certain fundamental statistical or legal issues surrounding detention.

8. Using an actuarial pretrial assessment instrument solely for determining detention or detention eligibility would create the possibility of detention for all charges using potentially vague terms, likely violating due process, equal protection, and excessive bail under the legal analyses mentioned above. Given the state of the science today, it is unlikely that any current tool could survive heightened scrutiny when used as the sole basis for determining pretrial detention.

Due to all of these concerns, if two fundamental questions are whether an actuarial pretrial assessment instrument can *ever* be used as the *sole or substantial basis* (anything more than a small part) for pretrial detention through the creation of a risk-based net or a virtually unlimited charge-based net, and whether the Supreme Court would ever allow such a process, the answer to both questions is likely no. Viewed another way, when the *Salerno* Court required a charge-based detention eligibility net, risk was already a part of the overall detention process; just as now, courts then were attempting to determine defendant risk to release or detain, albeit based on

[104] When it comes to danger, Andrew von Hirsch explains that what makes criminal conduct generally resistant to prediction is as follows: "(1) It is comparatively rare. The more dangerous the conduct is, the rarer it is. Violent crime-perhaps the most dangerous of all – is the rarest of all. (2) It has no known, clearly identifiable symptoms. Prediction therefore becomes a matter of developing statistical correlations between observed characteristics of offenders and criminal conduct." Indeed, von Hirsch explains, violence is difficult to predict due both to its rarity and "situational quality;" that is, violence does not apparently adhere to certain individuals, but, instead, can happen to any person based on a number of variables beyond the characteristics of the person. *See* von Hirsch, *supra* note 97, at 733-36. Predictions of flight based on failures to appear can pose similar difficulties. Indeed, because state data collection of failures to appear was so corrupted in Colorado, "prior failure to appear" was not even listed as a predictor of future failure to appear (let alone flight) in the statewide assessment. *See* PJI/JFA, *supra* note 102, at 13. The numerous, replicated studies on the efficacy of court date notification to reduce failure to appear rates indicate that when defendants miss court, the vast majority of them are simply not fleeing to avoid prosecution.

charge as a proxy for risk combined with some further limiting process. Believing now that a different kind of risk assessment – that is, risk as determined by an actuarial pretrial assessment instrument – might somehow lead the Court to approve of a nearly limitless net, especially given the concerns listed above, is likely misguided.

Nevertheless, this conclusion should not be used to denigrate in any way the importance of using actuarial risk assessment instruments at the pretrial phase of a criminal case. This generation of pretrial assessment using actuarial tools is better than any other generation of assessing risk we have experienced in the past,[105] and the literature suggests that using these tools results in prediction that is significantly better than clinical (i.e., largely subjective) prediction. As noted by researchers Sarah Desmarais and Jay Singh, "There is overwhelming evidence to suggest that assessments of risk completed using structured approaches produce estimates that are both more accurate and more consistent across assessors compared to subjective or unstructured approaches."[106]

This is likely true in the pretrial setting, and using these tools – empirically-based actuarial instruments that classify defendants by differing levels of pretrial probabilities of success and failure through weighted factors – is considered to be an evidence-based practice (in the sense that, like all actuarial science, the tools accurately sort people) and is often a critical prerequisite to adopting other best practices in the pretrial field.[107] They are the evolutionary result of over 1,000 years of "risk assessment," and 100 years of using research and statistics to inform pretrial assessment.

[105] For a good review of the history and then-current research of pretrial risk assessments as well as a description of how one was constructed, *see* Christopher T. Lowenkamp, Richard Lemke, & Edward Latessa, *The Development and Validation of a Pretrial Screening Tool,* 72 Fed. Prob. 2 (2008). For a description of risk assessment generations generally, *see* Sarah L. Desmarais & Jay P. Singh, *Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States: An Empirical Guide* (CSG, 2013) [hereinafter Desmarais & Singh]. The American Bar Association Standards on Pretrial Release trace the development of empirical risk since the 1920s, ending with VanNostrand's Virginia Pretrial Risk Assessment Instrument. *See* ABA Standards, *supra* note 84, Std. 10-1.0 (b) (i) (commentary), at 57, n. 22; *see also* Council of State Governments, *Risk Assessment: What You Need to Know* (2015) ("Risk assessments are absolutely, statistically better at determining risk than the old ways of doing things."), found at https://csgjusticecenter.org/reentry/posts/risk-assessment-what-you-need-to-know/, accessed on 09-22-2018; *see generally* Summers & Willis, *supra* note 93.
[106] Desmarais & Singh, *supra* note 105, at 4 (citing Stefania Aegisdottir, et al., *The Meta-Analysis of Clinical Judgement Project: Fifty-Six Years of Accumulated Research on Clinical Versus Statistical Prediction)* 34 the Counseling Psychologist, 341(2006)).
[107] *See generally* PJI Issue Brief, *supra* note 103.

These tools have shined a bright light on our previous, inadequate and often extremely biased methods of assessment (such as by charge, through a bail schedule, through non-predictive and unweighted statutory factors, or through subjective notions of bail setters) and have allowed us to see the results of those prior methods when assessment is used to illuminate and evaluate jail populations. In many cases, empirical pretrial assessment has been the catalyst for questioning and reforming an essentially random money bail system to one that is fairer, more effective, and purposeful.

The good assessment tools (and, importantly, the reader should recognize that not all tools are good tools) provide standardization and transparency, help avoid arbitrary decision making, help to assess bond "types," and can help to achieve the pretrial goals of maximizing release, maximizing public safety, and maximizing court appearance. Moreover, by telling us pretrial "risk" in a more accurate way, these tools also help us to follow the so-called "risk principle," which instructs jurisdictions to expend less or no resources on lower risk persons and more resources on higher risk persons, and which thus includes a requisite finding of risk to allocate resources properly. The risk principle is well known in the post-conviction field, and has equal relevance to pretrial release decisions.[108]

Using these tools to better follow the law – by helping courts to determine reasonable assurance of court appearance and public safety,[109] by making sure that pretrial liberty on least restrictive and otherwise lawful conditions is the "norm" (with no intentional or unintentional pretrial detention outside of any particular lawful process for doing so), by helping to assure that pretrial detention is done in a carefully limited way, and by helping courts to follow other fundamental legal principles – is a "legal and evidence-based practice" (one that follows both the law and the research), the very thing that American jurisdictions are attempting to achieve in the pretrial field.

[108] *See* Anne Milgram, Alexander M. Holsinger, Marie VanNostrand, & Matthew W. Alsdorf, *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making,* 27 Fed. Sentencing Rep., No. 4, at 216-17 [hereinafter Milgram, et al.]; Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court* (Washington, D.C.: Office of Federal Detention Trustee, 2009).

[109] Some have argued that pretrial assessment tools violate the notion of individualized bail settings merely because the defendants are compared to aggregate success and failure rates, but, in fact, the opposite is true. These tools require those performing the assessment to analyze each individual defendant on a variety of measures that are superior to the typical "charge assessment" with blanket conditions done through bail schedules and disapproved of by the U.S. Supreme Court in *Stack v. Boyle,* 342 U.S. 1 (1951). It is only after the individualized assessment that the defendant is then compared to the aggregate for purposes of scoring. This notion is entirely different from the notion of then using those aggregate scores to detain. In sum, the actuarial tools are infinitely superior to bail schedules (and other previous methods of assessing risk), but not so superior that they can then be used solely to detain a defendant pretrial.

Actuarial pretrial assessment instruments are not designed to replace professional discretion, but rather to enhance pretrial decision making by coupling instinct and objective assessment, which research has shown produces the best results.[110]

Overall, actuarial pretrial assessment instruments are invaluable to the release process, likely a necessary component to comprehensive reform, and provide additional justification for eliminating money at bail. As noted previously, they can guide courts and justice systems with virtually all issues concerning release (including structuring and evaluating supervision strategies, crafting responses to violations, assessing the efficacy of bond "types," evaluating jail populations, helping to encourage more summonses and citations, and even providing some rationale to emergency releases, when necessary), and they can assist – through cautionary legal backstops – with detention. Using them can even lead to more confidence in data processes and systems policies.[111]

Moreover, they are always improving; as noted previously, the Arnold Foundation's pretrial assessment tool, developed in 2013, has various attributes tending to ameliorate some of the concerns listed above. Nevertheless, if the issue is whether a jurisdiction can simply replace charge

[110] *See* Milgram, et al., *supra* note 108, at 219-20.

[111] Some researchers have raised additional concerns with assessment tools that are adequately addressed through various other avenues discussed in this author's *Model Bail Laws* paper, such as regular validation to account for changes through ongoing reforms and by using the tools almost exclusively for purposes of release. Those who argue against using an assessment instrument entirely typically fail see them as an evolutionary process and thus fail to explain what to do with current assessment methods (such as charge and money) or to explain how to create a viable release and detention model when the tools are not used. Moreover, even those few persons who argue against their use entirely admit that there are certain benefits to using the tools, such as to foster quick release or to help jurisdictions to refrain from over-conditioning. These two beneficial uses (and this author has many more) provide ample justification for a jurisdiction to adopt an assessment tool, and this automatically changes the debate from whether to use the tools at all to how to use them properly and to avoid their misuse in the areas identified as concerns. This has been the stance of research done by this author and other "neutral" pretrial reformers, which is to identify and address concerns but not to dismiss assessment instruments altogether. *See, e.g.,* Harvard Law School Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform,* (2016); Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail,* found in *Reforming Criminal Justice* (Acad. Of Justice/Ariz. State Univ. College of Law, 2017) [hereinafter Stevenson & Mayson] at http://academyforjustice.org/; various documents issued by the Pretrial Justice Center for Courts (NCSC), found at https://www.ncsc.org/Microsites/PJCC/Home.aspx; various documents issued by the Pretrial Justice Institute, found at http://university.pretrial.org/libraryup/topics/assessment; National Institute of Corrections, *A Framework for Pretrial Justice* (NIC, 2017); *Model Bail Laws, supra* note 18. All agree that assessment tools should not exacerbate bias, but the best research on the topic appears to show that existing bias will necessarily be reflected due to the nature of prediction itself, thus requiring "more fundamental changes in the way the criminal justice system conceives of and responds to risk." Sandra G. Mayson, *Bias In, Bias Out,* 128 Yale L. J. ___ (forthcoming 2019).

with risk, then the various concerns over using such a tool to determine initial detention based on prediction requires a deeper analysis than that previously given to the topic. More specifically, if a jurisdiction seeks to change its primarily charge-based detention eligibility net to one based solely on actuarial risk alone (or to otherwise use actuarial risk in any significant way in the detention process), then that jurisdiction must overcome both the substantial legal challenges as well as the significant limitations associated with using "risk" as the sole basis to detain in order to provide proper justification.

In sum, a lesson from the pretrial research is that while that research is causing jurisdictions to question assumptions forming the basis of detention eligibility, those jurisdictions will likely find that actuarial assessment cannot replace a charge-based detention eligibility net. Moreover, and to put things somewhat simplistically, a lesson from the research is that currently in America there are likely two types of risk: (1) the risk defendants pose as measured by current actuarial pretrial assessment instruments; and (2) the risk needed to trigger detention in the first instance based solely on prediction. While current assessment instruments are helpful, if not essential, to 98% of what we are trying to achieve at bail, actuarial scores from assessment instruments are perhaps, *at most*, a "necessary, but not sufficient basis to trigger a [detention] hearing."[112] Until these tools can adequately predict the type of risk necessary to detain under (2), and until jurisdictions can reduce if not eliminate the various legal hurdles associated with using actuarial assessment (no matter how accurate) as the sole or substantial basis for detention, those jurisdictions are advised to work cautiously to adequately justify current and future bail laws incorporating actuarial assessment, and to implement serious legal backstops to guard against potential misuse.

The Overall Conundrum of Charge and Risk

When jurisdictions study the risk research generally, they will quickly learn that there is little research justifying the creation of a detention eligibility net based on any single criminal charge. Whenever it is studied (for example, whenever researchers evaluate predictors of pretrial misbehavior), criminal charge is measured as only a small part of defendant risk, to the extent that basing detention eligibility on criminal charge alone would likely require

[112] Harvard *Primer, supra* note 42, at 27.

legal justification beyond empirical literature. For example, if a jurisdiction chose to create a detention eligibility net for persons charged with sex offenses, it would have a difficult time finding empirical research showing that being charged with a sex offense, by itself, leads to higher risk to fail to appear for court or to commit new crimes while on pretrial release. This becomes a conundrum when one simultaneously concludes that actuarial assessment, alone, also cannot serve as a detention eligibility net (which is the equivalent of a virtually unlimited charge-based net). Indeed, for the reasons listed in this paper, it is likely that the law will always require some charge-based net – articulated in advance – whether or not that net operates before or after pretrial assessment.

Jurisdictions can come to various solutions to this conundrum. One solution has been crafted by this author in *Model Bail Laws,* in which I use the history, the law, the national standards, and the empirical evidence (including five empirical studies showing some correlation between arrest for a violent charge and committing a subsequent violent charge while on release) to conclude that a net consisting of defendants charged with "violent criminal offenses" (but no broader) might be legally justified.[113] This charge-based net for detention ultimately based on prediction is then coupled with a secondary net of "failure while on pretrial release for the current case."[114] The two nets are then combined with two new and separate "further limiting processes," which are designed to assure that detention addresses only the kinds of extraordinary risk that America has sought to address since first attempting to intentionally detain noncapital defendants pretrial. Finally, these nets and processes are done through the sort of procedural due process protections necessary for detention that were discussed by the

[113] States might lawfully differ on how wide the nets should be (i.e., violent felonies, felonies, or some combination of charge and preconditions), and in how they are justified (i.e., through empirical evidence or by other valid legislative findings), but through the creation of new and better limiting processes focusing on the risk states seek to address through detention – the answer to the question, "Risk of what?" – even the widest nets will be significantly less likely to lead to over-detention. States are advised, however, to treat pretrial detention as it was recently described by Brandon Buskey from the ACLU's Criminal Law Reform Project – as the "death penalty of the pretrial system" – so that states recognize the extreme legal and evidentiary safeguards that must exist before they impose it. *See* Preventive Detention in Policy and Practice, found at https://university.pretrial.org/viewdocument/preventive-detention-in-policy-pr, accessed on 09-22-2018.

[114] While this is more commonly known as bail or bond revocation, the author describes it as a "secondary net" to emphasize the seriousness of pretrial detention even after pretrial failure and to avoid the perfunctory nature of most bond revocation proceedings.

United States Supreme Court in *Salerno.* In *Model Bail Laws,* I noted:

> [My] model attempts to answer the three big questions we have asked ever since a thing called the pretrial phase of a criminal case has been in existence – whom do we release, whom do we detain, and how do we do it? It does so by following the history, the law, and the research to adequately define the level of risk and the kind of risk we fear to justify secure detention prior to trial.[115]

Jurisdictions can conduct their own research to determine justification for a detention provision, or they may rely on expert testimony to make adequate findings. Moreover, in some cases, jurisdictions may decide that their current nets and limiting processes are sufficiently justified and adequately limited already. The fundamental point, however, is that in this generation of bail reform, all detention provisions must be legally justified and "carefully limited." It is simply unacceptable for states to enact laws providing for the potential detention of large categories of defendants without reason.

The Answer to the Primary Question

The answer to the question, "If we change, to what do we change?" is thus relatively simple: jurisdictions need to create legally justified (and likely charge-based) detention eligibility nets and better "further limiting processes" designed for purposeful release and detention decisions. Creating a detention eligibility net is, perhaps, a more intriguing endeavor (it is apparently easier or perhaps more satisfying to debate which broad categories of defendants should potentially be detained, whether by charge or by risk), and yet it is the creation of a new "further limiting process" – a process that improves upon the older, mostly subjective ones by articulating the risk that detention seeks to address and that avoids reliance on actuarial assessment to detain – that provides the ultimate solution. Indeed, jurisdictions can disagree on the breadth of detention eligibility nets (so long as they are justified), as it is ultimately the limiting process that will enforce rational and fair limits on pretrial detention. Overall, then, the solution to overcoming the various issues found in crafting rational and fair detention provisions lies primarily in crafting better limiting processes.

[115] *Model Bail Laws*, *supra* note 18, at 171.

As noted previously, when states (and the federal system) have enacted such provisions in the past, they have often limited detention to those defendants within the eligibility net for whom "no condition or combination of conditions suffice to provide reasonable assurance of court appearance or public safety," or with various other processes that are inadequate to a determination of release or detention. Also, and as noted previously, this default "no conditions" process is subjective and resource driven, and, quite candidly, has not always worked to constrain pretrial detention in those jurisdictions, such as the federal system, in which money has been eliminated as a confounding factor. Accordingly, an example of a new process for initial detention based on prediction (which references, but which could also include an express detention eligibility net) might be worded something like this:[116]

> All persons charged with a criminal offense shall be released on the conditions that they return to court and abide by all laws. If needed, a court may impose such further and least restrictive conditions necessary to provide reasonable assurance of court appearance and public safety, except that a court may confine a person who is eligible for pretrial detention [i.e., the detention eligibility net, which might be defined elsewhere or, preferably, included here; in my *Model Bail Laws* paper, the net is "violent offenses" but, of course, a net could be made much narrower through various means] when the court finds, in addition: (1) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk of intentional flight to avoid prosecution, or; (2) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk to commit or attempt to commit a serious or violent crime while on pretrial release against a reasonably identifiable person or groups or persons or their property; and, for all persons in (1) or (2), the court finds clear and convincing evidence that no condition or combination of conditions will suffice to manage the person's extremely high level of risk. In considering the facts and circumstances necessary to detain a defendant pretrial,

[116] States must consider where to enact these sorts of legal backstops. Including them in state constitutions is this author's choice, simply to avoid erosion of the various elements by future legislative bodies. Nevertheless, there are many variables that might lead a state, for example, to create a broad constitutional provision to be coupled with significant limiting language enacted into statutes or court rules.

> the court may consider the risk assessed through an actuarial pretrial assessment instrument, however the court may not detain based solely on the results of that instrument and must, instead, articulate and provide a written record of additional evidence to support the clear and convincing burden. The court may not impose a condition of release that results in the pretrial detention of the person. However, a person's willful refusal to agree to lawful conditions of release may result in the detention of that person. The legislature shall enact laws designed to carry out this provision, including specific and reasonable laws allowing for the temporary detention of defendants awaiting a full detention hearing not to exceed three days, excluding Saturdays, Sundays, and holidays, with an additional two calendar days granted to the state upon a motion showing good cause and no fault for the delay by the state, and additional periods of time granted to the arrested person upon motion and for good cause shown. The legislature shall also enact laws to define the terms "serious" and "violent" crimes [which could, instead, be defined here], to create a due process hearing required for pretrial detention, and to provide for speedy trials and immediate and expedited appeals for detained defendants. At a minimum, the detention hearing shall contain [insert procedural due process requirements from *Salerno* here].

This is but one example. Nevertheless, the example addresses the question, "risk of what," and attempts to answer it in a way that is supported by the history, the law, the pretrial research and the national standards. Moreover, this limiting process provides a lawful and rational backstop to prevent over-detention based on broad or ever-widening detention eligibility nets. Accordingly, and as mentioned above, jurisdictions might differ over specific nets up to constitutional boundaries; indeed, one jurisdiction may justify a net allowing potential detention only for capital defendants, while another may justify a net allowing potential detention only for defendants facing "violent felonies" or all "violent offenses." For each of these nets, however, this further limiting process better separates those defendants who should be released from those who are extremely high risk and unmanageable by articulating the risk America is attempting to address through detention based on prediction. Finally, a wider net may also lead to a further narrowing of the limiting process; for example, to shorten the days

allowed for temporary detention or to more thoroughly articulate the speedy trial provision.

Addressing risk for detention in the first instance based solely on aggregate prediction is different from addressing risk after pretrial failure, which provides courts with at least some concrete proof of individual risk. Many states currently have bond revocation processes to deal with pretrial failure, but others do not, and, even when they exist, they are often perfunctory (indeed, often nearly automatic) and tend to focus solely on the failure itself rather than the future risk, which may be informed by the failure. Accordingly, jurisdictions should consider creating a secondary detention eligibility net along with another limiting process, similar to the above, for instances in which defendants have failed on pretrial release by willfully failing to appear for court or committing a new crime. Such a process might look something like this:

> The court may also order the pretrial detention of a person when the court finds probable cause that a person already on pretrial release for any jailable offense willfully failed to appear for court to avoid prosecution or has committed a new jailable offense, and is shown through clear and convincing evidence of relevant facts and circumstances that: (1) the person poses an extremely high risk either to willfully fail to appear for court to avoid prosecution or to commit or attempt to commit any new jailable offense against persons or their property; and (2) clear and convincing evidence that no condition or combination of conditions will suffice to manage the extremely high risk. In considering the facts and circumstances to detain under this provision, the court may rely substantially on the assessed risk from an actuarial pretrial assessment instrument. The court may not impose a condition of release that results in the pretrial detention of the person. However, a person's willful refusal to agree to lawful conditions of release may result in the detention of that person. The legislature shall enact laws designed to carry out this provision, including specific and reasonable laws allowing for the temporary detention of defendants awaiting a full detention hearing not to exceed three days, excluding Saturdays, Sundays, and holidays, with an additional two calendar days granted to the state upon a motion showing good cause and no fault for the delay by the state, and additional

> periods of time granted to the arrested person upon motion and for good cause shown. The legislature shall also enact laws to create a due process hearing required for pretrial detention, and to provide for speedy trials and immediate and expedited appeals for detained defendants. At a minimum, the detention hearing shall contain [insert procedural due process requirements from *Salerno* here].

This limiting process is different from the prior process for preventive detention based purely on prediction in several ways. First, it allows judges to consider detention by assessing risk of flight after any willful failure to appear, and to consider detention by assessing the risk of danger after the commission of any new jailable offense while on release, thus avoiding the need to allow multiple failures (possibly leading to multiple open cases) to trigger the heightened scrutiny. Second, for public safety it guides judges toward releasing these persons except where there is clear and convincing evidence that no condition or combination of conditions can provide reasonable assurance, but it allows judges to consider the risk of the person committing any new jailable crime while on release (of course, this aspect of the provision could be narrowed further by requiring judges to detain based, once again, on a risk to commit only a serious or violent crime).[117] Third, it allows judges to now consider to a greater degree aggregate risk, so that a single failure while on pretrial release (not including so-called technical violations), along with the risk assessed by an actuarial tool for any crime, might provide significant evidence of future risk.

As noted in the examples, this author expects that either or both of these limiting processes would also be paired with the various crucial procedural due process protections – adversary hearing, right to counsel, judicial standards, etc. – similar to those approved by the United States Supreme Court in *United States v. Salerno.* Overall, like the net and "further limiting

[117] There is a good argument for not treating persons arrested while on pretrial release with a more lenient process than that used for persons being detained based solely on prediction due to the fact that the former persons are merely accused twice rather than once. *See* LaFave, et al., *supra* note 44, at 87. This issue can be addressed through language tightening up who may be detained in such cases (for example, by limiting the triggering crime or even both crimes to be "serious" crimes) and by making sure that courts apply the full complement of due process protections found in *Salerno.* According to LaFave, "more extensive use of [a] revocation procedure [what this author of this paper calls the secondary net and process], with expedited trials for those so detained, might well make considerable inroads upon the crime problem cited by preventive detention advocates." *Id.* at 88-89.

process," it is preferable to include these significant due process protections within a constitutional bail provision to reinforce their importance.

Both nets and limiting processes reflect complex attempts at drawing lines between release and detention. For example, if a state chooses a detention eligibility net of "violent charges," then even the highest risk defendants charged with lesser crimes (such as shoplifting) will simply not be eligible for detention in the first instance based on prediction alone, and this would be proper for all of the legal and evidence-based reasons listed throughout this paper. Nonetheless, if a defendant initially charged with shoplifting commits another shoplifting offense while on pretrial release, he will be eligible for detention under the secondary net, but not detainable without the requisite findings of future risk and that no conditions again suffice to manage the risk if the person is released. Jurisdictions will likely differ reasonably (but within some fairly straightforward boundaries) on the elasticity of the overall process, with some elements chosen for their overall limiting effect, and other elements chosen to allow for common sense and justifiable responses to pretrial failure. Nevertheless, jurisdictions should know that, overall, the history, law, research, and standards – i.e., the fundamentals of bail – all point to constantly *narrowing* detention whenever and wherever possible.

Such line drawing means that, necessarily, there will be compromises as well as some likely rare hypotheticals that will seemingly fall outside of the model. For example, some persons, such as mentally ill or homeless persons who habitually fail to appear for court for reasons other than to willfully avoid prosecution, will theoretically not ever be detainable in the above model despite these numerous violations (detention in those rare instances, instead, would likely be left to a judges' contempt power or through a perhaps reasonable finding that multiple FTAs eventually evince willfulness). The line drawing in the model simply reflects a decision that society's legitimate interests in addressing court appearance do not rise to the level of requiring pretrial detention in these cases. Indeed, this model is premised on the fact that solutions to certain hypothetical situations such as these are simply not found at bail. The solutions, instead, are found through commencing trials for high risk persons much more quickly, through sentencing (to begin the punishment or rehabilitative process for persons who habitually violate the law), or through crime prevention efforts designed to eliminate certain negative and systemic behaviors. Finally, the entire endeavor recognizes that judges in America have historically found ways to

detain the persons they want to detain, and thus perhaps the fundamental point is that aberrational cases should not be used to create policy.

Ultimately, however, line drawing is inevitable when jurisdictions decide to move from an arbitrary, random, and likely unconstitutional system of money bail to one making purposeful in-or-out release and detention decisions. By far, the traditional money bail system led to many more cases – indeed, over 100 years of cases – routinely "not fitting" within the secured money bond model erected in 1900. Moreover, the money bail system drew its own lines, giving Americans the false sense that, somehow, the difficult work of bail had already been done. Purposeful line drawing, in this sense, simply means taking the random lines drawn by the money bail system, and re-working them and justifying them based on the law, the research, and common sense. Purposeful line drawing is the essence of criminal law and procedure, and it is time for pretrial release and detention to catch up.

After the Line is Drawn: Essential Elements of Bail Statutes or Court Rules

As mentioned at the beginning of this paper, once a jurisdiction has done the difficult work of articulating its bail/no bail, or release/detain dichotomy based on the history, the law, the research, and the standards, the rest includes merely creating an in-or-out framework so that nothing interferes with either intentional release or fair and transparent detention. In short, once a jurisdiction has decided whom to release and whom to detain, model laws simply make this happen by using legal and evidence-based practices to achieve the constitutionally valid purposes of bail and no bail.

Nevertheless, there are certain fundamental themes or principles that likely should be included in any comprehensive bail scheme. The following list is derived from many sources, including: the Pretrial Justice Institute's *Key Features of Holistic Pretrial Justice Statutes and Court Rules*;[118] Harvard Law School's *Moving Beyond Money: A Primer on Bail Reform*;[119] NIC's *Fundamentals of Bail* and *Money as a Criminal Justice Stakeholder*

[118] *Key Features of Holistic Pretrial Justice Statutes and Court Rules* (PJI, 2016), found at https://university.pretrial.org/viewdocument/key-features-of-holi.
[119] *See* Harvard Law School *Primer, supra* note 42.

papers;[120] the American Bar Association and National Association of Pretrial Services Agencies Standards; the D.C. and federal release and detention statutes; and conversations primarily with Alec Karakatsanis (Civil Rights Corps) John Clark (Pretrial Justice Institute), Mike Jones (Pretrial Justice Institute (former) and Pinnacle Justice Consulting), Larry Schwartztol (Harvard Law School Criminal Justice Policy Program (former) and Protect Democracy, Claire Brooker (independent pretrial consultant for CLEBP and Justice System Partners), and the Honorable Truman A. Morrison, III, (Senior Judge, District of Columbia Superior Court). The list is as follows:

1. Provisions articulating the state's purposes and goals behind pretrial release and detention, and definitions of key terms and phrases.
2. As a part of those goals, provisions expressly articulating a strong presumption of release for all defendants and that no condition of release – particularly a financial condition – shall cause detention.
3. Provisions favoring (or mandating) release on citation and summons over arrest and arrest warrants, and expressing preferences of release through citation for all misdemeanors and nonviolent felony offenses.
4. Provisions allowing for evidence-based pretrial diversion of appropriate defendants.
5. Provisions eliminating all financial conditions at bail, including amounts on warrants.
6. Provisions allowing or mandating pretrial services agency functions (assessment, recommendations, and supervision) based on the law and the research.
7. Provisions articulating prompt first appearances.
8. Provisions giving defendants a meaningful right to counsel at first appearance.
9. If not already in a constitution, release provisions, including presumptions of release on a promise to appear; the use of least restrictive and individualized conditions designed to provide reasonable assurance of court appearance and public safety; various factors to be used by judges relevant to the release decision; contents of the release order; provisions articulating the procedure for dealing with violations of conditions, including those violations that result in the defendant being considered for pretrial detention; provisions expressly encouraging or mandating the use of actuarial pretrial

[120] *See* NIC *Fundamentals, supra* note 1; NIC *Money, supra* note 1. When initially assessing their laws, states might also benefit from reading *Guidelines for Analyzing State and Local Pretrial Laws* (PJI, 2017), found at https://university.pretrial.org/viewdocument/guidelines-for-analyzing-state-and.

assessment instruments for released defendants by favoring the assessment over pure clinical assessment, but by balancing the tool with other elements of risk relevant to flight and the danger we seek to address; provisions encouraging or mandating the use of research-based least restrictive conditions of release.

10. If not already in a constitution, detention provisions, including provisions articulating the detention eligibility net, further limiting process, and procedural due process hearing for detention; various factors judges should use in making the detention determination using principles articulated in this paper; other details made necessary by the enabling language from the main right to release provision.
11. If not already in a constitution, the requirement that judges provide written records of the reasons for imposing any and all limitations on pretrial freedom, up to and including detention.
12. If not already in a constitution, provisions dealing with speedy trial, periodic review of detained defendants, and with physically separating defendants from sentenced offenders.
13. If not already in a constitution, provisions dealing with victims and victim's rights, so long as they do not interfere with defendant rights.
14. Provisions mandating data collection and performance measures by all persons in the justice system to help assure that the underlying purposes of bail are met as well as to foster conversations over the proper context for pretrial release and detention within a state.

Conclusion

As jurisdictions work through this generation of bail reform, they will likely realize that some changes to their laws may be inevitable. If so, this paper identifies the various issues jurisdictions will face when determining – upfront and on purpose – whom to release, whom to detain, and how to do it. The notion of legal and evidence-based practices cautions jurisdictions that research is subservient to the law, and thus jurisdictions must provide lawful justifications for any changes to laws based on the research, and especially changes to laws concerning pretrial detention. Nevertheless, the pretrial research also affects laws by demonstrating a need to justify both old and new preventive detention models based on our current understanding of pretrial risk. When providing this justification, jurisdictions should not be surprised to conclude that actuarial pretrial assessment instruments, while extraordinarily valuable to every other area of the pretrial process, should never be used either solely to detain a defendant pretrial or even as a

substantial part (i.e., anything more than a small part) of a lawful detention process.

The overall solution to the issue of change thus involves each jurisdiction justifying an existing or new detention eligibility net – likely based on criminal charge – and enacting a "further limiting process" (with procedural due process protections) that is different from and superior to any previous American process. Again, risk research and actuarial pretrial assessment tools will be an invaluable part of creating and justifying these nets and processes, with the only caveat being that jurisdictions should never rely *solely* or *substantially* on assessment tools to detain (versus release) defendants before trial. Once the somewhat difficult decision is made about purposeful detention, legal and evidence-based practices will then guide jurisdictions so that both release and detention are lawfully effectuated.

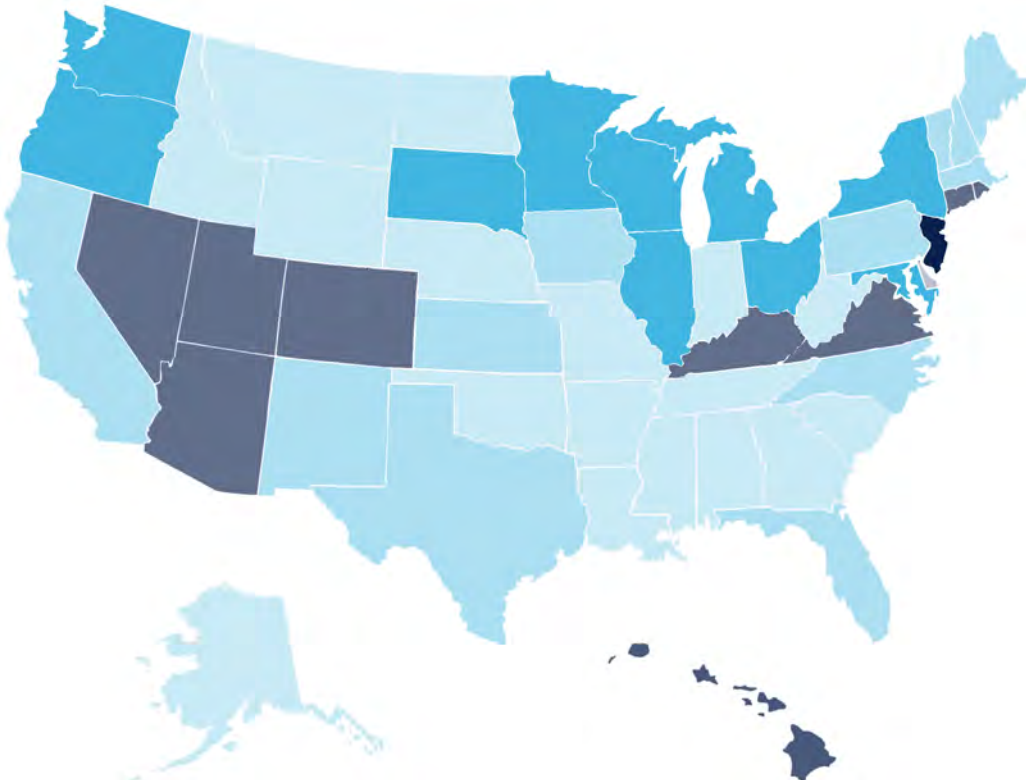
About the Author

Timothy R. Schnacke is the Executive Director of the Center for Legal and Evidence-Based Practices (www.clebp.org), a Colorado nonprofit corporation that provides research and consulting for jurisdictions exploring and/or implementing improvements to the administration of bail.

I would like to thank the following people for their invaluable input on this paper: Lori Eville (National Institute of Corrections), Judge Truman A. Morrison III (D.C. Superior Court), Alec Karakatsanis (Civil Rights Corps), Larry Schwartztol (Harvard Law School Criminal Justice Policy Program), Dr. Michael R. Jones (Pretrial Justice Institute (former) and Pinnacle Justice Consulting), and Claire Brooker (Independent Consultant for CLEBP and Justice System Partners), The topic itself is so complex that reasonable people can (and do) disagree on certain aspects, but each of these people helped me significantly in coming to my own conclusions about the various issues. Moreover, despite the significant complexity involved in reaching any sort of workable conclusions, each of these people helped me greatly to wrestle with that complexity by constantly reminding me that all release and detention laws must reflect deeply held American notions of liberty and freedom in addition to natural concerns for safety. Any errors are my own.

Where Pretrial Improvements Are Happening

October 2018



PRETRIAL JUSTICE INSTITUTE

Table of Contents

Introduction 1
Changing Practice 1
Pre-booking Deflection and Diversion 1
Prosecutor-led Change 1
Assessment/Conditions of Release 2
Judiciary-led Change 3
SPOTLIGHT: NFL Players Coalition Speaks Up on Bail 4
Pretrial Litigation 5
System-Reform Litigation 5
SPOTLIGHT: Voters Ready for Commonsense Pretrial Justice 6
Pretrial Caselaw 9
Pretrial Legislation 10
Passed Legislation 10
Introduced and Pending Legislation 13
U.S. Senators Request Information from Insurance Companies Who Underwrite Bail Bonds 14
Executive Branch-led Change 15
Community & Grassroots-led Change 15
Municipal-Level Change 15
State and Local-Level Reports 16
List of acronyms 19

Cover: Color-coded activity map of the U.S. Darker colors represent states or territories closer to achieving full pretrial justice; based on grades from the PJI report, State of Pretrial Justice in America.

Introduction

Efforts to improve pretrial justice are underway across the country, from small towns that seek to lower jail populations to bills before Congress that would restrict federal funding for states that continue to rely on money bail. This document is intended to help readers understand the variety of pretrial improvements underway and where they are happening.

It's clear that the train bound for pretrial justice is leaving the station, and more and more states are getting on board as they discover that too many people are being held before trial because they cannot bond out, even though they are likely to appear in court with no new arrests. In the first nine months of 2018, 23 states passed legislation relating to pretrial justice, including a major reform bill (SB 10) in the nation's most populous state, California. Passing legislation is just one step, of course; careful implementation is also needed to realize meaningful and long-lasting pretrial practices that honor fairness, justice, and public safety.

This report offers brief descriptions of a range of work currently happening or recently accomplished and is organized into several main categories: Changing Practice, Judiciary-Led Change, Pretrial Litigation, Pretrial Legislation, Executive Branch-Led Change, and Community & Grassroots-Led Change. A state-by-state table is provided at the end of the document for quick reference.

This publication, updated quarterly by the Pretrial Justice Institute, retains overall information to ensure that this is a complete, standalone resource. New items are labeled after each quarter.

Changing Practice

There are many ways jurisdictions can improve pretrial systems and the outcomes they produce without introducing new laws or amending state constitutions. Simply changing practice within existing legal structures can create immediate and positive results. For example, some jurisdictions have seen success in diverting people with mental health or substance use disorders away from the criminal justice system and into treatment. Other places have chosen to issue non-custodial citations or summonses to people accused of low-level offenses, thus avoiding the harms of unnecessary detention. This section describes that work and more.

Pre-booking Deflection and Diversion

Many jurisdictions are pursuing diversion or deflection projects that keep people away from jail booking when a custodial arrest would be unnecessary or even harmful. The Police, Treatment and Community Collaborative (PTAC) held its inaugural conference on pretrial arrest diversion in March. The conference agenda included addressing the opioid crisis through pretrial diversion, decriminalizing mental illness, the role of communities in diversion, and creating a trauma-informed workplace.

Prosecutor-led change

Florida State Attorney Aramis Ayala announced that prosecutors in Orange and Osceola counties will no longer seek bail in low-level offenses, stating that it is a "poverty penalty." The charges where bail will not be sought include: driving without a license or vehicle registration; low-level drug crimes, such as possession of drug paraphernalia or fewer than 20 grams of marijuana; as well as disorderly intoxication, panhandling, and loitering.

NEW The primary for the Democratic nomination for Suffolk County (Massachusetts) District Attorney (DA) produced a five-way race, with the candidates offering various versions of bail reform, from a repeal of cash bail for nonviolent charges to prosecutors seeking bail only when a conviction would result in jail time. Rachel Rollins, a former federal prosecutor, won the nomination; she campaigned on a transparent policy whose default response is to decline to prosecute certain low-level, nonviolent crimes. She will run against independent candidate Michael Maloney; their positions have been highlighted through the ACLU of Massachusetts campaign, What a Difference a DA Makes.

Manhattan District Attorney Cyrus Vance announced that his office would no longer seek bail for people charged with low-level offenses, citing money bail as a cause of inequality and mass incarceration. This policy is similar to a policy implemented by Brooklyn District Attorney Eric Gonzalez.

Following up on a campaign promise to end mass incarceration and calls for change from advocacy groups, Philadelphia District Attorney Larry Krasner announced that his office would not seek money bail in a number of misdemeanor and low-level felony cases.

Defense attorney Joe Gonzales defeated incumbent Nico LaHood in the Democratic primary for the Bexar County (Texas) District Attorney race. During the primary campaign, Gonzales emphasized the need for bail reform. When someone is charged with a low-level offense and has little to no criminal history, Gonzales said, "I don't see why we can't agree to [personal recognizance] bonds so that these people can be released to go back to work, and then we'll see them when they have their day in court."

Commonwealth's attorneys in the city of Richmond (VA) will no longer seek cash bail bonds for people awaiting trial. In a Richmond Times-Dispatch article, prosecutor Michael N. Herring said he was "unaware of any validation of the correlation of money conditions and risk." The move received the support of the Richmond-based Business Coalition for Justice, a parent of the city's community bail fund—though some advocates are unsure what impact this new policy may actually have.

NEW Since July 2017, the rate of referral to all court diversion programs in Vermont has more than doubled, from 10 percent to 24 percent. The steep increase in court diversion participation is the result of statutory and programmatic changes led by Attorney General T.J. Donovan. Act 61, passed in 2017, made important changes to the court diversion and pretrial services programs in order to expand access. The majority of diversion participants are charged with misdemeanors, such as disorderly conduct, petit larceny, and unlawful mischief.

Assessment/Conditions of Release

A new video from Denver, CO, highlights its changes in practices as a result of participating in Smart Pretrial. These changes include: participation of defense attorneys at first appearance hearings; pre-release pretrial assessment of everyone charged with a felony offense; and graduated levels of supervision for people released before trial—beginning with no supervision for those with the highest likelihood of pretrial success.

NEW Pilot programs in Hamilton County and Hendricks County, **Indiana**, show that employing pretrial assessments results in more people being released while maintaining public safety and court appearance rates. In Hamilton County, 2,166 people were assessed in 2017 and 79 percent were released without having to pay bail; of those people, over 91 percent made all court appearances and 89 percent were not charged with new crimes. In Hendricks County, the failure to appear rate has declined from 19 percent to 10 percent. Overall in Indiana, 11 pilot

counties are using pretrial assessment tools; they are also working with the Indiana University Public Policy Institute to collect data and to validate the tools. A 2017 law signed by Gov. Eric Holcomb asks all Indiana courts to adopt evidence-based assessment rules by 2020.

In an effort to reduce the number of people held pretrial due to an inability to pay, Nashville's Pretrial Release program, run by the Davidson County's Sheriff's Office, will use a scoring tool to identify people with high likelihoods of pretrial success—those who will return to court with no new arrests—and permit them to be released without paying cash bail. The new policy involved negotiations between the sheriff, prosecutor, public defenders, police, court clerks, and judges. Sheriff Daron Hall supported the program, saying, "There has never been any proof that someone's ability to pay is a predictor they are more likely to show up for court. There is research, however, that shows people who remain in jail are more likely to be found guilty and serve more time." The city's efforts at making these changes were intensified by the threat of a lawsuit by the nonprofit law firm Civil Rights Corps.

The Players Coalition, which says its work was inspired by Colin Kaepernick's protests, also negotiated a plan with the NFL to donate $89 million over seven years to social justice issues important to African-American communities. In September, NFL Commissioner Roger Goodell attended a summit in New Orleans organized by the Coalition. Goodell and members of the Coalition spoke with public defenders about bail, fines, and fees and watched a bail hearing.

Judiciary-led Change

Judiciaries in some states have conducted studies to explore pretrial justice issues in depth and have adopted court rules and procedures that seek to reduce money-based detention and implement assessment-based practices. This section covers pretrial improvement work initiated and enacted by the courts.

In her 2018 State of the Judiciary address, **California** Chief Justice Tani Cantil-Sakauye renewed her call for bail reform, referencing Robert Kennedy's 1964 report on bail, saying, that money bail is "a vehicle for systematic injustice". She highlighted the work of the commission that she had established in 2016 and the ten unanimous recommendations that the group made in the fall of 2017. The language in this report influenced subsequent provisions in SB 10.

Colorado Supreme Court Chief Justice Nancy Rice has established a blue ribbon commission to address pretrial release practices. In a press release, Rice noted the importance of maintaining the presumption of innocence, while preserving a victim's right to be kept safe and informed during the pretrial process.

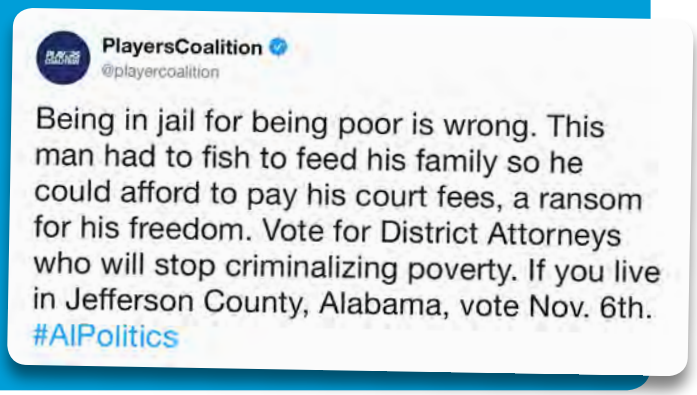
NEW The Judicial Council Ad Hoc Committee on Misdemeanor Bail Reform submitted a report to the Judicial Council of **Georgia**, making several recommendations to the state's bail framework. The changes include establishing a data collection system to determine which practices are the most effective, creating an efficient citation system, and investigating the use of pretrial assessments.

NEW A broad range of system stakeholders and legal professionals are calling on the **Illinois** Supreme Court to adopt a statewide rule that ensures no indigent people are locked up pretrial due to inability to pay. A group of 87 attorneys, including prosecutors, judges, and law professors, sent a letter to the Illinois Supreme Court Rules Committee urging the adoption of the rule. The group also contributed an article to Medium. Written by State Sen. Kwame Raoul, chairman of the Illinois Senate's Judiciary Committee, and Commissioner Jesus "Chuy" Garcia, chairman of

SPOTLIGHT: NFL Players Coalition Speaks Up on Bail

Professional football is Americans' favorite sport, and some current and former players are using their fame and influence to highlight social injustices, including money bond. Founded by recently retired wide receiver Anquan Boldin and Malcolm Jenkins of the Philadelphia Eagles in 2017, the Players Coalition has been bringing together system stakeholders, attending court-watching sessions, and speaking up on bail-related voter issues that affect the communities represented by NFL teams. Their activities have included:

- Philadelphia Eagles players Jenkins, Chris Long, and Rodney McLeod attended a meeting hosted by the National Legal Aid and Defender Association and the American Council of Chief Defenders in Philadelphia to discuss bail reform and future strategies involving all three organizations.
- In Chicago, former Bears player Matt Forte attended a rally organized by the Chicago Community Bail Fund and called for the end of the money bond system.
- The owner of the New York Jets and three members of the Coalition, Josh McCown and Kelvin Beachum of the Jets and Demario Davis of the New Orleans Saints, sent a letter to New York Gov. Andrew Cuomo urging the passage of comprehensive bail reform.
- Members of the Coalition, including San Francisco 49er Richard Sherman, attended an event in Oakland, Calif., to discuss the district attorney's race in Alameda County; the organization's Twitter feed has urged followers to pay attention to district attorney races.
- Takeo Spikes, twice an All-Pro selection, attended a "Listen & Learn Day" in Atlanta with the Players Coalition to learn more about bail and systemic issues that lead to the disproportionate incarceration of African-American youth.
- Panther Torrey Smith learned about the criminal justice system in his newly adopted city of Charlotte, along with Panthers owner David Tepper. Smith, on behalf of the Players Coalition, met with the Charlotte district attorney to discuss bail reform, visited a public defender's office, and spoke at a juvenile detention facility.
- Seattle Seahawk Douglas Baldwin, whose father was a career law enforcement officer, has attended Seattle Municipal Court and criticized bail as an "antiquated system" in press conferences.
- The Coalition has also created videos to educate the public about how bail works and the problems it causes, including an illustrated video released in September.



the Cook County Criminal Justice Committee, the article noted that all key stakeholders in Cook County supported the rule change.

Maryland's Court of Appeals voted unanimously last year to overhaul the bail system, requiring judges to consider whether defendants are able to pay bail when they set conditions for release. According to Judge John P. Morrissey, chief judge of the District Court of Maryland, as a result of this rule, about one-fifth of defendants are being held because they can't or don't pay bail, down from 40 percent in the months before the reforms were enacted. About 53 percent of those who appear before a bail commissioner are released from custody, up from 44 percent before the reforms, he said.

The Hon. Tina L. Nadeau, chief justice of the Superior Court of **New Hampshire**, welcomed PJI's 3DaysCount™ initiative to the state, saying, "We are committed to implementing smarter pretrial justice policies here in New Hampshire. The 3DaysCount model will help us start the process of evaluating our current practices regarding money bail and pretrial justice. This will help us determine the best ways to make changes and to take action." As part of the 3DaysCount process, officials will also explore ways the pretrial system may be amended to better address the challenges posed by New Hampshire's ongoing opioid crisis, which has claimed over 1,800 lives over the past five years.

Utah rolled out its plan to give judges information from pretrial assessments, following a slight delay resulting from a motion by the legislature encouraging the courts to halt the use of assessments. The tool gives judges more information, which judges had identified as necessary to make effective pretrial decisions. Rep. Paul Ray, who had introduced the original motion and suggested that he would introduce legislation to ban assessments, said that he became more comfortable with the assessment after court officials explained how it would be used.

In **Virginia**, Fairfax County Circuit Court Judge David Bernhard has stopped setting bail for nearly all defendants not deemed a danger to the public or a flight possibility. Bernhard, a former defense attorney, stated in a Washington Post article that the imposition of money bond often has a cascading effect, leading to a loss of employment and housing, and instead, often recommends pretrial services. Bernhard is believed to be the first judge in northern Virginia to undertake this practice.

Pretrial Litigation

In recent years, the constitutionality of existing pretrial practice has been challenged in lawsuits against counties and cities. Many of these cases have been settled, with jurisdictions agreeing to change practices that treat people differently because of their access to money. Some initial rulings have been appealed and these challenges continue to make their way through the courts. At the same time, as states adopt new rules and laws around pretrial practice, and attorneys advocate more rigorously at the pretrial stage, new caselaw is developing around issues such as what evidence must be disclosed at the pretrial stage, the right to call adverse witnesses at a pretrial detention hearing, and the boundaries of preventive detention.

System-Reform Litigation

The nonprofit civil rights law firms Civil Rights Corps (CRC) and Equal Justice Under Law (EJUL) have been successfully challenging the constitutionality of secured money bail derived from bail schedules. An overview of their work can be found in the PJI publication, *Money-Based Pretrial Practices Face Constitutional Challenges*. The ACLU has also undertaken system-reform lawsuits, focusing on wealth-based detention, access to counsel, and prosecutorial accountability.

The 10th Judicial District of **Alabama** and the U.S. Department of Justice (DOJ) reached an historic

Voters Everywhere Are Ready for Commonsense Pretrial Justice

A new poll of registered voters from the Pretrial Justice Institute (PJI) and the Charles Koch Institute (CKI) shows that most Americans realize the current pretrial justice system is not working and are open to considering—and supporting—commonsense solutions, particularly as they learn more about how the system operates.

An overwhelming majority of Americans—across all partisan, regional, and demographic divides—would like the criminal justice system to become fairer and to reduce the use of incarceration, except when it is necessary to protect public safety. Ninety-one percent of survey respondents supported reform, with 19 percent of them calling for a complete overhaul of the system. Only 6 percent saw no need for change. Voters showed that they want fewer people in the criminal justice system and want to move away from the system's default response of incarceration, preferring to move toward community-based supports.

REDUCE ARREST

Seventy-six percent of all respondents supported citations instead of arrests for low-level, nonviolent offenses. Seventy-eight percent of African Americans supported this idea, as did 86 percent of Latinx voters and 73 percent of whites.

RESTRICT DETENTION

When given a choice of what should be the deciding factor in determining whether or how to release someone before trial, voters overwhelmingly picked public safety (72 percent) over failure to appear concerns (10 percent). Americans also believe that many people who are arrested may be better served by community support services than by jail. Eighty-nine percent of respondents would provide supports for people who are victims of domestic violence, while 77 percent would help those with drug or alcohol dependencies. Eighty-nine percent of respondents also would provide support services for people who suffer from mental health issues.

REPLACE MONEY BOND

Voters are deeply concerned that wealth creates disparate outcomes in the justice system. More than three-quarters of respondents said the current system favors the wealthy. African-American and Latinx voters were most emphatic in that assessment, with 86 percent and 89 percent, respectively, saying wealthier people enjoyed better outcomes. Seventy-seven percent of white respondents agreed. Seventy-two percent of poll respondents want to limit how many days people not charged with serious violent crimes can remain in jail before trial if they cannot afford money bond.

RAISE EQUITY

More than half of all survey respondents, including a plurality of whites, believe white people enjoy better justice system outcomes than do people of color. Overall, 56 percent of those polled said whites have better outcomes, with 78 percent of African-American, 74 percent of Latinx, and 50 percent of white voters in agreement. Asked which was fairer to people of all races, money bail or community supports—such as court reminders and referrals to services, as well as supervision—nearly half of all respondents, or 48 percent, favored supports. Twenty-nine percent of all respondents said money bail was fairer, while 23 percent responded "both," "neither," or "don't know."

The survey showed that as people learned more about alternatives such as community-based supports and court notification programs, the more strongly they favored moving away from reliance on money bond. These findings hold important messages for system stakeholders and elected officials who determine pretrial policies and practices. The public wants change, but leaders need to work with community members to identify safe and effective alternatives.

89% support services for victims of domestic violence

89% favor mental health services

77% support services for drug/alcohol use

agreement to improve pretrial justice practices in Jefferson County, Alabama, heading off additional litigation. The binding agreement came in response to a complaint filed by EJUL and a subsequent investigation by the DOJ's Office for Civil Rights into Jefferson County's lack of an objective decision-making framework for pretrial release decisions, leading to discriminatory outcomes. In response to this complaint, the county sought technical assistance from PJI to find alternatives to a fixed money bond system, and to implement an objective system of pretrial justice. The binding agreement reached with the DOJ solidified pretrial improvements by providing DOJ oversight of:

- Engagement of prosecutor and defense in reviewing pretrial assessment results before bail setting;
- Collaboration with the University of Alabama-Birmingham for ongoing data collection and reporting, including validation of the pretrial assessment tool and equity measurements; and
- Establishment of supervision of least-restrictive conditions and the provision of services to support individuals in being successful during the pretrial phase.

NEW A federal district judge issued a preliminary injunction in a lawsuit brought against Cullman County, Ala., by Civil Rights Corps, the Southern Poverty Law Center, the ACLU Criminal Law Reform Project, and the ACLU Foundation of Alabama, ordering that the sheriff of Cullman County release all bail-eligible people on unsecured appearance bonds using Cullman County's current bail schedule, with some exceptions. The injunction followed a memorandum opinion from the judge, in which she outlined several deficiencies in the county's bail procedures; she also noted that the plaintiffs had convincingly demonstrated that "prolonged pretrial detention is associated with a greater likelihood of re-arrest upon release, meaning that pretrial detention may increase the risk of harm to the community."

The man whose case resulted in a historic **California** bail decision finally obtained his own pretrial release on May 9th. Earlier in the year, the California appeals court ruled that it was unconstitutional for courts to set bail amounts without considering ability to pay, and that Kenneth Humphrey was entitled to a new bail hearing. These hearings are now known as "Humphrey hearings." Humphrey was released after such a hearing with a number of non-financial conditions, including an ankle monitor, a restraining order, and full-time occupancy in a residential program for seniors.

NEW A lawsuit brought by the ACLU of **Florida** against Leon County moved another step forward in August. Judge Robert Hinkle of the U.S. District Court of Northern Florida stated that the county's practice of setting unaffordable bail as a means of detaining someone was unconstitutional, but he declined to make a ruling. Instead, the judge asked plaintiffs to determine how many people in the Leon County Detention Center are detained due to inability to pay and could qualify as part of a class action.

NEW The Court of Appeals for the 11th Circuit vacated earlier preliminary injunctions granted by the lower court, saying that the standing bail order adopted by the city of Calhoun, **Georgia**., was constitutional. The standing bail order had been challenged because it set bail amounts based on the offense and allowed a 48-hour period to determine indigency; in a split decision, the Court of Appeals upheld both policies. The dissenting judge, Beverly Martin, wrote, "It seems unremarkable to say that being jailed for 48 hours is more than a mere inconvenience."

The ACLU of Georgia and the ACLU has filed a class action in **Glynn County, Georgia**, alleging

an unconstitutional bail system and inadequate access to counsel. The plaintiffs in the suit are people who have been locked up for misdemeanors because they cannot afford bail. Moreover, the suit also claims that the attorney in charge of indigent defense cases for the county does not visit detained clients or represent them in bail hearings.

NEW In a lawsuit brought by Civil Rights Corps, the Lawyers' Committee for Civil Rights Under Law, Orrick, Herrington & Sutcliffe, and New Orleans civil rights attorneys Bill Quigley and Anna Lellelid-Douffet, the U.S. District Court for the Eastern District of Louisiana issued a declaratory judgment finding that judges in New Orleans have been systematically and unconstitutionally jailing people solely because they are too poor to pay court costs, fees, and fines. The court also found that the New Orleans courts failed to provide a neutral forum for determining fines and fees because a portion of the fines and fees went to a fund benefitting the judges who imposed them.

The bail bonds industry has also tried to employ litigation as a means of stopping system-wide reform. In **New Mexico**, such efforts proved unsuccessful. A federal judge imposed sanctions on an attorney representing the New Mexico bail bond association for filing frivolous claims seeking damages from the state Supreme Court justices and others while challenging the system of pretrial release that virtually did away with monetary bail bonds for criminal defendants. Judge Robert Junell had dismissed the underlying suit in December 2017, finding that the bail bond association and lawmakers who brought the suit lacked standing, and the named plaintiff failed to demonstrate that her Constitutional rights had been harmed under New Mexico's reform.

NEW A plea deal on notary fraud in **North Carolina** has attracted some attention. As part of the deal, Sarah Jessenia Lopez has agreed to testify against members of different bail bond companies, including Cannon Surety. In 2017, the state's Department of Insurance seized control of the company due to a failed audit and claims that the company was not paying its bail forfeiture obligations. The Department of Insurance regulates the state's bail bond industry. Between 2009 and 2016, criminal investigators made more than 1,500 arrests related to insurance and bail bonding fraud alone.

Tulsa County, Oklahoma, its sheriff, its 15 special judges and presiding judge of the district court were named defendants in a lawsuit brought by the CRC and local civil rights group, Still She Rises. The suit alleges that the courts routinely fail to consider ability to pay or the necessity of requiring secured money bail, resulting in detention based solely on inability to pay. The suit also points out that the county denies the appointment of counsel for indigent defendants at the hearing where pretrial release decisions are made; appointed counsel's first opportunity to file a motion challenging the secured money-bail condition occurs a week into a client's detention. The county's pretrial detention rate is 18 percent higher than the rest of the state.

NEW An investigation into the pretrial practices of Davidson County, **Tenn.**, by the Office of Civil Rights (OCR) closed in August after OCR found that the changes made by the county were consistent with the remedies it would have sought if it fully investigated the complaint and found a violation. The investigation was initiated after Equal Justice Under Law filed a complaint in 2015, claiming that the pretrial practices Davidson County discriminated against African Americans. The changes included the implementation of a pretrial assessment tool, which had been found to effectively predict re-arrest and failure to appear with no statistically significant disparate impact on African Americans.

A lawsuit filed by the ACLU of Texas and national law firm Arnold & Porter alleges that **Galveston County, Texas** operates a two-tiered system of justice, where those who cannot afford to pay money bail amounts determined by the county's bail schedule are detained for weeks or longer, while those who face the same charges but can afford to pay the money bail amounts are freed until trial. The lawsuit was brought against the county itself as well as the county's sheriff, chief magistrate judge, and chief prosecutor. This is the first filing by the ACLU to include the district attorney for the county named in the lawsuit, because the county district attorneys are involved in setting bail amounts for felony charges, often recommending bail amounts even higher than what the bail schedule suggests.

NEW The Harris County, Texas bail case of O'Donnell v. Harris County continues to make its way through the courts. Fourteen county judges objected to the terms of an order laid out by the federal district court and, as a result, a federal appeals panel of judges halted the portion of the order that called for certain people to be released immediately on no-cost bail in cases in which another person with the money would be released immediately. The appeals panel found that the immediate release of qualified poor people "easily violates the mandate [of the appeals court to the district court], which explicitly found that individualized hearings would remedy the identified procedural violations." The court did leave in place the requirement that courts make individualized bail determinations within 48 hours for people jailed on misdemeanors.

NEW A second class action based in Houston, brought by Civil Rights Corps, the Texas Fair Defense Project, and Kirkland & Ellis, alleges that Harris County failed to comply with the Fourth Amendment's probable cause requirements. In September, a federal judge found that city officials had intentionally destroyed evidence and made multiple misrepresentations to the court relating to the suit. The judge made a rare ruling that, if the case goes to trial, members of the jury must infer as fact that authorities destroyed evidence, knowingly and routinely detained people more than 48 hours without a probable cause hearing, and acted with deliberate indifference to the fact that they were violating people's constitutional rights.

NEW Civil Rights Corps, the ACLU, and the Texas Fair Defense Project have brought a lawsuit against **Dallas**, its sheriffs, judges, and magistrates because people who cannot afford bail are held indefinitely, while those who can afford bail are freed immediately, a violation of the U.S. Constitution. The suit further charges that people in jails are not permitted access to counsel and that the public is not permitted to attend hearings. The U.S. District Court for the Northern District of Texas granted a preliminary injunction on Sept. 20, finding that plaintiffs were likely to prevail on claims of equal protection and procedural due process. The court also agreed with the Harris County case finding that "secured financial conditions fare no better than unsecured or non-financial conditions at assuring appearance or law abiding behavior, and that community supervision was actually more cost effective than pretrial detention." The court based its relief after the case in Harris County, Texas.

Pretrial Caselaw

The **California** Court of Appeals upheld a trial court's decision to hold a man charged with kidnapping with intent to commit rape without bond, noting that while it was unusual to withhold bail for a non-capital offense, there was evidence to support the trial court's finding that there was a substantial likelihood that the man's release would result in great bodily harm to others.

The **Indiana** Supreme Court has ruled that state law does not prohibit a clerk of court from transferring bond funds to a creditor who has obtained a civil

court order to garnish a cash bond, once the bond is no longer required. Judges dissenting with this decision expressed concern that such a rule might interfere with a person's incentive to appear in court, if the person realizes the bond is not recoverable even with compliance with court appearance.

NEW The U.S. Court of Appeals for the Third Circuit affirmed the District Court's ruling in the case of Holland v. Rosen that there is no constitutional right to deposit money or to obtain a corporate surety bond as an equal alternative to non-monetary conditions of pretrial release. New Jersey moved away from the monetary bond system with a model that prioritizes the use of non-monetary conditions in 2017.

The **New Jersey** Supreme Court ruled in State v. Dickerson that a search warrant affidavit is not required to be automatically disclosed to defendants in a pretrial detention hearing, citing the "impractical demands" it might place on law enforcement and ongoing investigations. The case, which was criticized by the New Jersey Law Journal as potentially leading to the withholding of relevant information, is one of a series interpreting the state's new Criminal Justice Reform Act. The state appellate court also ruled recently that pretrial defendants cannot call adverse witnesses in pretrial detention hearings.

Pretrial Legislation

State and federal lawmakers have proposed numerous bills aimed at reducing the use of money in pretrial systems, increasing the use of pretrial assessment tools, and limiting the number of people who are held in jail before trial.

Passed Legislation

Alabama has revised its laws to permit magistrates to use electronic communication with a defendant and levy fees upon conviction (HB 262).

NEW On Aug. 28, Gov. Jerry Brown of **California** signed SB 10 into law. The new law eliminates money bail, implements a revised pretrial release procedure, requires every county to adopt a pretrial assessment instrument, and allows judges to preventively detain individuals after a preventive detention hearing under certain circumstances. According to the California Department of Insurance, the bail bond industry presence in the state had been significant; a CDI report from 2011-2013 found bail agents each year posted an average of 205,000 bail bonds and collected an average of $308 million in nonrefundable premium fees.

NEW **California** amended an existing law that allows individuals charged with specific crimes to qualify for a deferred entry of judgment (AB 208). The law makes the deferred entry of judgment program a pretrial diversion program upon a person's pleading not guilty, waiving his or her right to a trial by jury, and entering a drug treatment program.

NEW **California** SB 215 requires a court granting pretrial diversion due to mental disorder, upon request, to conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, to order its payment during the period of diversion. The bill also provides that an arrested person's inability to pay restitution due to indigence or mental disorder is not grounds for denial of diversion or a finding that the person has failed to comply with the terms of diversion.

NEW **California** SB 1054 authorizes a qualified local public agency in the City and County of San Francisco to contract with the existing not-for-profit entity that is performing pretrial services to provide continuity and sufficient time to transition the entity's employees into public employment.

Colorado enacted twin bills, both introduced by state senator Bob Gardner, to establish alternative

programs in the criminal justice system to redirect individuals with a behavioral health condition to community treatment (SB 249), and to also establish a statewide behavioral health court liaison program (SB 251).

Connecticut will study the feasibility of establishing one or more courts that specialize in the hearing of criminal or juvenile matters in which a defendant is an opioid-dependent person. (S 483).

Delaware Governor John Carney signed a bill (HB 204) to change the conditions under which people are released pretrial. The new law, while not eliminating money bail, encourages courts to use non-monetary conditions of release to provide reasonable assurances that the person will appear in court and not compromise public safety. The law also calls for the use of empirically developed instruments to guide courts in making decisions about a person's likelihood of pretrial success.

NEW The **Delaware** Appropriation Act (SB 235) establishes a Criminal Justice Improvement Committee, whose members include the attorney general, chief defender, commissioner of correction, and director of substance abuse and mental health. The committee's mandate is to look for opportunities for efficiencies in the criminal justice system, including "[b]ail and alternatives to incarceration including new technologies."

Florida has enacted historic criminal justice legislation (SB 1392), requiring the collection and public release of criminal justice data. The bill is being hailed as a way to increase transparency, identify areas for improvement, and provide a yardstick for reforms as they are implemented. The data collected will include who is being assigned bail and for what kind of charges, how much bail defendants are mandated to pay to be released from pretrial detention, who is failing to pay low bail, and what is the pretrial release violation rate.

NEW **Hawaii** has passed a criminal justice data bill (SB 2861) that requires the Department of Public Safety to collect data and performance indicators, including the total number of people held pretrial and admitted to pretrial detention each month; the number of people released pretrial each month; the average length of pretrial stay; the number of people held on cash bail; and the average amount of time for completing and verifying pretrial risk assessment. Each indicator will provide information by gender, race, and age.

NEW **Illinois** has amended its code of criminal procedure to address the needs of pregnant women at the pretrial stage. HB 1464 provides that if the court reasonably believes that a pretrial detainee will give birth while in custody, the court shall order an alternative to custody unless, after a hearing, the court determines that the release would pose a real and present threat to the alleged victim or to the physical safety of any person or the general public.

NEW **Illinois** SB 3023 creates the Community Law Enforcement Partnership for Deflection and Addiction Treatment Act, which allows any law enforcement agency to establish a program to facilitate contact between a person and a licensed substance abuse treatment provider for the assessment and coordination of treatment. The bill also requires the Criminal Justice Information Authority to measure performance of the program. The initiation of the bill was a joint effort of the Dixon Police Department, the Mundelein Police Department, and Treatment Alternatives for Safe Communities (TASC).

Georgia Governor Nathan Deal signed SB 407 into law, which promotes the use of citations in response to misdemeanors by requiring the Judicial Council of Georgia to develop a uniform misdemeanor citation and complaint form for use by all law enforcement officials. Other portions of the bill state that courts shall not impose excessive bail for misdemeanors

and require courts to consider financial resources of the person accused when setting bail.

A new **Indiana** law (HB 1328) states that a person charged with murder is not bailable if the state proves by a preponderance of the evidence that the proof is evident or the presumption strong. In all other cases, offenses are bailable.

A program to pilot pretrial assessments in four counties in **Iowa** was originally vetoed by Governor Kim Reynolds in the appropriations bill, which would have immediately ended the program. Instead, though, the program has been given six months to operate and gather data. In her veto message, Gov. Reynolds wrote, "If, after studying the data and research conclusions, it is found that this program will be in the best interests of the public, then new legislation should be considered that authorizes the (Public Safety Assessment) or similar risk-assessment tools." (HF 2492)

Louisiana now provides for the release of a person without surety when the person was not brought before a judge within 72 hours of arrest (HB 293). The legislature also passed a resolution, requesting the Louisiana State Law Institute to review state laws regarding bail and study whether a system which provides for the presumed release of a person on unsecured personal surety or bail without surety in lieu of a preset bail schedule would be more successful in ensuring the appearance of the defendant and the public safety of the community.

Maryland has established the Pretrial Services Program Grant Fund to provide grants to eligible counties to establish pretrial services programs (HB 447).

Massachusetts has enacted changes to its laws that require prosecutors to establish pre arraignment programs to divert people with mental health needs away from the justice system; require judges to make inquiries into ability to pay and to make on the record findings when the amount of bail set results in detention; and establishes a commission to further study pretrial release. (S 2371 and H 4012)

NEW The **Michigan** appropriations bill (SB 848) declares that the state court administrative office shall pilot a pretrial assessment tool in order to provide relevant information to judges "so they can make evidence-based bond decisions that will increase public safety and reduce costs associated with unnecessary pretrial detention"; the bill also requires the office to submit a progress report on the implementation of the assessment tool and associated costs by Feb. 1, 2019.

New Hampshire enacted SB 556 which revises the procedures for the granting of bail, the procedure for annulment of certain violations and misdemeanors, and the requirements for demonstrating indigency for the purpose of the annulment of a criminal record.

Ohio enacted SB 66, which allows prosecutors to establish pretrial diversion programs for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again. The prosecuting attorney may require, as a condition of an accused's participation in the program, the accused to pay a reasonable fee for supervision services that include, but are not limited to, monitoring and drug testing. The new law also allows "[a]ny person who has been arrested for any misdemeanor offense and who has effected a bail forfeiture for the offense charged may apply to the court in which the misdemeanor criminal case was pending when bail was forfeited for the sealing of the record of the case that pertains to the charge."

Oklahoma amended its Pretrial Release Act and authorized special judges to determine eligibility for certain releases through SB 363.

Through HB 849, **Tennessee** has directed the State Advisory Commission on Intergovernmental Relations to study the implementation and effects of global positioning monitoring as a condition of bail for defendants accused of stalking, aggravated stalking, or especially aggravated stalking, involving a violation of an order of protection.

Vermont has enacted H 728, which replaces the language "ensure the appearance of the person" to "mitigate the risk of flight from prosecution" to reflect more accurately the legislative intent behind bail; provides that in general no bond shall be imposed upon the temporary release of a person charged with an expungement-eligible misdemeanor, though judges retain the discretion to set bail for these individuals at a maximum of $200; requires the court to consider the defendant's financial means prior to setting bail; creates separate lists of considerations for judges when setting conditions to mitigate the possibility of flight and conditions to protect the public; provides that the court has the authority to revoke bail if a defendant repeatedly violates the conditions of his or her release only if those violations impede the prosecution of the accused.

Virginia has raised its felony threshold from $200 to $500, the first such increase in almost 40 years. Lawmakers who supported the change in SB 105 expressed concerns that the low threshold unnecessarily derailed lives for relatively minor items; Virginia previously had the lowest felony threshold amount in the country.

Washington has enacted significant bail reform with the signing of SB 5987 by Gov. Jay Inslee. The bill, which was drafted in response to a Washington Supreme Court opinion, revises the definition of a pretrial release program to include any program in superior, district, or municipal court and finds that courts are allowed to pursue interests other than court appearance through the regulation of release. The bill raises concerns that courts may heavily extend conditions of release in a greater number of cases.

Introduced and Pending Legislation

Federal legislation

NEW Sen. Bernie Sanders (I-Vt.) introduced S. 3271, the No Money Bail Act, a companion bill to one introduced by Rep. Ted Lieu (D-Calif.). The bill provides grants to states that wish to implement alternate pretrial systems and reduce their pretrial detention population; withholds grant funding from states that continue to use money bail systems; and requires a study to ensure the new alternate systems are not leading to disparate detention rates.

Illinois Congressman Danny Davis introduced HR 4833, the Bail Fairness Act of 2018, which would require states to release people charged with misdemeanors on non-monetary conditions in order to be eligible for certain federal law enforcement and justice funds. The bill also requires states to provide pretrial diversion programs.

State legislation: The following state legislatures were still in session as of Sept. 30 with pending pretrial bills.

Illinois SB 2564 provides that the chief judge of the Circuit Court of a county may decide not to implement a provision by local court rule that requires a person charged with an offense to be allowed counsel at the hearing at which bail is determined. Multiple bills, including SB 2600, SB 3269, and HB 4644, allow some credit toward bail for each day a person is incarcerated. SB 3268 appropriates money from the General Revenue Fund to the Supreme Court for probation reimbursements and training for probation officers in pretrial services and other operational expenses in support of bail reform.

Massachusetts HB 4401, in the part relevant to pretrial, provides that that "funds shall be used for the ongoing development and implementation of the validated assessment tool to inform pre-adjudication decision-making with regard to detention, release on personal recognizance, or release under conditions of criminal defendants before the adult trial court; provided further, that a report shall be submitted to the house and senate committees that includes: (a) the status of the validated risk assessment tool; (b) any efforts to implement the risk assessment tool in the courts; and (c) further goals to expand the use of the risk assessment tool".

NEW **Massachusetts** Gov. Charlie Baker filed bill H 4903 to expand the list of offenses that provide grounds for a pretrial dangerousness hearing; the bill also would change current law by allowing a person's criminal history to be considered as grounds to warrant a dangerousness hearing. The proposed law also allows prosecutors to seek a dangerousness hearing at any time.

NEW **Missouri** HB 2 allows circuit courts to establish a treatment court division to provide an alternative for the judicial system to dispose of cases that stem from substance use. The treatment court division may include an adult treatment court, DWI court, family treatment court, juvenile treatment court, veterans treatment court, or any combination thereof.

NEW **New Hampshire** HB 1395 would provide that the "court shall consider the financial resources of the person who is detained when setting cash bail and shall not set cash bail in an amount resulting in pretrial incarceration."

New Jersey has bills that provide for pretrial diversion of people with mental health disorders (S 2529 and S 2560). Other bills create rebuttable presumptions for detention for certain crimes (S 1675, A 2220, A 3198). S 2687 and A 3995 expand pretrial assessment to include history of domestic violence. S 2754 directs Administrative Office of the Courts to collect data about crimes committed by persons released on bail.

New York has several bills that address bail bonds and pretrial procedures. Looking at the bills broadly, one group of bills looks at who may issue bail bonds and to whom; S 8146, for example, prohibits for-profit bail bonding. Another group of bills establish varying procedures for release, with presumptions for release on recognizance, time limits on pretrial detention, court notifications, right to counsel at recognizance hearings, and data gathering provisions.

Ohio bills SB 274 and HB 439 require courts to use the results of a validated assessment tool in bail determinations, allow nonmonetary bail to be set, require courts to collect certain data on bail, pretrial release, and sentencing, and require the Supreme Court to create a list of validated assessment tools and monitor the policies and procedures of court.

U.S. Senators Request Information from Insurance Companies Who Underwrite Bail Bonds

Citing concerns about industry abuses, Sens. Sherrod Brown (D-Ohio) and Cory Booker (D-N.J.) sent letters to 22 insurance companies, requesting information about their practices regarding underwriting bail bond companies, monitoring for abuses and legal violations, and promoting consumer awareness. In the letter, the senators noted that they were "concerned that many of our nation's insurance companies may be pursuing profits at the expense of economic security for vulnerable families and the goals of public safety."

Executive Branch-led Change

Executive branch pretrial improvements can include actions taken by governors, attorneys general, or county commissioners, as well as by groups that utilize funding provided through government agencies such as the Bureau of Justice Assistance.

A report from **New York City** Comptroller Scott M. Stringer documents the role that money bail plays in New York City's criminal justice system and calls for the immediate elimination of commercial bail bonds. The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC found that money bail results in short, unproductive, and costly stays in jail.

The **New York City** Department of Consumer Affairs filed charges against a bail bond agency and multiple insurance companies for violations of consumer protection law. The bail bond agency was charged with charging illegal fees, refusing to provide copies of documents, and failing to return collateral owed to consumers. The agency is seeking more than $57,500 in fines and restitution for 16 consumers, and a restitution fund for consumers who have not yet filed complaints.

NEW *__New York__ Gov. Andrew Cuomo has proposed new regulations to address predatory practices in the bail bond industry. The new regulatory package clarifies that bail agents may not charge fees other than the premiums set by statute and costs of special bail conditions imposed by a court. It also requires prior approval from the superintendent of the Department of Financial Services of all bail bond contracts and forms and prohibits the use of unapproved forms; requires that bail agents provide consumers with receipts and copies of all contracts and documents involved in the bail transaction; and requires that bail agents post their licenses and display "how to make a complaint" signs.

Governor **Tom Wolf** of **Pennsylvania** announced plans to improve pretrial decision-making. The plans were based on findings that pretrial release decisions vary widely by geography and race. In 2015, monetary bail was used in 76 percent of felony cases in Philadelphia County, but just 53 percent in Allegheny County, and closer to 50 percent of cases in other counties. Thirty-three percent of white defendants charged with felony offenses involving a weapon received a monetary bail decision, compared to 78 percent of black defendants. Moreover, only 37 of Pennsylvania's 67 counties have county pretrial services programs, and just 12 of those use assessments to inform decisions about bail, diversion, release, and pretrial supervision.

Community & Grassroots-led Change

Municipal-Level Change

Over objections from the for-profit bail bond industry, the **Atlanta City Council** unanimously passed changes to its ordinances that will reduce the number of people locked up before trial for nuisance and non-violent charges. The changes, sought by community and grassroots activists, were sponsored on behalf of newly-elected Mayor Keisha Bottoms.

The website cleveland.com ran a series entitled "Justice for All," highlighting issues around money bond in **Cuyahoga County (Ohio)**. Among the findings of the series was that a first degree misdemeanor charge resulted in bonds ranging from $2,000 to $10,000 among the county's 13 municipal courts. The series also featured personal stories of people affected by bond, and a poll finding that Ohioans overwhelmingly favor bail reform.

In an effort to promote transparency around jails, a **Mississippi jail database**, created through a partnership of the Roderick and Solange MacArthur Justice Center and the University of Mississippi School of Law, provides information on who is in jail on what charge, length of stay, and county-by-county information.

Black Lives of Unitarian Universalism led a panel discussion in **Kansas City** called "Anatomy of a Bailout" to educate fellow Unitarian Universalists about the money bail system and to identify ways congregations can work to abolish it in their communities.

The **New York City Council** passed the Algorithmic Accountability Bill, which calls for the establishment of a task force to examine how city agencies are using algorithms, with the intention of creating more transparency in formulas used by algorithms.

The **Orange County (NC) Board of Commissioners** unanimously passed a resolution endorsing the goals of the 3DaysCount campaign to reduce arrest, replace money bail with evidence-based practices, restrict detention, and reduce disparities in the system.

Philadelphia's city council passed a resolution encouraging the city's district attorney's office and the state's first judicial district to reduce their use of money bail. The resolution also calls on Pennsylvania's legislature and supreme court to amend state laws to "allow for the elimination of cash bail statewide."

Philadelphia has also announced plans to close one of its oldest prisons without opening a new one. Philadelphia has cut its prison population by one-third since joining the MacArthur Safety and Justice Challenge.

The **San Francisco Board of Supervisors** unanimously approved legislation to eliminate criminal justice fees for incarceration, probation, penalty assessments and electronic monitoring. The proposal was supported by the Office of the Treasurer's Financial Justice Project, Public Defender's Office and Mayor's Budget Office. A study of the San Francisco's justice system fees found that only 17 percent was collected on the $15 million accumulated over 6 years by 20,000 people.

State and Local-Level Reports

NEW A report from the ACLU of Florida and its Greater Miami chapter demonstrates that racial and ethnic disparities occur at all decision points in Miami-Dade's criminal justice system. Unequal Treatment: Racial and Ethnic Disparities in Miami-Dade Criminal Justice shows that at the pretrial stage, black Hispanics are the least likely to bond out compared to whites, white Hispanics, and black non-Hispanics. Black Hispanics also have the longest periods of pretrial detention.

The **Georgia** Council on Criminal Justice Reform released a report outlining recommendations for improving the state's criminal justice system. The report includes recommendations specific to improving pretrial justice with the goal of maximizing public safety, maximizing pretrial appearances and maximizing personal liberty. Recommendations include increasing the use of citations in lieu of arrest, utilizing release with the least restrictive conditions, and implementing the use of pretrial assessment tools to aid judges in their decision-making; some of these recommendations have been enacted through S 407.

Nearly half of the people in jail in **Hawaii** have not been convicted of the charges against them, according to a new report from the ACLU of Hawaii. Hawaii's Accused Face an Unequal Bail System found, moreover, that native Hawaiians and Pacific

Islanders are disproportionately more likely to be unable to afford bail and that it takes around 90 days for a meaningful bail hearing to occur. The report offers 16 recommendations for reform, including eliminating money bail, requiring a bail hearing within 48 to 72 hours, and updating the current bail statute to include a presumption of unconditional release for all arrestees regardless of crime. Read the full report here.

The Chicago-based (**Illinois**) Coalition to End Money Bail released a court-watching report after Cook County implemented a new order that no person should be detained due to an inability to pay bail. *Monitoring Cook County's Central Bond Court* found that while the rule was effective in some instances—the use of money bail decreased by 48 percent after the order went into effect—nearly half of all money bonds issued were still unaffordable because judges were failing to follow the new order.

DataCenterResearch.org released a brief, From Bondage to Bail Bonds: Putting a Price on Freedom in New Orleans. The brief traces the development of cash bail from its roots in slavery and post-bellum practices to modern practices, then explains the processes and costs of modern money bail. Finally, it presents some ways in which the city has been moving to a less harmful criminal legal system and offers models from jurisdictions that have rejected money-based detention as inconsistent with the core principle of innocent until proven guilty. **New Orleans** leads U.S. cities in jailing its residents.

The University of Baltimore School of Law's Pretrial Justice Clinic issued its second annual report in June. Clinic students represented 45 low-income **Marylanders** and secured the pretrial release of 15 clients in the 2017-18 academic year. Seventy percent of all cases referred to the clinic had a disposition where the defendant obtained a favorable or partially favorable result, showing that many people are locked up pretrial on charges that ultimately go away.

The **Maryland** Office of the Public Defender released Bail Reviewed: Report of the Court Observation Project. Members of the community observed bail review hearings to learn more about the pretrial process and to gather data about the implementation of a court rule change intended to curb reliance on money bail. Community members who participated found the lack of sufficient pretrial resources to be a critical factor in many of the bail review hearings. Court watchers found that bail reviews did not primarily result in the imposition of money bail, indicating a clear success of the rule change. However, a high number of people were held without bail for drug charges that did not inherently suggest a danger to the public.

A report from the Baltimore City and Prince George's County (**Maryland**) branches of the NAACP provided quantifiable results from the state's court rule change to end detention of people due solely to inability to pay money bail. Advancing Pretrial Reform in Maryland: Progress and Possibilities found that after the new court rule, the following outcomes occurred: a 21 percent drop in defendants assigned bail at initial hearings; an increase in defendants both held without bail and released on recognizance; those assigned bail had amounts that were 70 percent lower than in 2015.

NEW An in-depth report on Mississippi's bail bond industry by the Marshall Project, a nonprofit news organization covering the U.S. criminal justice system, reveals that the 193 bail bond companies in the state took in $43 million in fees over 18 months, and that 36 percent of that revenue was from bonds of $5,000 or less. The reporting was made possible by an October 2016 requirement by the Mississippi Department of Insurance that bond agencies report details of every bond they write. An accompanying guide to the methodology of the Marshall Project report revealed that three-quarters of bail agents in Mississippi are personal surety agents, meaning that after staking $30,000 with the state, these

agents are allowed to write an unlimited number of bonds.

NEW The ACLU of Nebraska has launched a revolving bail fund in Lancaster County to facilitate the release of people who are jailed pretrial because they cannot afford money bail. The organization is also collecting stories from people who have been held in jail because of inability to pay.

A poll conducted by FWD.us found overwhelming support for bail reform among **New York** voters. After being given the opportunity to hear from both sides of bail reform, more than 70 percent of respondents were in favor of eliminating pretrial detention for misdemeanors and non-violent felonies. A majority of respondents also said it was a waste of money to lock up people charged with low-level offenses.

More than 90,000 people spent at least one day in jail because they could not post bail in New York state over the past five years, according to a newly published analysis of eight upstate counties by the New York Civil Liberties Union. Sixty percent were jailed pretrial on only a misdemeanor or violation and almost a quarter on bail amounts of $500 or less. Presumed Innocent for a Price documents how the issue of money bail reaches far beyond New York City.

Beyond the Myths: Making Sense of the Public Debate about Crime in New Mexico is a new report from the **New Mexico** ACLU that separates fact from fiction after New Mexico's changes to its pretrial practices, both through a state constitutional amendment and changes to the state court rules. The report addresses issues such as pretrial assessments and the bail bond industry.

NEW A statewide poll commissioned by the ACLU of North Carolina has found that support for bail reform is strong and cuts across political ideologies. Seventy-four percent of voters supported reforms to make release from jail while awaiting trial "less reliant on money and more dependent of the circumstances of each individual case," including 77 percent of Democrats, 75 percent of Republicans, and 70 percent of independents.

NC Policy Watch, a project of the **North Carolina** Justice Center, specializes in providing news and analysis on policy issues relevant to the state. In a series of pithy pieces focused on bail, the non-profit news center called out perverse incentives created by for-profit bail, such as people asking for higher bail amounts because they cannot afford bonds written by bondsman for smaller amounts; corruption in the North Carolina bail bond industry; and the success of Mecklenberg County's pretrial release system, which in 2015 had a 98 percent court appearance rate and 93 percent public safety rate.

After 18 months of studying its local bail system the Cuyahoga County (**Ohio**) Bail Task Force released a report on its findings and recommendations. The task force, which was appointed by Court of Common Pleas Presiding Judge John Russo, calls for a "transition from a bail system based on bond schedules, which vary widely from one [municipal] court to the next, to a centralized, consistent, and comprehensive system of pretrial services initiated immediately after arrest."

In response to growing litigation around the issue, a Montgomery County, **Ohio** commission made up of diverse stakeholders, including judges, court administrators, defense attorneys, and prosecutors, made new recommendations to improve its pretrial practices. While courts felt that bail schedules and practices were generally effective, Public Performance Partners (P3) "discovered a different narrative occurring in the data." P3 found that more than one out of three people were failing to appear, and 27 percent were charged with a new crime. The commission recommended moving toward an expanded, regional pretrial services model and moving away from money bail.

After requesting data for 12 county jails, **Oklahoma** Watch found wide disparities among nonmonetary releases for people charged with misdemeanor offenses, ranging from no releases in Adair County, to 63 percent in Comanche County in 2017. Several counties have taken steps to address these issues. Working with the Vera Institute, the then-presiding district judge for Rogers County issued an administrative order establishing a nonmonetary release program for nonviolent offenses; as a result the county's pretrial release rate for misdemeanors increased from 3.8 percent to nearly 60 percent in one year.

NEW In a letter sent to the presiding judges of the **Philadelphia** court systems, the ACLU of Pennsylvania outlined several concerns about unconstitutional bail practices and asked for a meeting to discuss remedies. The organization, which sent the letter after observing approximately 650 arraignment proceedings, noted that it hoped that by working together, "litigation to ensure necessary reforms will not be needed."

List of acronyms

ACLU	American Civil Liberties Union
BJA	Bureau of Justice Assistance
CPAT	Colorado Pretrial Assessment Tool
CRC	Civil Rights Corps
CSG	Council of State Governments
DOJ	Department of Justice
EBDM	Evidence-Based Decision Making
EJUL	Equal Justice Under Law
IACP	International Association of Chiefs of Police
JDAI	Juvenile Detention Alternatives Initiative
JRI	Justice Reinvestment Initiative
LEAD	Law Enforcement Assisted Diversion
LJAF	Laura and John Arnold Foundation
LJAF PSA	Laura and John Arnold Foundation Public Safety Assessment
NACo	National Association of Counties
NCJA	National Criminal Justice Association
NCJRP	National Criminal Justice Reform Project
NCSC	National Center for State Courts
NCSL	National Conference of State Legislatures
NGA	National Governors Association
NIC	National Institute of Corrections
OSF	Open Society Foundations
PJI	Pretrial Justice Institute
PSA	Public Safety Assessment
SJC	Safety and Justice Challenge (MacArthur Foundation)
SJI	State Justice Institute
SPLC	Southern Poverty Law Center
SONG	Southerners on New Ground
STEER	Stop, Triage, Engage, Educate, and Rehabilitate
TAD	Treatment and Diversion
TASC	Treatment Alternatives for Safe Communities

Activity by Region and State

Following is a list presenting the major pretrial improvements described above as of July 2018, organized by state.

	Changing Practice	Judiciary-Led	Pretrial Litigation	Pretrial Legislation	Executive-Led	Community & Grassroots-Led
Alabama			●	●		
Alaska						
Arizona				●		
Arkansas						
California		●	●	●		●
Colorado	●	●		●		
Connecticut				●		
Delaware				●		
Florida	●		●	●		●
Georgia		●	●	●		●
Hawaii				●		●
Idaho						
Illinois				●		●
Indiana	●		●	●		
Iowa	●			●		
Kansas						
Kentucky		●				
Louisiana			●	●		●
Maine						
Maryland		●		●		●
Massachusetts	●	●		●	●	
Michigan				●		
Minnesota						
Mississippi						●
Missouri				● (Pend Only)		●
Montana						
Nebraska						●
Nevada						
New Hampshire		●		●		
New Jersey			●			
New Mexico			●			●
New York				● (Pend Only)	●	●
North Carolina	●		●			●
North Dakota						
Ohio				●		●
Oklahoma		●		●		●
Oregon						
Pennsylvania					●	●
Rhode Island						
South Carolina						
South Dakota						
Tennessee	●		●	●		
Texas	●		●			
Utah		●				
Vermont	●			●		
Virginia	●	●		●		
Washington				●		
West Virginia						
Wisconsin						
Wyoming						

AMERICAN CIVIL LIBERTIES UNION OF OHIO AND THE PRETRIAL JUSTICE INSTITUTE PRESENT:

POLL RESULTS ON BAIL REFORM IN OHIO

This study was conducted by Lake Research Partners between May 2 and May 17, 2018, and included phone interviews with 537 registered voters in Ohio. The percentages reflect the view of Ohio voters of all major demographic groups, political affiliations, and geographical regions throughout the state.

87% SUPPORT PROVIDING SERVICES FOR OHIOANS WHO HAVE MENTAL HEALTH NEEDS

BELIEVE THAT THE WEALTHY ENJOY BETTER OUTCOMES IN THE CRIMINAL JUSTICE SYSTEM

72% SUPPORT PROVIDING RELIABLE TRANSPORTATION TO COURT FOR INDIVIDUALS AWAITING TRIAL

SEVENTY %
SUPPORT LIMITING THE NUMBER OF DAYS MOST OHIOANS CAN REMAIN IN JAIL BEFORE TRIAL

SEVENTY-FIVE %
FAVOR REDUCING THE NUMBER OF ARRESTS FOR CERTAIN OFFENSES BY ISSUING CITATIONS TO APPEAR IN COURT

WHY IS BAIL REFORM IMPORTANT?

- DEPOPULATE OUR ALREADY OVERCROWDED JAILS AND WORK TOWARD ENDING OHIO'S UNJUST SYSTEM OF MASS INCARCERATION
- CONFRONT THE TWO-TIER SYSTEM OF JUSTICE; WHERE WEALTHY PEOPLE CAN BUY THEIR FREEDOM AND POORER PEOPLE CANNOT
- ENSURE THAT PEOPLE'S LIVES DO NOT SPIRAL OUT OF CONTROL WHILE THEY ARE AWAITING TRIAL. THESE CONSEQUENCES COST PEOPLE THEIR JOBS, HOMES, AND EVEN FAMILIES

FIFTY-FIVE %
SUPPORT RELEASING INDIVIDUALS WITH NO MONEY DOWN (UNSECURED BONDS)

54%
SUPPORT MAJOR REFORMS TO THE CRIMINAL JUSTICE SYSTEM

FIFTY-THREE %
BELIEVE THAT WHITE PEOPLE ENJOY BETTER CRIMINAL JUSTICE OUTCOMES THAN PEOPLE OF COLOR

ACLU Ohio

ACLU SMART JUSTICE Ohio

pji PRETRIAL JUSTICE INSTITUTE

UNDERSTANDING SB10:
WHAT THE NEW LAW MAY MEAN FOR CALIFORNIANS

By eliminating money bail in the nation's most populous state, California's historic SB10 legislation has sent a clear message that this practice is unfair, ineffective, and a waste of public resources. This did not come without controversy, nor are the challenges over simply because a bill was passed. As we speak, a movement to put this issue before voters in 2020 and delay implementation is being fronted by the commercial bail bond industry.

Meanwhile, as the state moves forward with preparations for the law to take effect in October 2019, decisions are being made that will determine the impact of SB10 on long-standing economic and racial disparities at the pretrial stage. As a first step toward understanding the facts of SB10 and thinking through an optimal implementation process, the Pretrial Justice Institute offers this overview to interested stakeholders across the country.

BEFORE AND AFTER

Before SB10	After Implementation
Under prior law, county courts were required to establish a bond schedule.	Monetary bonds will no longer be set on individuals awaiting trial, and California counties will no longer be required or permitted to maintain a bond schedule.
Prior to SB10, financial terms of release were predominant.	Pretrial release must be on the least restrictive conditions necessary to reasonably assure public safety and court appearance.
Though many counties in California had an assessment in place prior to SB10, assessments were not addressed in statute and were often secondary to the bond schedule.	Each county is required to adopt a pretrial assessment instrument.
Prior to SB10, only a small number of charges were eligible for preventive detention, though detention due to inability to pay a financial bond was quite common.	Judges can preventively detain individuals subsequent to a preventive detention hearing if the person is accused of a violent crime, is on post-conviction supervision, is charged with a new offense while pending trial or sentencing for a felony conviction, has allegedly intimidated a witness, or if the judge believes that no conditions or combination of conditions will allow the person to remain safely in the community.

HIGHLIGHTS FROM THE NEW LAW

Prior to arraignment:

- Individuals charged with misdemeanor offenses, with certain exceptions, are booked and released within 12 hours without conditions.[1]
- Individuals in custody (those charged with felonies and certain misdemeanors) are assessed by a new entity, Pretrial Assessment Services, using a validated pretrial assessment tool. Pretrial Assessment Services can be operated by the court, or the court can contract with another county government agency to provide this service.
- Victims have a right to comment on an individual's custody status.
- Individuals assessed as "low risk" are are released by Pretrial Assessment Services pre-arraignment on their own recognizance with or without conditions of release, with certain exceptions.
- Individuals assessed as "medium risk" can be released by Pretrial Assessment Services or a judicial officer, or if those entities do not authorize release, the individual is held until by the Sheriff's Department until arraignment, depending on local court rules established by each county.
- Individuals assessed as "high risk" are held by the Sheriff's Department until arraignment.

In court:

- At arraignment, the court makes a non-monetary bail determination. The law includes a presumption of release for most individuals.
- An individual must be released unless the prosecutor makes a motion for a preventive detention hearing, citing any of the circumstances described above. Hearings must be held within three court days for individuals in custody.
- Pretrial Assessment Services reports assessment results and recommendations for release conditions to the court and counsel.
- In addition to assessment results (which theoretically would already take these things into consideration), release decisions are informed by current charge, criminal history, court appearance history, and input from the individual being charged, victims, law enforcement, the prosecutor, and the defense attorney.
- Individuals who are charged with violent felonies, score "high risk," and have certain criminal history factors have a presumption of detention but still have the right to a full hearing.

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1. Exceptions to eligibility for pre-arraignment release include individuals charged with certain serious or violent offenses, those who have violated orders of protection or conditions of pretrial or post-conviction release, and those with certain criminal histories. For more information, see http://www.courts.ca.gov/pretrial.htm.

- Individuals have the right to counsel at a preventive detention hearing (but not at first appearance).
- If the court orders preventive detention, the reason must be stated on the record.

To manage implementation:

- The California Judicial Council is charged with maintaining a list of approved assessment instruments and will develop court rules to guide assessment, administration, preventive detention hearings, and pretrial supervision. The Judicial Council must also address the identification and mitigation of bias in the instruments.
- The Judicial Council must convene a panel of experts to guide rule development, including an expert on implicit bias.
- County courts are charged with operating or contracting with Pretrial Assessment Services.
- County probation departments are charged with administering pretrial supervision.
- The Judicial Council, Board of State and Community Corrections, and county courts and probation departments all play a role in collecting data and evaluating the effectiveness of the law, including evaluating the impact of the law on race, ethnicity, gender, and economic status.

Design Challenges for a Decarceral Outcome

A growing body of literature is available to guide effective implementation of SB10, and the law creates opportunities to align with pretrial best practice. There are also opportunities for Californians to go beyond the letter of the law to improve pretrial systems. Below are some questions to consider in that process.

- The expert body that will be convened by the Judicial Council is charged with setting standards for risk levels within and across assessment tools. How will those levels be set to address the variation across tools, and how will predictive validity be measured across counties?
- Critics of the law are concerned about the potential for bias in the use of assessment tools. Though the Judicial Council will be working with an implicit bias expert when establishing standards, how will community members be involved in this process, and how can transparency be assured throughout the selection and implementation of the assessment?
- Limited legal precedent or research is available to define "least restrictive conditions." How will supervision standards be defined by the Judicial Council, and how will the correlation between those standards and pretrial outcomes be measured at the state and county level? And will measures of bias in the setting of conditions be included?
- The law includes a presumption of release for most individuals juxtaposed with broad discretion for preventive detention. What shifts are needed in court culture to favor the presumption of release? What transparent and accountable processes will be put in place locally for regular review of administrative and judicial decisions, and of their impact on individuals awaiting trial?
- Under the law, pretrial assessment and supervision are functions of county government. How will the courts and probation departments collaborate with community based resources, such as behavioral health services and grassroots supports for impacted individuals?
- How will violations of pretrial release conditions be managed to limit the use of preventive detention for individuals who are initially released to the community?