



MacArthur
Foundation

RATIONAL AND
TRANSPARENT BAIL
DECISION MAKING:

MOVING FROM A CASH-BASED TO A
RISK-BASED PROCESS

The Pretrial Justice Institute

March 2012

CONTENTS

I. Pretrial Inmates Are Driving Jail Populations and Mass Incarceration.....	2
II. An Irrational Cash-Based Bail Process Is Driving Pretrial Detainee Populations	5
III. The Cash-Based Bail Process Supports An Extraordinary Role for a Private, Profit-Motivated Industry.....	8
IV. The Origins of the Cash-Based Bail Process And Previous Efforts At Reform	13
V. Renewed Efforts to Replace the Cash-Based Bail Process With a Risk-Based Process	18
VI. A Model for a Rational and Transparent Risk-Based Bail Process	23
VII. Implementing the Model of a Rational and Transparent Risk-Based Bail Process	36
VIII. Conclusion	42



I. PRETRIAL INMATES ARE DRIVING JAIL POPULATIONS AND MASS INCARCERATION

Between 1990 and 2008, the jail population in the United States doubled from 400,000 inmates to 800,000. During much of this period, crime rates were steadily dropping, falling to levels not seen in decades. The number of defendants held in jail awaiting disposition of their charges drove much of the increase in the jail population. Up until 1996, jail populations were comprised evenly of about 50 percent sentenced and 50 percent pretrial inmates. Beginning in 1996, the number of pretrial inmates grew at a much faster pace than the sentenced inmates. Currently, 61 percent of inmates in local jails have not been convicted, compared to 39 percent who are serving sentences.¹ This shift has resulted in a dramatic change in how jails are being used.

One major policy shift corresponding with the rise in the pretrial detainee population has been the increase in the use of money bond. When a person is arrested, the court can release the defendant with non-financial conditions or set a money bond, which must be posted before the defendant can be released. Existing laws in most states establish a presumption for release on the least restrictive conditions necessary to reasonably assure the safety of the community and the defendant's appearance in court. Those laws also identify non-financial release options as being the least restrictive and money bonds being the most restrictive. Notwithstanding the presumption for release on the least restrictive conditions, historically, money bond has been used in the majority of cases – and its use is on the rise. In 1990, money bonds were being set in 53 percent of felony cases. By 2006, that figure had jumped to 70 percent.² As the use of money bonds has gone up, pretrial release rates have gone down. In 1990, 65 percent of felony defendants were released while awaiting trial, compared to 58 percent in 2006.³

Rising jail populations have come at great cost to taxpayers. Between 1982 and 2006, county expenditures on criminal justice grew from \$21 billion to \$109 billion. County spending on jails alone rose 500 percent over that period.⁴ A recent analysis by the Florida Sheriff's Association calculated that in just 30 of Florida's county jails, taxpayers spend \$983,921,079 – or nearly one billion dollars – a year to house just those inmates who are in jail awaiting trial.⁵ If these figures were extrapolated nationally, they would be in the tens of billions of dollars.

This White Paper takes the position that most of the money spent to house defendants who cannot post a bond is unnecessary to achieve the purposes of bond – to protect the safety of the community

¹ Todd Minton, *Jail Inmates at Mid Year 2010: Statistical Tables* (Washington, D.C.: Bureau of Justice Statistics, 2011).

² Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, State Court Processing Statistics, 1990-2004* (Washington, D.C.: Bureau of Justice Statistics, 2007); and Thomas H. Cohen and Tracy Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006* (Washington, D.C.: Bureau of Justice Statistics, 2010).

³ *Id.*

⁴ Bureau of Justice Statistics' *Justice Expenditures and Employment Extracts series*.

⁵ Sarah Carroll, *Pretrial Detention in Florida* (Power Point Presentation to the Florida Tax Watch/American Bar Association Roundtable on Pretrial Justice, 2/21/12).

while the defendant's case is pending, and to assure the appearance of the defendant in court. With local jurisdictions laying off teachers, police officers and firefighters and cutting back on vital services because they do not have the money to pay them, this waste of money is unconscionable.

Aside from the wasteful use of taxpayer dollars, the practice of using money to decide pretrial release has also played a significant role in contributing to the mass incarceration phenomena that has swept the nation for the past three decades. Research dating back 50 years clearly and consistently demonstrates the relationship between being locked up pending trial and subsequent incarceration. The research shows that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period. These relationships hold true when controlling for other factors, such as current charge, prior criminal history, and community ties.⁶ As one of these studies noted, "Although no statistical study can prove causality, the findings of this research are fully consistent with the argument that something about detention (awaiting trial) itself leads to harsher outcomes."⁷

Regardless of the reasons for the harsher outcomes for those who are detained during the pretrial period, the facts cannot be ignored. There is an enormous amount of unnecessary pretrial detention taking place in this country, and being held in jail awaiting trial in effect pre-selects persons for later incarceration. Moreover, the greatest impact of this falls on racial and ethnic minorities, who are the least likely to be able to post money bonds.

As U.S. Attorney General Eric Holder has noted in speaking about defendants sitting in jail on bonds that they cannot afford: "Almost all of these individuals could be released and supervised in their communities – and allowed to pursue and maintain employment and participate in educational opportunities and their normal family lives – without risk of endangering their fellow citizens or fleeing from justice. Studies have clearly shown that almost all of them could reap greater benefits from appropriate pretrial treatment or rehabilitation programs than from time in jail – and might, as a result, be less likely to end up serving long prison sentences."⁸

6 Anne Rankin, "The Effects of Pretrial Detention," *New York University Law Review*, 39, (1964); Patricia Wald, "The Right to Bail Revisited: A Decade of Promise Without Fulfillment," in Stuart S. Nagel, ed. *The Rights of the Accused* (Beverly Hills, California, Sage Publications, 1972); William M. Landes, "Legality and Reality: Some Evidence on Criminal Procedure," *Journal of Legal Studies*, 3, (1974); Hans Zeisel, "Bail Revisited," *American Bar Foundation Research Journal*, 1979; John S. Goldkamp, *Two Classes of Accused* (Cambridge, Massachusetts, Ballinger Publishing Company, 1979); Stevens H. Clarke and Susan T. Kurtz, "The importance of Interim Decisions to Felony Trial Court Dispositions," *Journal of Criminal Law and Criminology*, 74, (1983); Michael R. Gottfredson and Don M. Gottfredson, *Decision Making in Criminal Justice: Toward a Rational Exercise of Discretion* (New York, New York: Plenum Press, 1988); Mary T. Phillips, *Bail, Detention, and Non-Felony Case Outcomes*, Research Brief Series No. 14, New York City Criminal Justice Agency, 2007; and Mary T. Phillips, *Pretrial Detention and Case Outcomes, Part 2, Felony Cases*, Final Report, New York City Criminal Justice Agency, 2008.

7 *Id.*, Phillips, 2007.

8 National Symposium on Pretrial Justice: Summary Report of Proceedings (Washington, D.C.: Bureau of Justice Assistance, 2012), 30.

II. AN IRRATIONAL CASH-BASED BAIL PROCESS IS DRIVING PRETRIAL DETAINEE POPULATIONS

*"The practice of admission to bail...is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty."*⁹ Justice Robert Jackson, U.S. Supreme Court

*"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."*¹⁰ Chief Justice William H. Rehnquist, U.S. Supreme Court

In most jurisdictions in the country today, more often than not access to money decides who is released before trial and who sits in jail.¹¹ The result, contrary to the sentiments expressed by Justice Jackson and Chief Justice Rehnquist, is that many defendants, regardless of how little risk they pose, remain in jail pending trial because they have no money to pay their bonds. Every year, tens of thousands of defendants are stuck in jail until their cases are concluded because they cannot pull together what is often just a couple of hundred dollars. In New York City alone, a recent study identified over 11,000 defendants charged with misdemeanor offenses in a one-year period who sat in jail until their cases were disposed of because they could not raise \$100 or less.¹²

Sometimes these cases end in tragedy and are highly publicized, as happened when a 65-year-old man who suffered from mental illness was murdered by his cellmate in the Mental Health Unit of the Camden County, New Jersey Jail. At the time of his killing, the man had been in jail for a month facing a misdemeanor charge on a bond that he could not post – a bond of \$150.¹³ Mostly, however, the cases of those who sit in jail, unable to bond out, draw no public attention.

With its emphasis on money as the device to determine release, the current bail process places the heaviest burden on racial and ethnic minorities – those least likely to be able to pay to get out of jail. A study of felony cases taken from samples drawn from 40 of the largest 75 counties in the country between 1990 and 1996 found, for example, that 27 percent of white defendants were held in jail throughout the pretrial period on bonds that they could not post, compared to 36 percent of black defendants and 44 percent of Hispanic defendants.¹⁴

9 *Stack v. Boyle*, 342 U.S. 1, 1951.

10 *U.S. v. Salerno*, 481 U.S. 739, 1987.

11 Data show that seven out of ten felony defendants nationwide are required to post a money bond to be released pending trial. Cohen and Kyckelhahn, *supra*, note 2.

12 *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (New York, Human Rights Watch, 2010).

13 "Grant To Keep Mentally Ill Out Of South Jersey Jail," *Courier-Post*, 11 October 2010.

14 Stephen Demuth, "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees," *Criminology*, (41) 3, (2003).

In this cash-based bail process, decisions about the amount of cash required are often made on the basis of the charge, ignoring substantial empirical evidence that other factors are better predictors of how a defendant will do on pretrial release. There is even a formal instrument that is used in most jurisdictions that institutionalizes this short-sighted practice of setting bond amounts by charge. It is called a bond schedule. A bond schedule is a list of all criminal charges with each charge assigned a dollar bond amount.

Bond Schedule

The information below is taken from the bond schedule of the Orange County, California Superior Court. A bond schedule is simply a monetized list of crimes, identifying the amount that can be paid to be released pretrial. Bond schedules do not account for a defendant's prior record, prior history of appearance in court, resident and employment status, or community ties – all factors that statutes require must be considered in determining pretrial release.

Charge	Bond Amount
Driving under the influence – first offense	\$2,500
Driving under the influence – second offense	\$10,000
Driving under the influence – third offense	\$15,000
Battery against peace officer	\$2,500
Battery against spouse	\$10,000
Battery with serious bodily injury	\$20,000
Residential burglary	\$50,000
Grand theft	\$20,000
Possession of controlled substances	\$20,000
Manufacture of controlled substances	\$75,000
Assault with a firearm	\$50,000
Robbery 2 nd degree	\$50,000
Robbery 1 st degree	\$100,000
Rape	\$100,000

A bond schedule can be used at two different points in the process. Its most common use is as a way for new arrestees to bond out of jail in the hours or days between the arrest and the first appearance in court before a judicial officer. A 2009 survey of 150 of the largest counties in the country found that

over half allow defendants to bond out of jail using bond schedules before seeing a judge.¹⁵ A 2011 study in one jurisdiction found that one half of all defendants who were released during the pretrial period obtained that release by using a bond schedule before going in front of a judge.¹⁶

The second point of use can be by a judicial officer at a defendant's first appearance hearing. When used at this point, the schedule provides the presumptive bond amount to the court, but the judicial officer has the discretion to raise or lower that amount, or release the defendant without the need to post a financial bond. According to the American Bar Association, judges in many jurisdictions continue to make pretrial release decisions based solely, or at least predominantly, on the charge, taking little or no account of other factors that might be better predictors of conduct on pretrial release.¹⁷

¹⁵ Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes (Washington, DC: Pretrial Justice Institute, 2009) 8.

¹⁶ David J. Levin, Development of a Validated Pretrial Risk Assessment Tool for Lee County, Florida (Washington, D.C., Pretrial Justice Institute, 2011).

¹⁷ ABA Standards for Criminal Justice: Pretrial Release, Third Edition (Washington, D.C., American Bar Association, 2007), 50-51.

III. THE CASH-BASED BAIL PROCESS SUPPORTS AN EXTRAORDINARY ROLE FOR A PRIVATE INDUSTRY

When the judge sets a money bond, defendants can post the full face value of the bond to be released. For example, if the bond is set at \$1,000, the defendant can post that amount in cash with the court. This money is returned to the defendant at the end of the case if the defendant makes all court appearances. Most defendants, however, are not able financially to post the full amount, and bond is rarely posted in this manner.¹⁸

For well over a century, a private industry (commercial bail bonding companies) has been providing help to defendants who cannot afford the full cash amount. For these defendants, the option is to pay a non-refundable fee to the bonding company, usually ten percent of the face value of the bond. So for a \$1,000 bond this would be \$100 non-refundable fee paid to the bondsmen. In exchange for the non-refundable fee, a bail bonding company will promise to pay the full value of the bond to the court should the defendant fail to appear. (See Sidebar on The Myth of Bond Forfeitures for more information on what this liability actually means.)

Under this long-standing business model, the commercial bail bonding industry exercises extraordinary control over determining who is released pending trial and who stays in jail. Those defendants who do not have the ability, either through their own financial resources or through that of family or friends, to pay the non-refundable fee to the bonding company are out of luck and out of options. They must await the disposition of their cases in jail. Those defendants who can afford the fee then have to find a bail bonding company willing to take their business. The size of the bond amount can affect their chances of success in this.

Economics plays the primary role in determining whether a bonding company decides to do business with a particular defendant. The higher the bond amount set by the court or through the bond schedule, the higher the non-refundable fee that the bonding agent collects. With this simple economic fact, the financial incentive is for the bonding companies to seek the higher bond cases. Unfortunately for the safety of the public in this cash-based bail process, the highest bonds are typically set for those charged with the most serious crimes. Defendants who have lower bonds are not financially attractive to bonding companies. One bail bondsman summed up the calculus to decide who to bond out and who to pass on: "If someone doesn't come to court, by the time we go to their house, track them down and get them back in court, it's not worth the \$75 we get from a \$500 bond. Let's face it. It's just not good economics."¹⁹

¹⁸ Data from felony cases in 2006 showed that just five percent of defendants were released on full cash bail, compared to 42 percent who were released on a commercial surety bond through a bail bonding company. Cohen and Kyckelhahn, *supra* note 2.

¹⁹ "Bail Bondsmen Consider a Minimum," Raleigh News & Observer, 6 June 2002.

Being a potential high-paying customer puts the defendants charged with the most serious crimes in the best bargaining position. These defendants take advantage of the fact that bonding companies are in competition with one another for business, and therefore shop around for the best deal on fees. Bail bonding companies, like any other business facing competition, try to offer their services at the lowest possible cost to attract customers. As a result, bonding companies offer easy payment plans and even reduced fees to draw business, in effect, putting their services “on sale.”²⁰ Or, when bonding companies don’t offer discounts up front, defendants, at least those who are experienced, know to bargain. Charles White, president of the Tennessee Association of Professional Bond Agents and owner of two bonding companies in Tennessee explained the kinds of telephone calls he gets from defendants in jail. “What they will normally do is call and say, ‘I’ve got a \$10,000 bond, what can you make it for?’ They will come back and say, ‘Is that the best that you can do? I just talked to XYZ or two other bonding companies, offering \$500 or \$600.’”²¹ The less experienced criminal – or even the innocent person who is caught up in the criminal justice system – does not know enough to play this game and stays in jail.

Thus, under this cash-based bail process, the judge simply sets a price on a defendant’s release. Market forces then take over and release occurs where the potential profits for the bonding companies are the greatest, and where the defendants are the most adept at finalizing deals by gaming the system – skills that many learn through the experience of having been arrested multiple times in the past.

²⁰ “Paying a Price for Dishonest Bondsmen: Cost Cutting Tactics Put Dangerous Defendants on Streets,” Connecticut Law Tribune, 25 May 2009; “Get Out of Jail Almost Free: Competition Pushes Down the Price of Bail,” Alabama Press Register, 9 November 2008.

²¹ “Suspects Bonding Out of Jail for Less,” Times Free Express, 21 August 2011.

The Myth of Bond Forfeitures

Bail bonding companies claim that they put themselves at financial risk whenever they bond defendants out. To an extent, this is true. If the defendant fails to appear in court, the court can order the bonding company to forfeit the full amount of the bond. While there is no research showing how frequently courts order forfeitures, or how often bonding companies pay, it is clear that bonding companies today owe substantial amounts in unpaid forfeitures, including:

- In Dallas County, Texas, where bail bonding companies owe at least \$35 million in unpaid forfeitures.
- In Harris County, Texas, where they owe at least \$26 million.
- In New York City, where they owe at least \$2 million.
- In New Orleans, where one bail bonding company was suspended after it was learned that it owed millions in unpaid forfeitures.

As one bail bondsman told KUSA-TV News, a Colorado news station that was looking into the problem of unpaid forfeitures, "It's a game not to pay the forfeiture and I'm very good at what I do. There are a thousand tricks to not paying the court and after a few years I have it down pat." This bondsman estimated that he had saved his company \$400,000 in unpaid forfeitures in the previous two years. As another bondsman who boasted of getting released from almost all his forfeitures noted, "My job is to protect the insurance company from the loss. If you can financially get off a bond, and it's a sound business decision to do so, then anybody in their reasonable mind would do so. It's not a greed thing, we just don't want to pay. And if we don't have to pay, then we win that one. The system loses. The defendant wins, he's the ultimate winner, because he's still running."

It is important to understand that even though there are two outcomes that are sought with every pretrial release – that the defendant return to court when ordered to do so, and that the defendant refrain from any criminal activity while on pretrial release – the bonding companies are only liable for assuring the former. These companies face no liability whatsoever when their clients are rearrested for committing new offenses while out on bond. In fact, the more that defendants are rearrested while on bond, the more potential business for the bonding companies. Rearrests simply become opportunities for repeat customers.

Once a defendant is released to a bail bonding company, the company has complete, unchallengeable authority to take a defendant back to jail at will, totally absolving the company of any liability if the defendant ever fails to appear in court. What's more, the company need never have to state a reason for doing so. It is legal for a bail bonding company to accept a non-fundable fee of hundreds, or even

thousands, of dollars from a defendant, secure his or her release, and then the next day take the defendant back to jail – and keep the fee. The New York Times recently ran a story on how frequently this occurs. The article identified one bail bondsman who had returned to jail 89 people over a four-month period – people who had never missed a court appearance.²² And it goes beyond simply making risk-free money. There have been several incidents reported of bail bondsmen coercing female clients into having sex with them by threatening to return them to jail if they refused.²³

When defendants who have been released through a bail bonding company fail to appear in court, the bonding companies are technically responsible for locating them and returning them to court. In reality, though, the police, not the bonding companies, bring in most out-on-bond defendants with bench warrants for failing to appear in court.²⁴

When the bonding companies do look for defendants who have missed court, they and the bounty hunters that they hire have authority exceeding that which is granted to public law enforcement agencies to locate and arrest these fugitives. They can enter a private home if they believe that the defendant is inside. They do not need a warrant or permission from the residents of that home. While the extraordinary power given to bonding companies or their bounty hunters has been romanticized by *Dog the Bounty Hunter* and other shows and movies, the reality of what occurs is sometimes frightening, with innocent people often traumatized, injured, and killed.

22 “For Poor, Bail System Can Be an Obstacle to Freedom,” *The New York Times*, 9 January 2011.

23 “Bail Bondsman Faces Sex Charges After Client Says She Was Coerced,” *Orlando Sentinel*, 22 January 2010; “Woman Testifies Bondsman Forced Her Into Sex Acts,” *The Palm Beach Post*, 31 May 2007.

24 Spurgeon Kennedy and D. Alan Henry, *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision* (Washington, DC: Pretrial Services Resource Center, 1996).

Examples of Abuses by Bondsmen and Bounty Hunters in Search of Fugitives

A 32-year-old father of two was celebrating Christmas Eve with his family when two armed men broke into their home. Thinking it was a home invasion, the man fought with the intruders. In the struggle that ensued, the man was shot and killed. The two men who broke into the home were bounty hunters, hired by a bail bonding company, looking for a fugitive. But they had gone to the wrong address. The man who was killed while trying to protect his family was completely innocent.

A 43-year-old Charleston, South Carolina man was asleep at his home with his family in the middle of the night when two armed bounty hunters broke in, handcuffed him, forced him into a car and drove him six hours to a jail in North Carolina. The man spent seven days in jail before authorities realized that they were holding the wrong person. Once again, the bounty hunters had gone to the wrong address.

A Utah bail bondsman was charged with two counts of kidnapping and a charge of burglary and robbery after allegedly handcuffing a man and a woman and driving them around town for several hours looking for a relative who had failed to appear in court. The two testified at a preliminary hearing that the bondsman threatened to take them to jail if they did not reveal the whereabouts of the defendant. Both claimed repeatedly that they did not know where the defendant was.

To sum up the problems with the cash-based bail process and the role that a private industry plays in it: The use of jail space has a direct impact on taxpayer dollars. Each night spent in jail carries housing, food, medical, and security costs, expenses that come out of the public treasury. When setting a money bond, judges do not make a definitive “in or out” decision; rather they are merely authorizing the release. The actual outcome of release or detention, and thus the expenditure of public resources, is from that point on out of their hands and in the hands of a private industry. That industry makes its own decisions, totally out of the view of the public, about who to sell a bond to and who to leave in jail. As Judge Skelly Wright has noted, the ultimate effect of this “is that the professional bondsmen hold the keys to the jail in their pockets.”²⁵ Local officials, who should be responsible for managing the use of jail bed space, lose significant control over how the jail is used. It is difficult to think of any other public institution that cedes so much control to a private, profit-motivated industry over how taxpayer resources are used.

²⁵ Pannell v. United States, 320 F.2d 698.

IV. THE ORIGINS OF THE CASH-BASED BAIL PROCESS AND PREVIOUS EFFORTS AT REFORM

Historical Roots of the Cash-Based Bail Process

At the start of the colonial era in America, the laws of the colonies, including those relating to bail, were based upon those of England. In 1689, Parliament had passed the English Bill of Rights, in response to the setting of very high money bails by judges. The Bill of Rights contained in its Preamble the following language: “Excessive bail hath been required for persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subject.” The document provided that “excessive bail shall not be required,” although it made no attempt to define what was meant by the term “excessive bail,” leaving judges with no guidance on how to apply that requirement.

Colonial America simply adopted the uncertainties about bail from England. George Mason first adopted the “excessive bail” language in the then-colonies when he drafted the Virginia Declaration of Rights, in 1776. Clause 9 of this document read: “That excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” This language is very similar to the language that ultimately would become the Eighth Amendment of the U.S. Constitution.

Without any clear idea of what the term “excessive bail” meant, American judges began setting dollar amounts just as their predecessors in England had done for centuries. In the 1890s, a commercial enterprise arose as a way to help defendants post their bonds and be released. It was based on the old English system of having a surety, which was usually a family member or neighbor, pledge the bond amount and be responsible for paying it if the defendant failed to appear in court. Under this new idea, a commercial entity would pledge to the court the full amount of the bond and would forfeit that bond to the court if the defendant failed to appear in court. In exchange for this service, the defendant would pay this entity, which would become modern day bail bonding companies, a fee that was based on a percentage, usually ten percent, of the face value of the bond.

The First Criticisms of the Cash-Based Bail Process

Little attention was paid to the bail system, and any problems that might exist in it, from the beginning of the republic until the early part of the 20th Century. The first to identify the dysfunctional workings of the bail process were Roscoe Pound and Felix Frankfurter, who in 1922 conducted a major study of the bail process in Cleveland.²⁶ They were followed by Arthur Beeley, who studied Chicago’s bail process in 1927²⁷, and Caleb Foote, who looked at the process in Philadelphia in 1954²⁸ and in New York City in 1958.²⁹ These studies identified the following problems:

26 Roscoe Pound and Felix Frankfurter, *Criminal Justice in Cleveland* (Cleveland: The Cleveland Foundation, 1922; reprinted, Montclair, N.J.: Patterson Smith, 1968).

27 Arthur L. Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927; reprinted, Chicago, University of Chicago Press, 1966).

28 Caleb Foote, “Compelling Appearance in Court: Administration of Bail in Philadelphia,” *University of Pennsylvania Law Review*, 102, (1954).

29 Caleb Foote, “A Study of the Administration of Bail in New York City,” *University of Pennsylvania Law Review*, 106, (1958).

- Many high-risk defendants were able to buy their way out of jail since they had access to money, while many low risk defendants sat in jail, often for months or years, solely because they had no access to money to pay their bonds.
- The bond that was set was generally based only on the charge, with little or no attention to the risks posed by each individual defendant.
- Those who stayed in jail because they could not afford their bonds pled guilty or were convicted more often, and were sentenced to prison more often than those who were able to bond out.

In a 1964 book, author Ronald Goldfarb, reflecting on the historical evolution of bail, noted that the bail system as it had been practiced up until that point in the United States was “an unworkable and unreasonable abortive outgrowth of historical Anglo-American legal devices which worked once in a far different time and place and in a far different way.”³⁰ (Emphasis added.)

Initial Efforts to Reform the Cash-Based Bail Process

In 1961, an organization called the Vera Institute of Justice launched the Manhattan Bail Project in New York City. The project’s underlying hypothesis was that defendants with strong ties to the community were likely to return to court if released on personal recognizance – or their promise to return. The project targeted defendants who were in jail on bonds that they could not afford, and recommended for non-financial release those who had strong ties. The results of the project showed that these defendants were just as likely to come back to court as those who posted a money bond to be released. Moreover, the project found that when judges were given verified information about defendants, including assessments about their likelihood of appearing in court, these defendants were three times more likely to be released on personal recognizance than comparison group defendants who had no risk assessments done.³¹

Based on the success of the Manhattan Bail Project, the idea spread to target indigent defendants for pretrial release by looking at their community ties and other risk factors. By 1964, what came to be known as pretrial services programs had been implemented in dozens of cities around the country to assess defendants’ risks and seek the release of lower risk defendants. Dozens more jurisdictions had programs in the planning stage. In 1964, U.S. Attorney General Robert Kennedy convened a National Conference on Bail and Criminal Justice to showcase the work of these new programs and to discuss the challenges presented by the still heavy reliance on money bond to determine who was released awaiting trial and who was held.

A significant development in bail reform occurred in 1966, when Congress passed a law that, for the first time, included a list of factors – such as ties to the community, family in the area, residence and

³⁰ Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (Harper and Row, 1964), 5.

³¹ Charles E. Ares, Ann Rankin, and Herbert Sturz, “The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Bail,” *New York University Law Review*, 38(2), (1963), 67-95.

employment, the defendant's prior criminal record and record of appearance in court – beyond just the charge, that the court must consider in making a bail decision. This law, the Bail Reform Act of 1966, also provided a prioritized list of options that the judicial officer must consider, beginning with release on recognizance, followed by various forms of non-financial conditions. Release by financial conditions was the last option.³² Although this law applied only in Federal jurisdictions, over the next several years most states revised their bail laws to include a similar set of factors that the court must consider and a similar list of options, with a presumption for release on the least restrictive option.

These statutory changes meant that risk, not money, should dictate who should be released during the pretrial period and how. These statutory changes put new demands on a still young pretrial services field. Pretrial services programs, which had been established as a means to help indigent defendants get out of jail pending trial, were given a new mission. They were the entities that were going to implement these new laws. Rather than focusing just on indigent defendants, pretrial services programs were tasked with interviewing and investigating all defendants so that the court would have information on all the factors it was required by law to consider on every defendant.

In 1968, the American Bar Association (ABA) released the first edition of its Standards on Pretrial Release. In this document, the ABA called for the presumption of release on the least restrictive conditions necessary to reasonably assure the defendant's appearance in court. Just as the Federal Bail Reform Act of 1966 had, the Standards listed release on personal recognizance as the least restrictive form of release, followed by non-financial conditions. The standards held that financial conditions should "be reduced to minimal proportions," and that both commercial bail bonding for profit and bond schedules should be eliminated altogether.³³

A study conducted in the 1970s showed that there was some progress in reforming bail practices. The study compared pretrial release rates, including types of release, in 20 cities around the country in 1962, before the reform efforts took hold, and in 1971, after these efforts had been underway for a number of years. Overall release rates rose in 18 of the cities, with significant increases in non-financial release rates for both felonies and misdemeanors.³⁴

In the 1970s and 1980s, another major change was made to the federal and most state pretrial release statutes. In addition to the risks of failure to appear in court, judicial officers were also required to consider the risk that each defendant posed to be a danger to the public or to any individual member of the public. Many of these statutory revisions did more than simply add community safety as a co-equal consideration in the bail decision, establishing instead the safety of the public as the primary consideration.³⁵

These changes required pretrial services programs to revise their risk assessment procedures and su-

32 118 U.S.C., Sec. 3146.

33 Standards Relating to Pretrial Release (Chicago: American Bar Association, 1968).

34 Wayne Thomas, *Bail Reform in America* (Berkeley, University of California Press, 1976).

35 John S. Goldkamp, "Danger and Detention: A Second Generation of Bail Reform," *The Journal of Criminal Law and Criminology*, 76(1), (1985).

pervision strategies to address public safety. Many of these danger statutes also authorized courts to hold defendants without bail in certain circumstances if it was determined that no release conditions or combination of conditions could reasonably assure public safety.

As a result, pretrial services programs completed their transformation from being entities that sought only to facilitate the release of low risk-of-flight indigent defendants to becoming vital assistants to the court to help judges sort out which defendants could be safely released, and under what conditions, and which needed to be held without bail.

Since money was never designed to address public safety, and with the statutory changes providing for release on the least restrictive conditions, the use of money bond should have been greatly reduced. While four states – Illinois, Wisconsin, Oregon and Kentucky – did eliminate commercial bail bonding for profit, the heavy reliance on money bail continued, and has even grown in recent years.

The Stalling of Initial Reform Efforts

It was clear by the late 1970s that the Bail Reform Movement, which had started with such great promise in the early 1960s, had stalled. While changes made to bail laws provided a much more rational framework for pretrial release decision making, the reliance on money bond, although diminished from its level of use up until the 1960s, was still the practice in many jurisdictions. There are several possible reasons for why bail reform efforts stalled.

The first involves the context of what was going on at the time. The reform efforts began in the 1960s, during a period of significant action on issues such as civil rights and combating poverty. Also during that period there were several U.S. Supreme Court cases that expanded the rights of those suspected of or accused of crimes.³⁶ Bail reform efforts fit right in with these developments. Beginning in the 1970s, however, there was more of a focus on crime control efforts. Society started taking a tougher stance on crime, ushering in an era of mass incarceration driven by a war on drugs and a move toward mandatory minimum sentencing. The media started giving much more coverage of crime, leading to impressions that crime was worse than it was. Those seeking political office made crime an issue in elections. Crimes committed by defendants out on bail became a big concern, and led to the statutory changes requiring judges to consider public safety in making bail decisions and in providing for detention without bail for those posing high risks to the safety of the community. In this environment, efforts to assure that criminal defendants be released on the least restrictive conditions needed to reasonably assure safety and appearance became less of a priority.

A second reason that reform efforts stalled is that judges simply continued to do what they had always done – set money bonds. As Senior U.S. District Court Judge James Carr has noted, setting money bond is ingrained among judges as the way that things should work. When new judges take

³⁶ These included: *Mapp v. Ohio*, 367 U.S. 643 (1961), which held that evidence obtained in violation of the Fourth Amendment's search and seizure provisions could not be used in a trial; *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the government had to appoint counsel for felony defendants who could not afford a lawyer; and *Miranda v. Arizona*, 384 U.S. 436 (1966), which held that suspects had to be informed of their constitutional right to an attorney prior to police questioning.

the bench, he has said, they simply follow the lead of their experienced colleagues by setting money bonds, without questioning whether that is the best approach, thus perpetuating the practice.³⁷ In addition, up until very recently, any kind of judicial training on pretrial release decision-making was non-existent.

A third possible reason is that judges, prosecutors, and the public at large may perceive that money is the only way that the bail process can work – that defendants would not come back to court if they did not have a financial stake in doing so. Moreover, some are concerned at the idea of defendants being back on streets so quickly after arrest, believing that a little jail time after arrest is an appropriate penalty for being arrested.

Perhaps the most significant reason for the stalling of bail reform efforts has been the strong resistance from the industry that benefits from the money-based bail system – commercial bail bonding companies. The reason for the industry's resistance is apparent – releasing defendants on the least restrictive conditions needed to reasonably assure public safety and court appearance significantly cuts into the industry's market. Every defendant released on a non-financial bond is one less potential paying customer. For decades, bail bonding companies have been seeking to roll back legislative gains by limiting the eligibility of defendants for non-financial release options through the introduction of state and local legislation, and by contributing to political campaigns as a way to gain influence with lawmakers.

³⁷ *Supra*, note 8, at 14.

V. RENEWED EFFORTS TO REPLACE THE CASH-BASED BAIL PROCESS WITH A RISK-BASED PROCESS

Despite some of the legislative reforms establishing the presumption for release on least restrictive conditions, it is clear that a culture change is needed to move away from a cash-based bail process to one that is risk-based. That change is beginning to take place. At a National Symposium on Pretrial Justice, held in Washington, D.C. in the summer of 2011, Attorney General Eric Holder told the assembled group of judges, prosecutors, defense attorneys, law enforcement, jail administrators, victim advocates and others that it was “troubling” that so many defendants remain in custody “because they simply cannot afford to post the bail required – very often, just a few hundred dollars – to return home until their day in court arrives.” He noted that “[b]y competently assessing risk of release, weighing community safety alongside relevant court considerations, and engaging with pretrial services providers – in private agencies, as well as in courts, probation departments, and sheriff’s offices – we can design reforms to make the current system more equitable, while balancing the concerns of judges, prosecutors, defendants, and advocacy organizations. We can help those serving on the bench make informed decisions that improve cost-effectiveness and preserve safety needs, as well as due process.”³⁸

There is mounting evidence supporting the replacement of the cash-based bail process with a risk-based process. For example, in Washington, D.C., financial bond has been essentially eliminated and the commercial bail bonding industry long ago moved out. In that jurisdiction, 80 percent of defendants are released on non-financial bonds, and another 15 percent are held without bond under provisions of the District’s detention statute.³⁹ Only five percent have a financial bond, but those are imposed only in cases where the defendant has a hold in another case, and only upon the request of the defendant, so that the defendant can receive credit for time served if ultimately convicted. This high rate of non-financial release has been achieved without sacrificing public safety or court appearance. Data from the D.C. Pretrial Services Agency shows that 88 percent of defendants go through the pretrial period without being rearrested on a new charge, and 88 percent make all their court appearances.⁴⁰

Other jurisdictions have seen significant changes after implementing validated pretrial risk assessment procedures. In Montgomery County, Maryland, for example, the rate of recommendations for non-financial releases by the county’s pretrial services program rose from 20 percent to 52 percent after the program implemented a validated risk assessment instrument. These increases were accomplished with no changes in the rates of rearrests on new offenses and failure to appear in

³⁸ *Id.*, at 31.

³⁹ DC Code 23-1322.

⁴⁰ The D.C. Pretrial Services Agency: Lessons Learned From Five Decades of Innovation and Growth (Washington, D.C., Pretrial Justice Institute, 2010).

court.⁴¹ In addition, in Mecklenburg County, North Carolina, the introduction of risk-based policies resulted in the significant decrease in the use of money bond, with a corresponding decrease in the jail population – both without any increase in rearrest or failure to appear rates.⁴²

As a follow-up to the National Symposium on Pretrial Justice, the Justice Department appointed a high-level Working Group to meet regularly to review and synthesize efforts underway by the Department of Justice, private foundations, and others to advance pretrial justice. Among the activities currently underway are the following:

- The Bureau of Justice Assistance of the U.S. Department of Justice has awarded a grant to the Pretrial Justice Institute to provide training and technical assistance to jurisdictions seeking to enhance pretrial justice. In the first two-and-one-half years of that grant several pretrial risk assessment validation studies have been completed, and dozens of pretrial services programs have received technical assistance. In addition, hundreds of judges, prosecutors, defense attorneys, jail officials, law enforcement officers, pretrial services program staff, victim advocates, and others have received training on pretrial justice. Also, several publications and other technical assistance materials have been produced.
- The Public Welfare Foundation has provided funding to numerous entities to enhance pretrial justice, including: the Pretrial Justice Institute to advocate for reform; the Justice Policy Institute to develop publications on the shortcomings of money bond and commercial bail bonding; the National Council on Crime and Delinquency to study the impact that current bail setting practices that rely on financial bonds have on racial, ethnic and economic minority groups; the National Conference of State Legislatures to conduct a review of state bail laws and provide legislative analysis support to their members; and, the John Jay College of Criminal Justice to inform members of the media about the challenges facing pretrial justice.
- In 2011, the Kentucky legislature passed and the governor signed a bill that had the intent of reducing incarceration in that state, and the costs associated with it. Among the changes relevant to pretrial justice are: with limited exceptions, law enforcement officers are required to issue citations for misdemeanors instead of making full custodial arrests; the use of validated pretrial risk assessment tools are required in every case of defendants in custody awaiting the initial appearance in court; in most cases, defendants found by the risk assessment to be low or moderate risk must be released on non-financial bond; and, in most cases, defendants who remain in jail on financial bonds are entitled to a daily credit of \$100 towards their bonds.⁴³

41 Timothy Murray, "Using Research to Improve Pretrial in Montgomery County, Maryland," *Translational Criminology*, (Winter 2012), 4-5.

42 2010 Bail Policy Review (Mecklenburg County: Mecklenburg County Manager's Office, 15 March 2011).

43 HB 463.

- In 2011, the American Bar Association announced plans for an effort to reform criminal justice practices in ten states, with a focus on addressing pretrial release decision making. The ABA has also formed a Pretrial Release/Bail Reform Task Force to seek ways to improve pretrial release decision-making.
- In 2012, the Conference of Chief Justices announced plans to study the role that judges can play in enhancing pretrial release decision-making.

RESOLUTIONS IN SUPPORT OF ENHANCING PRETRIAL JUSTICE

Several associations have recently passed resolutions supporting reforms to the cash-based bail process.

The **National Association of Counties**, in its 2009 County Platforms and Resolutions, called for the universal screening of all arrestees, with each receiving an impartial assessment of risks of danger to the public and non-appearance in court before any pretrial release decision is made.

In 2010, the **American Probation and Parole Association** enacted a resolution that “supports the role of pretrial supervision services to enhance both short-term and long-term public safety, provide access to treatment services and reduce court caseloads, and submit that such a role cannot be fulfilled as successfully by the bail bond industry.”

In 2010, the **American Jail Association** passed a resolution that “recognizes the value of high functioning pretrial services agencies to enhance public and officer safety, safeguard the judicial process, and aid jail administrators in safely managing jail populations.”

In 2011, the **International Association of Chiefs of Police** passed a resolution that “calls for a national law enforcement summit to address the need for bail reform and in particular the urgent need for more robust pretrial services that conduct dangerousness assessments for use by the judiciary when considering pretrial release.”

In 2011, the **Association of Prosecuting Attorneys** issued a policy statement calling for the use of validated pretrial risk assessments to help judicial officers make more informed pretrial release decisions.

In 2011, the **American Council of Chief Defenders** issued a policy statement calling on public defenders throughout the country to dedicate sufficient resources to the first appearance hearing, obtain and use pretrial risk assessment information, and work with judges, prosecutors, and pretrial services program staff to improve pretrial release practices.

In 2012, noting that defendants who do not have counsel at their initial appearance in court “are more likely to face an unaffordable bail and extended pretrial detention,” the **National Association of Criminal Defense Lawyers** issued a policy statement calling on all jurisdictions to pass laws or regulations requiring legal representation for every accused person at the initial appearance.

With the renewed efforts to reform the cash-based bail process, the commercial bail bonding industry has opened up a new wave of actions on several fronts to counter these efforts.

It has been pushing legislation in a number of states to limit the use of non-financial release.

It has been engaged in a public relations campaign to convince local officials and the general public that the cash-based bail process saves taxpayer money and is more rational than using objective, evidence-based risk assessment criteria.

It has been using data in misleading ways to paint a false picture of the benefits of money bond or to claim that non-financial release options are ineffective.

THE BAIL BONDING INDUSTRY PUSHES BACK

On the legislative front: The industry was behind efforts in Virginia in 2010 (S.B. 716) and in Florida in 2011 (S.B. 372) to legislatively restrict non-financial release to indigent defendants. Neither of these bills passed. Also in 2011, the industry pushed a bill in North Carolina (S.B. 756) that would have prevented county governments from using county funds to pay for county-run pretrial services programs. This bill did not pass. In 2010, the bail bonding industry was successful in getting a measure on the Colorado ballot that would have made non-financial release an option for the court only if the defendant had no prior convictions and was charged with a non-violent misdemeanor. All other defendants would either have to post a financial bond or remain in jail in lieu of bond. This measure, Proposition 102, failed by a margin of two-to-one.

On the public relations front: In Orange County, Florida, the industry tried to turn public opinion in its favor, arguing that the county's taxpayer-funded pretrial services program was a "criminal welfare program," and should be eliminated. At the time, county leaders were faced with the task of cutting the budget by 13.6 percent. A bail bonding company, seeing this as an opportunity to eliminate funding for the county's pretrial services program, sent a flier to 50,000 residents in Orange County, urging citizens to tell county commissioners to end the "wasteful" program. The flier listed a number of defendants who had been released and noted that taxpayers were paying for those released. The flier framed the choice as being between parks for children and this program that released dangerous defendants. If residents supported parks for children, they were asked to let the county commissioners know by mailing in the self-addressed pull out postcard that was part of the flier.

On the data front: Another strategy employed by the industry has been to misrepresent data generated through a project run by the Bureau of Justice Statistics (BJS) of the U.S. Department of Justice. This project, called State Court Processing Statistics (SCPS), collects data on a sample of felony cases in 40 of the nation's 75 largest counties every two years. The data are aggregated across all 40 counties. The data show that defendants released to commercial surety bail have a lower failure to appear in court rate, 18 percent, than those released on non-financial conditions, 22 percent. The industry claimed that this finding "settles for all time the debate over which is the most effective method of pretrial release. **The chief finding is that, beyond question, commercial bail is the most effective method of pretrial release.**" (Emphasis in original.) Yet, SCPS provides only descriptive data, and offers no opportunity to test for cause and effect relationships. When the industry continued to ignore this fact, BJS took the unusual step of issuing a Data Advisory making it clear that any claims to the effectiveness of one type of pretrial release over another cannot be supported by SCPS data.

VI. A MODEL FOR A RATIONAL AND TRANSPARENT RISK-BASED BAIL PROCESS

Participants at the National Symposium on Pretrial Justice produced a list of recommendations for enhancing pretrial justice. Among the recommendations was to seek the development of demonstration sites that would allow interested jurisdictions to facilitate changes while serving as a model for others. Those demonstration sites would design a system of pretrial justice that would have the following elements:

- Use of citation releases by law enforcement in lieu of custodial arrests for non-violent offenses when the individual's identity is confirmed and no reasonable cause exists to suggest the individual may be a risk to the community or to miss court.
- Elimination of the use of bond schedules that allow a defendant to bond out of jail before appearing in front of a judge for a bail-setting hearing.
- Screening of criminal cases by an experienced prosecutor before the initial court appearance to make sure that the charge that goes before the court at that hearing is the charge on which the prosecutor is moving forward.
- Presence of defense counsel at the initial appearance who is prepared to make representations on the defendant's behalf on the issue of pretrial release.
- Existence of a pretrial services program or similar entity that: conducts a risk assessment on all defendants in custody awaiting the initial appearance in court; provides supervision of defendants released by the court with conditions of pretrial release; reminds defendants of their upcoming court dates; and regularly reviews the pretrial detainee population in the jail to see if circumstances may have changed to could allow for pretrial release.
- Availability and use of detention without bail for defendants who pose unmanageable risks to public safety or appearance in court.⁴⁴

The following model for a rational bail process closely mirrors these elements.

Citation release

When an individual comes in contact with a law enforcement officer for a possible law violation, the officer can make a full custodial arrest. When this occurs, the individual is brought to the police station or local jail where he or she is fingerprinted, photographed, booked, in many cases, strip searched, and is held in a cell or other secured area until being released. Not only does a full custodial arrest involve trauma and embarrassment for the person going through this intake process, it also consumes important resources. It takes the arresting officer off the street for the time it takes to transport the person

⁴⁴ *Supra*, note 8.

and transfer custody to the holding authority. It involves the time and resources of the holding authority to book the defendant, including conducting a medical screening and a suicide assessment.

Defendants who are in jail awaiting the initial court appearance typically do not go through the jail classification process, and are held in the same cell with all other new arrestees. This means that those arrested for minor offenses are often mixed with those charged with violent offenses. Moreover, research shows that 30 percent of all jail and lockup suicides occur within three hours of intake, and 50 percent within 24 hours.⁴⁵ This intake process has been described in the following way: “No other criminal justice activity can claim the convergence of such potentially dangerous people or circumstances which are present at the intake. Intake presents the most potential for injury to staff or prisoners because of the instability or uncertainty of the prisoners or the circumstances in which they find themselves.”⁴⁶

As a result of the time, resources, and potential threats to safety associated with jail intake following full custodial arrests, and given the concept of release on the least restrictive conditions necessary to reasonably assure appearance and public safety, the American Bar Association calls for maximum use of citations “in cases involving minor offenses.” The ABA Standards state: “[A] police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the person to the police station or to court. In determining whether an offense is minor, the police officer should consider whether the alleged crime involved the use or threatened use of force or violence, possession of a weapon, or violation of a court order protecting the safety of persons or property.”⁴⁷

The Standards go on to say that a full custodial arrest is warranted for persons with minor offenses under certain circumstances, such as: if the person fails to identify himself or herself satisfactorily; if the person refuses to sign the citation agreeing to appear in court on the designated date; if the person has no ties to the jurisdiction; if the person has failed to appear in court on a citation previously, or if there is “substantial likelihood” that the person will continue the criminal conduct if not arrested.⁴⁸

The ABA Standards cite five components of an effective citation release process:

- Accurate and reliable information about the identity, background and living situation of the person being considered for a citation
- Workable criteria for determining eligibility for citation release
- Training of law enforcement to make informed decisions regarding citation release

⁴⁵ Joseph Rowan, “Suicide Prevention,” *American Jails*, November/December 1994, 24.

⁴⁶ Thomas Rosazza, “Jail Intake: Managing a Critical Function,” *American Jails*, March/April 1999, 108.

⁴⁷ *Supra*, note 17, Standard 10-2.2, at 65.

⁴⁸ *Id.*

- Minimizing the period of time between the issuance of the citation and the defendant's first scheduled court date
- The capacity for rapid follow up of defendant's who miss that first court date.⁴⁹

It has typically been up to each law enforcement agency to set its own policies regarding the use of citation releases. As noted above, a new law that went into effect in 2011 in Kentucky that states that, except in limited circumstances,⁵⁰ "a peace officer shall issue a citation instead of making an arrest for misdemeanor committed in his or her presence, if there are reasonable grounds to believe that the person being cited will appear to answer the charge."⁵¹

The expanded use of citation releases would be a more rational approach than the use of bond schedules to allow early release of low risk defendants before the first appearance in court. Bond schedules were introduced into U.S. criminal justice systems in the 1940s as a way to give defendants the opportunity to avoid the trauma and stigma of sitting in jail – at least for the hours or days it takes to bring them before a judge. But, as noted, bond schedules are based on just one criterion – the name of the charge – and the defendant can only be released if he or she has the cash. Replacing bond schedules at this point with expanded citation releases would assure that criteria beyond just the charge is considered in the decision to cite rather than arrest the individual and it would remove the discriminatory aspect – the individual's access to money would have no bearing on release.

Early involvement by the prosecutor

Prosecutors are in the position to make very important decisions very early in the life of a criminal case. Many cases wash out after review by a prosecutor and are dropped, or the charges lodged by the arresting officer are reduced so that the elements of what is being alleged most closely match the charge that is being filed. In fact, a recent study found that 25 percent of all felony cases are dropped, which is considerable if those individuals spent significant time in pretrial detention, lost their jobs, homes, etc.⁵² Experienced prosecutors, those who have extensive trial experience and who know what is needed to get a conviction, are better equipped to do a review of cases before the initial court appearance than less experienced prosecutors. The early screening by experienced prosecutors also allows for the earlier identification of possible candidates for pretrial diversion – which is available

⁴⁹ Id., Commentary to Standard 10-2.1, at 65.

⁵⁰ Such as when the case involves the violation of a protection order, assault, or the use of a weapon, or the person poses a safety risk, or if the person refuses to follow the law enforcement officer's reasonable instructions.

⁵¹ KRS 431.015.

⁵² Cohen and Kyckelhahn, *supra* note 2.

in many jurisdictions as a way to allow selected defendants to participate in a program and have the charges dismissed upon successful completion.

The Standards of the National District Attorneys Association state that prosecutors have the responsibility to screen cases “at the earliest practical time”⁵³ to “eliminate from the criminal justice system those cases where prosecution is not justified or not in the public’s interest.”⁵⁴ Moreover, prosecutor offices should provide the training and guidance to prosecutors assigned to this task to enable them to use sound discretion in making these decisions.⁵⁵ The Commentary to these standards state: “It could be argued that screening decisions are the most important made by prosecutors in the exercise of their discretion in the search for justice.”⁵⁶

In addition to screening cases early, prosecutors should also be present at the initial appearance of the defendant in court. At the hearing, the prosecutor should make appropriate representations on behalf of the state on the issue of pretrial release. As the National District Attorneys Association standards state, at that hearing “Prosecutors should recommend bail decisions that facilitate pretrial release rather than detention.”⁵⁷

Philadelphia District Attorney Seth Williams attributes the decline in the pretrial detainee population in that jurisdiction in part to the more proactive role that prosecutors in his office have taken before and at the initial appearance in court. For example, he began assigning very experienced and high functioning assistant district attorneys to the charging unit, which screens cases before the in initial appearance.

Early appointment of defense counsel

The U.S. Supreme Court has said that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of the adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”⁵⁸ The Court stopped short of saying that an attorney must be present at that hearing, only that one must be appointed at the hearing.

In 2012, the Maryland Court of Appeals, the highest court in that state, issued a unanimous ruling that requires the presence of public defenders at the initial appearance of a defendant before a commis-

53 National Prosecution Standards: Third Edition (Alexandria: National District Attorneys Association, 2009), Standard 4-1.1.

54 Id, Standard 4-1.3.

55 Id, Standard 4-1.2.

56 Id, Commentary to Standard 4-1.

57 Id. Standard 4.4.4.

58 *Rothgery v. Gillespie*, 554 U.S. 191 (2008), at 20.

sioner.⁵⁹ In doing so, the court noted that the Maryland Public Defender Act provides a right to counsel that is broader in scope than that provided by the Sixth Amendment. That act states that representation is to be provided to indigent defendants in all key stages, including any “proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result.”⁶⁰ The court concluded that the initial bail-setting hearing is such a proceeding.

The American Council of Chief Defenders calls on all public defender offices to “dedicate sufficient resources to the bail hearing and/or first appearance, where pretrial release terms are set.” At that hearing, public defenders should “obtain and use crucial risk assessment information for making relevant and persuasive arguments regarding appropriate release conditions for their clients.”⁶¹

A 2008-2009 survey of over 900 public defender offices in all 50 states found that about half do not provide representation at the initial appearance in court where the bail decision is made. Only ten states guarantee representation at the initial appearance. In 30 other states, whether a lawyer is present at the hearing depends on the county in which the arrest occurred, and in the remaining states, no lawyers are provided for indigent defendants at the in initial appearance in any of the counties.⁶² “Across half of the country, it is not unusual for indigent, often uneducated and ill-equipped incarcerated defendants, to do their best to speak and self-advocate for their liberty when brought before a judicial officer. Detainees who cannot afford bail remain in custody without the benefit of assigned counsel’s representation until the next scheduled court appearance. Jailed defendants have become accustomed to waiting anywhere from several days to several weeks, and considerably longer in certain jurisdictions, before seeing their assigned lawyer appear in court.”⁶³

A 2000 study conducted in Baltimore, Maryland illustrated the impact that having representation at the initial appearance can have. The study involved a sample of 300 indigent defendants. Fifty-eight percent of the defendants in the sample were randomly assigned to the group that had an attorney from the Lawyers at Bail Project provided to them at their initial appearance before a district court judge. The other 42 percent were sent to this hearing in the usual way – without representation. The study produced the following results:

- Thirty-four percent of defendants who were represented by a Lawyers at Bail Project attorney were released on their own recognizance, as opposed to 13 percent of defendants without an attorney
- The court reduced the bail amount for one of every two defendants represented by Project lawyers, compared to one out of every seven who had no lawyer

⁵⁹ DeWolfe v. Richmond, Court of Appeals of Maryland, No. 34, September Term 2011.

⁶⁰ Section 16-204(b)(1).

⁶¹ Supra, note 58.

⁶² Douglas L. Colbert, “Prosecution Without Representation,” Buffalo Law Review, 59(2), (April 2011).

⁶³ Id., at 410.

- Where the bail set by the commissioner was reduced at the bail review hearing, defendants represented by Project lawyers had their bail cut by an average of \$1,000, as opposed to \$166 for those without a lawyer
- Those with lawyers at the bail hearing spent a median of two days in jail, compared to nine days for those without a lawyer
- Four out of ten defendants with representation were released the day of their bail review hearing, compared to just two out of ten without a lawyer.⁶⁴
- These increased release rates were achieved with no corresponding increase in rearrest rates. Those released due to the intervention of a lawyer were not rearrested any more often than those released without one.⁶⁵

Universal assessment of risk using validated risk instruments

The American Bar Association Standards on Pretrial Release state that “the information gathered in the pre-first appearance investigation should be demonstrably related to the purposes of the pretrial release decision and should include factors shown to be related to the risk of flight, threat to the safety of any person or the community and to the selection of appropriate release conditions.”⁶⁶ Over the past 50 years, pretrial services programs have been attempting to follow this standard by using objective risk assessment instruments to help formulate the pretrial release recommendations that they make to judicial officers.

The rationale for this effort is simple. While statutes and court rules tell judicial officers what factors they are supposed to consider in making a pretrial release decision, they say nothing about the weight to be given to each individual factor. But there is substantial research that has shown that it is possible to empirically identify which set of factors with which set of weights are best at predicting success or failure on pretrial release. Studies have demonstrated that while pretrial risk assessments cannot predict individual behavior, it is possible to group defendants into categories of risk in such a way as to predict the probability that persons assigned to each group will appear in court and remain law abiding.⁶⁷

⁶⁴ Douglas L. Colbert, Ray Paternoster, & Shawn Bushway, “Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail,” *Cardozo Law Review* 23 (2002), 1719, 1720.

⁶⁵ *Id.*

⁶⁶ *Supra*, note 17, Standard 10-4.2.

⁶⁷ Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument* (Richmond: Virginia Department of Criminal Justice Services, 2003); Christopher T. Lowenkamp and Kristen Bechtel, *Meeting Pretrial Objectives: A Validation of the Summit County Pretrial Risk Assessment Instrument* (Cincinnati: University of Cincinnati, 2007); Marie VanNostrand and Kenneth Rose, *Pretrial Risk Assessment in Virginia*, St. Petersburg: Luminosity, Inc., 2009); Marie VanNostrand and Gena Keebler, *Pretrial Risk Assessment in the Federal Court* (St. Petersburg, Luminosity, Inc., 2009); Edward Latessa, Paula Smith, Matthew Makarios, and Christopher Lowenkamp, *Creation and Validation of the Ohio Risk Assessment System: Final Report* (Cincinnati: University of Cincinnati, 2009); David J. Levin, *Validation of the Coconino County Pretrial Risk Assessment Tool* (Washington, D.C.: Pretrial Justice Institute, 2010); James Austin, Roger Ocker, and Avi Bhati, Ken-

The factors that are found to be most predictive vary slightly among jurisdictions, as do the weights that are assigned to each factor, but most validated pretrial risk assessment instruments contain the following factors: current charge; prior criminal history, prior history of failure to appear, whether there are any pending cases, current residence, employment, and history of substance abuse.⁶⁸

Researchers are examining if a uniform risk assessment tool can be used across multiple jurisdictions. For example, Virginia, Kentucky, and Ohio have each implemented statewide pretrial risk assessments that were validated in multiple counties within their respective states.⁶⁹ Several other states are in the process of doing this. In addition, based on a study of data from all 94 federal district courts, a risk assessment instrument was developed for use throughout the federal court system.⁷⁰

Supervision of pretrial release conditions

The purpose of pretrial supervision is to monitor the conditions of release that are set by the court. According to statutes and national standards, conditions of pretrial release should be related to the risk identified for each individual defendant and should be the least restrictive necessary to reasonably assure the safety of the public and appearance in court. Aside from the legal reasons to do so, use of the least restrictive conditions assures the most economical use of limited supervision resources. Moreover, research has shown that adding unnecessary conditions of release for low risk defendants can actually increase non-compliance for that population. As one researcher has noted, “[t]he law tells us that a person has a right to release on the least restrictive terms and conditions, and the research tells us that is going to produce the best outcomes.”⁷¹

The Pretrial Release Standards of the National Association of Pretrial Services Agencies state that pretrial services programs “should establish appropriate policies and procedures to enable the effective supervision of defendants who are released prior to trial under conditions set by the court. The agency or program should: (i) monitor the compliance of released defendants with assigned release conditions; (ii) promptly inform the court of facts concerning compliance or noncompliance that may warrant modification of release conditions and of any arrest of a person released pending trial; (iii) recommend modifications of release conditions, consistent with court policy, when appropriate; (iv) maintain a record of the defendant’s compliance with conditions of release; (v) assist defendants released prior to trial in securing employment and in obtaining any necessary medical services, drug or mental health treatment, legal services, or other social services that would increase the chances of successful compliance with conditions of pretrial release; (vi) notify released defendants of their court

tucky Pretrial Risk Assessment Validation (Washington, D.C.: JFA Institute, 2010); David J. Levin, Development of a Validated Pretrial Risk Assessment Tool for Lee County, Florida (Washington, D.C.: Pretrial Justice Institute, 2011); James Austin, Avi Bhati, Michael Jones, and Roger Ocker, Florida Pretrial Risk Assessment Instrument (Washington, D.C., JFA Institute, 2012).

68 Cynthia A. Mamalian, State of the Science of Pretrial Risk Assessment (Washington, D.C., Pretrial Justice Institute, 2011).

69 *Supra*, note 88, VanNostrand 2003; VanNostrand & Rose 2009; Austin, Ocker & Bhati 2010; Latessa, Smith, Lemke, Makarios, & Lowenkamp 2009.

70 *Supra*, note 88, VanNostrand and Keebler 2009.

71 *Supra*, note 8, at 21.

dates and when necessary assist them in attending court; and (vii) facilitate the return to court of defendants who fail to appear for their scheduled court date."⁷²

Pretrial Release Conditions

Non-financial pretrial release conditions can fall into one of four different categories. Status quo conditions require that defendants maintain their current residence, employment or school status. The supervision needed for monitoring these conditions is to periodically verify, either through references or records, that the defendant is maintaining the required status quo. Contact conditions require the defendant to report in to the pretrial services program on a regular basis, such as once or twice a week, either in person or by telephone. Restrictive conditions limit the defendant's movements or associations in the community. For example, a defendant may be ordered to stay away from a certain area or a certain individual. Supervision of these types of conditions is usually passive – a violation is discovered only when it is brought to the attention of the pretrial services program. An exception to this would be if the defendant is placed on electronic monitoring through Global Positioning Satellite (GPS) technology and the technology detects the violation. Problem-oriented conditions address specific defendant issues, such as substance abuse or mental health problems, which may affect the defendant's likelihood of coming back to court and staying out of trouble while on pretrial release.

The research on pretrial supervision lags behind what has been done in the area of pretrial risk assessment, but the literature does include two methodologically rigorous studies, both of which showed very positive outcomes for pretrial supervision. One study used an experimental design with random assignment of cases in three jurisdictions: Miami-Dade County, Florida; Multnomah County, Oregon; and Milwaukee County, Wisconsin. The study targeted defendants who were not released, either on non-financial or financial bond, at or immediately after the initial appearance in court. The purpose of the study was to test whether those defendants who were initially denied pretrial release, presumably due to their higher risks, could be released under supervision with no adverse effects on rearrest or failure to appear rates. The study found that 90 percent of these defendants were not rearrested and made all court appearances, a rate that was higher than for those defendants released on their own recognizance with no conditions, and those defendants released on financial bonds.⁷³

The second study was conducted in Philadelphia, Pennsylvania, and it tested the impact of various frequencies and types of contact by the defendant with the pretrial services program. Defendants who had scored as medium-level risk on the risk assessment tool were randomly assigned to one of two

⁷² Standards on Pretrial Release: Third Edition (Washington, DC: National Association of Pretrial Services Agencies, 2004), Standard 3.5(a).

⁷³ James Austin, Barry Krisberg, and Paul Litsky, "The Effectiveness of Supervised Pretrial Release," *Crime & Delinquency*, 31(4), (1985).

groups. The first group received the regular level of supervision (attending an orientation meeting and calling into the automated telephone system once a week to check in), while second group received this supervision, plus a telephoned reminder from the pretrial services program the day before the scheduled court date. Defendants who had scored as higher-level risk were also randomly assigned to two groups. Both groups had to attend the orientation and make twice-weekly telephone check-ins, but defendants randomly assigned to the second of this group were required to meet face-to-face with their case manager three days before their scheduled court appearance. The study found that the rearrest and failure to appear rates did not vary significantly among any of the groups, but all supervised groups had lower rearrest and failure to appear rates than another group of defendants who received no supervision. The authors of this study concluded that while frequency and type of supervision may not matter in reducing rearrest and failure to appear rates, the general act of supervising defendants does matter.⁷⁴

Much more research is needed to identify which types of supervision works best for which types of defendants. As one team of researchers has noted, an important step in doing so involves establishing more consistent supervision practices. "There is no standard for what constitutes pretrial supervision as it relates to frequencies and types of defendant contacts, and as a result, practices vary substantially. A review of supervision strategies in numerous pretrial services agencies nationally revealed disparate practices for what constitutes pretrial supervision. The frequency and types of contacts ranged from monthly phone contacts with an automated calling system to daily in-person reporting by defendants. Some agencies utilize face-to-face contacts while others do not." This situation led these researchers to conclude: "With the lack of standardization as to what is pretrial supervision and the wide variation of supervision requirements and practices, little is known about the supervision practices that are most effective for pretrial defendants in assuring court appearance and community safety pending trial."⁷⁵

Court date reminders

The American Bar Association says that pretrial services programs should establish procedures to remind defendants of their upcoming court dates.⁷⁶ Recent research has shown that this simple act can have a dramatic impact on reducing the likelihood of failure to appear. One study, conducted in Jefferson County, Colorado in 2005, found that calling the defendant's home and leaving a message either on voice mail or with a responsible member of the household regarding the defendant's upcoming court date decreased the failure to appear rate from a baseline of 21 percent to 13 percent. When the caller was able to speak directly with the defendant, the failure to appear rate fell to eight percent.⁷⁷

Another study, this one done in Multnomah County, Oregon in 2006, tested the impact of a pilot court

⁷⁴ John S. Goldkamp and Michael D. White, "Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments," *Journal of Experimental Criminology*, 2(2), (2006), 143-181.

⁷⁵ Marie VanNostrand, Kenneth J. Rose, and Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (Washington, D.C., Pretrial Justice Institute, 2011), 29.

⁷⁶ *Supra*, note 17, Standard 10-1.10(b)(xi).

⁷⁷ Jefferson County, Colorado Court Date Notification Program: FTA Pilot Project Summary, November 2005.

date reminder project that used an automated telephone dialing system. The study found that those defendants who were successfully reached by an automated call had a failure to appear rate of 16 percent, compared to a rate of 29 percent for similar defendants before the project was started. The study also concluded that the county criminal justice system saved \$14.21 in the costs associated with failure to appear for every one dollar it spent to run the program.⁷⁸ A follow-up evaluation a year later found that failure to appear rates were down 31 percent from before the project was started, and was saving the county an estimated annual net of \$1.55 million.⁷⁹

A pilot project in Coconino County, Arizona in 2006 focused on the high incidence of failure to appear of defendants who had been issued citations and given a date by the police officer to appear in court. A study of this project involved a study group of 245 defendants who had received a telephone reminder and a control group of 244 defendants who received no reminder. The failure to appear rate for the control group was 25.4 percent, compared to 12.9 percent for the study group. When callers were able to speak directly with the defendant the failure to appear rate fell to 5.9 percent.⁸⁰

Researchers in Nebraska looked not only at the impact of providing court date reminders, but also examined how the message that was presented in the reminder notice affected appearance rates. The study looked at 7,865 misdemeanor defendants who were mailed postcard reminders between March 2009 and May 2010 as part of a 14-county pilot project. There were three study groups. The first group received a simple message indicating the date, time and location of the court hearing. The second group of defendants received the same information in addition to a description of the sanctions for missing court. The third group received the information about the date, time and location of the hearing plus the description of sanctions for missing court, but also received a positive message about being able to speak on their own behalf in court. The study also looked at the impact of messaging on three different racial/ethnic groups: whites, blacks, and Hispanics. There was also a control group that received no reminders.

The study found that all three groups that received court date reminders had lower failure to appear rates that were statistically significant than those in the control group. The study also found that while all three racial/ethnic groups who had received reminders had lower failure to appear rates than their counterparts in the control group, only one group seemed to be influenced by the type of messaging. Hispanic defendants in the third group – those who were reminded that they would have the right to speak on their own behalf – had higher appearance rates than Hispanics in the other two groups.⁸¹

⁷⁸ Matt Nice, Court Appearance Notification System: Process and Outcome Evaluation (Multnomah County: Multnomah County Budget Office, March 2006).

⁷⁹ Matt O’Keefe, Court Appearance Notification System: 2007 Analysis Highlights (June 2007).

⁸⁰ Wendy White, Court Hearing Call Notification Project (Coconino County: Coconino County Criminal Justice Coordinating Council and Flagstaff Justice Court, 2006).

⁸¹ Mitchel N. Herian and Brian H. Bornstein, “Reducing Failure to Appear in Nebraska: A Field Study,” *The Nebraska Lawyer*, (September 2010).

Bond Review

A common feature of initial appearance hearings across the country is that the pretrial release decision is made in seconds – at most a minute or two in all but the most unusual cases. Once the decision is made and that day’s cases have all been heard, the tendency is to focus all energies the next day on the new cases. Yet, at the end of a day there may be several defendants who were not released because information vital to the decision was not available or not yet verified. As a result, the National Association of Pretrial Services Agencies Standards state: “The pretrial services agency or program should review the status of detained defendants on an ongoing basis to determine if there are any changes in eligibility for release options or other circumstances that might enable the conditional release of the defendants. The program or agency should take such actions as may be necessary to provide the court with needed information and to facilitate the release of defendants under appropriate conditions.”⁸²

Detention without bail

The laws in many states, as well as in the Federal system, recognize that there are some defendants for whom no conditions or combinations of conditions can reasonably assure the safety of the community or court appearance. The laws in these jurisdictions allow such defendants to be held without bail. For example, in the Federal system, the law states that the Government can file a motion with the court to hold a detention hearing if the defendant is charged with a crime of violence, with an offense that carries a maximum sentence of life in prison or death, or with a drug charge that carries a maximum sentence of 10 years or more.⁸³ The court must schedule an immediate hearing on the motion, although the law allows the Government to request a three-day delay and the defendant a five-day delay, for good cause shown.⁸⁴ At that hearing, there is a rebuttable presumption that the defendant will be held if certain enumerated conditions are met. Where there is no rebuttable presumption for detention, the Government has the burden of demonstrating by clear and convincing evidence that no conditions or combination of conditions will reasonably protect the safety of the community.⁸⁵ In 1987, the U.S. Supreme Court upheld a facial challenge to the constitutionality of these detention provisions. In doing so, the Court noted that these detention provisions “carefully limit the circumstances under which detention may be sought to the most serious of crimes. The arrestee is entitled to a prompt detention hearing, ...and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.”⁸⁶

At least 26 states, plus the District of Columbia, have statutes or constitutional provisions authorizing detention without bail in non-capital cases. Washington State was the latest to add such a provision. In the aftermath of the murder of four police officers by a defendant who was charged with very serious crimes but bonded out after paying pennies on the dollar for bonds totaling over \$400,000, Washing-

⁸² Supra, note 90, Standard 3.6.

⁸³ 18 U.S.C. 3142 (f).

⁸⁴ 18 U.S.C. 3142 (f)(2).

⁸⁵ 18 U.S.C. 3142 (e).

⁸⁶ United States v. Salerno, 481 U.S. 739.

ton voters passed a referendum to amend the state constitution to allow for detention without bail in certain circumstances. That amendment read: "Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to limitations as shall be determined by the legislature."⁸⁷

No jurisdiction in the country has had more experience in pretrial detention than the District of Columbia. In 1970, Washington, D.C. became the first jurisdiction to have the statutory authority to hold defendants without bail. Today, according to Ron Machen, U.S. Attorney for the District of Columbia, about 15 percent of defendants are held without bail. About 80 percent are released on non-financial conditions, with money bonds used in only five percent of the cases. He noted that the long list of non-financial conditions that exist in the District, and that are supervised by the pretrial services program, gives him the confidence to recommend release at such high rates and then seek detention without bail for the small percentage that pose unmanageable risks.⁸⁸

In those jurisdictions without detention authority, judges can do no more than set very high bonds in an effort to try to prevent the release of dangerous defendants in the hope that the bonds will not be posted. As was discussed earlier, however, very high bonds are the most attractive to the bail bonding industry because they provide the greatest opportunity for profit.

New Jersey Governor Chris Christie, a former U.S. Attorney very familiar with the Federal pre-trial detention statute, recently proposed amending that state's constitution to allow judges to hold certain defendants without bail in appropriate instances. The proposal "aims to provide our courts the ability to keep dangerous offenders in jail and off community streets rather than given them an opportunity to commit further acts of violence, intimidate witnesses until the time of their trial," said Governor Christie in announcing the proposal. The proposal was immediately opposed by the bail bonding industry in the state, claiming that to make it work would require the expansion of pretrial services to assure that all defendants are assessed for their risks of dangerousness. "If you introduce that into the state system," said bail bondsman Jack Furlong of the proposal, "you would be creating an entire new bureaucracy." Of course, the proposal, if enacted, would also reduce the number of high-paying customers for bail bonding companies.

⁸⁷ Joint Resolution 4220.

⁸⁸ *Supra*, note 8, at 15.

VII. IMPLEMENTING THE MODEL OF A RATIONAL AND TRANSPARENT RISK-BASED BAIL PROCESS

The plan for implementing the model of a risk-based bail process that is rational and transparent should focus on three areas:

- communications;
- demonstration; and
- data driven policies.

Communications

Communications encompasses gauging and molding public opinion about how the bail process currently works and how it should work, engaging the media to focus more attention on the shortcomings of the current process and the benefits of addressing those shortcomings, addressing the concerns of judges and prosecutors that changing the existing cash-based bail process, even given its significant deficiencies, could make matters worse, and educating state legislators, county executive and legislative branch officials, about the statutes and policies needed to replace the cash-based bail process with the risk-based process.

The foundation for this work has already been laid. For example, as a follow up to the National Symposium on Pretrial Justice, the Office of Justice Programs of the U.S. Department of Justice formed a Working Group to assure that the recommendations coming out of the Symposium remained a priority. That Working Group formed a subcommittee on communications, which has its first meeting in March 2012. The goals of the Communications Subcommittee are:

- to create a media campaign for public education purposes;
- to promote best practices in pretrial justice as an integral element of reform to states and localities seeking cost-effective ways to enhance public safety while containing costs; and
- to replicate parts of the National Symposium at state and regional levels to inform criminal justice practitioners and policy makers about risk-based pretrial release decision making.

In terms of public opinion, Florida Tax Watch, a watchdog group dedicated to assuring the Florida tax dollars are being used effectively, recently conducted a survey of 800 registered Florida Republicans in that state. The group chose only Republicans to survey because it wanted to gauge the sense of the most conservative segments of the population. The survey found that:

- 91 percent supported pretrial services an alternative to detention;

- 69 percent agreed that a defendant's ability to pay a money bond should not be the main factor used in determining pretrial release; and
- 59 percent were supportive of such pretrial services as risk assessment and supervision; only 25 percent were opposed.⁸⁹

More of these types of surveys are needed.

Several media groups have become engaged in highlighting the deficiencies in the money-based bail process. For example, in 2010, National Public Radio ran a three-part series on the many defendants throughout the country who sit in jail pending trial because they cannot afford their bonds. The New York Times also did a series of articles on the problems with bail bonding in 2010. Many other newspapers have published editorials in opposition to bills pushed by the bail bonding industry to limit non-financial release, or in support of the work of pretrial services programs. Also, in 2012, with funding from the Public Welfare Foundation, the John Jay Center on Media, Crime and Justice is providing a yearlong fellowship for crime reporters, to inform them of the challenges being faced to transform the cash-based bail process to a risk-based process and to support their investigative reporting on this issue.

As to working with judges, in another follow up to the Symposium, PJI, together with the Bureau of Justice Assistance of the U.S. Department of Justice, has convened a National Judicial Council on Pretrial Justice, comprised of about a dozen judges from around the country, to discuss the challenges faced from the perspective of judicial officers in moving away from the cash-based bail process. In addition, the Conference of Chief Justices has announced plans to study the role that judges can play in enhancing pretrial release decision-making.

Finally, PJI has been working closely with the National Association of Counties and National Conference of State Legislatures on ways to communicate with their respective memberships about enhancing pretrial justice, as well as with public interest groups across the political spectrum, such as Right on Crime, Florida Tax Watch, and the American Civil Liberties Union, who are concerned about the costs and the irrationality of the current system.

Demonstration

There is one jurisdiction in the country where each of the elements of the model of a rational and transparent risk-based bail process listed in the previous section has been implemented and it has shown to be very effective. In Washington, D.C., there is expansive use of citation release for persons charged with misdemeanors. There is a thorough screening of cases by an experienced prosecutor before initial appearance court, weeding out those cases that would not advance through prosecution anyway. An attorney is assigned to indigent defendants before the initial appearance and the attorney is given the opportunity to meet with the defendant before the hearing, and argues on behalf of

⁸⁹ Smart Justice Poll Results, Florida Tax Watch, Right on Crime, and Associated Industries of Florida, (2012).

the defendant on the issue of release at that hearing. There is a very high functioning pretrial services program that: interviews all defendants and uses a validated instrument to assess their risks of rearrest and failure to appear in court, and makes recommendations for conditions to respond to any identified risks; provides supervision of conditions of release, with a range of intensity to match the risks posed; and sends court date reminders to defendants.

Officials from other jurisdictions, however, look upon Washington, D.C. as being unique, given its status as the nation's capital. The judges are appointed by the president and confirmed by the Senate – so they do not have to stand for election. The prosecutor is the U.S. Attorney, who also does not have to face the voters. The District of Columbia Pretrial Services Agency is a Federal agency and it is well funded, as compared to most county or state run programs that must struggle to receive the resources that they do have.

As a result, officials are looking for examples of jurisdictions that achieve the same outcomes, in terms of release and compliance rates, as Washington, D.C., without the advantages that they perceive D.C. has. There are several other jurisdictions that have made great strides in recent years to improve their pretrial release decision-making practices, including in Allegheny County, Pennsylvania,⁹⁰ throughout Kentucky,⁹¹ and in the U.S. District Court for the Southern District of Iowa.⁹²

There is precedent for demonstrations achieving great success. When officials in Miami-Dade County, Florida introduced the Drug Court in the 1980s, it represented a radical departure for how courts handled drug cases. Based on some early successes of that initiative, the U.S. Department of Justice soon made millions of dollars available to other jurisdictions for the planning and implementation of Drug Courts, for the purpose of testing whether this model developed in one location could be demonstrated to work in other jurisdictions. Those early Drug Court demonstration sites clearly demonstrated that it could, and today Drug Courts are found in thousands of jurisdictions around the country. Twenty years later, the expansion of Drug Courts has dramatically changed the way that courts in the United States handle drug cases, and drug-involved defendants.

Data-Driven Policies

In the end, no matter how effective communications strategies have been, or how smoothly demonstration projects have been implemented, without empirical evidence that the risk-based bail process delivers better results than the current cash-based process, jurisdictions will be reluctant to make the major changes required to complete the transformation. This requires a commitment to the collection of data.

90 Pretrial Justice Institute Guides Innovative Reforms, Helping Justice Trump Tradition: New Agency in Allegheny County, Pennsylvania Increases Pretrial Fairness and Safety (Washington, D.C.: Pretrial Justice Institute, 2008).

91 James Austin, "Accomplishments and Challenges in Kentucky's Pretrial Release System," *The Advocate: Newsletter of the Kentucky Department of Public Advocacy*, (October 2011): 1.

92 Marie VanNostrand, *Alternatives to Pretrial Detention: Southern District of Iowa – A Case Study* (St. Petersburg: Luminosity, 2010.)

Data are required for two purposes: to measure outcomes and performance for day-to-day management purposes; and to conduct methodologically rigorous research to identify evidence-based practices. The boxes on the next two pages list the data elements that should be captured to measure outcomes and performance of first pretrial services programs specifically, and then more system wide measures. These data should be collected before any changes are made, to serve as a baseline, and then regularly after implementation.

The standardization of data elements can also help researchers in their work to identify evidence-based practices. For example, comparing pretrial risk assessment validation study findings from one jurisdiction to another can only be done if the two jurisdictions defined the factors that were studied in the same way.

The Working Group from the National Symposium of Pretrial Justice has also formed a Research Subcommittee. The goals of that sub-committee are:

- to stimulate detailed pretrial justice data collection at the local, state and federal levels;
- to stimulate quantitative and qualitative research within the government and academic communities;
- to support existing initiatives of the Office of Justice Programs focused on county justice systems with evaluations to produce and document evidence-based practices; and
- to stimulate courses on pretrial justice in undergraduate and graduate programs and law schools.

PRETRIAL SERVICES PROGRAM-RELATED MEASURES

In 2011, the Pretrial Executive Network, a group of about a dozen pretrial services program administrators convened by the National Institute of Corrections, developed a list of outcome, performance, and mission critical measures for pretrial services programs. The outcome measures include the following:

- Appearance rate: the percentage of defendants who are supervised by the pretrial services program that make all scheduled court appearances.
- Safety rate: the percentage of defendants who are supervised by the pretrial services program that are not charged with a new offense while the case is pending.
- Concurrence rate: the ratio of defendants whose supervision level or detention status corresponds with their assessed risks of pretrial misconduct.
- Success rate: the percentage of released defendants who (1) are not revoked for technical violations of the conditions of their release, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision.
- Pretrial detainee length of stay: The average length of stay in jail for pretrial detainees who are eligible by statute for pretrial release.

The Performance Measures identified by the Pretrial Executive Network include:

- Universal screening: the percentage of defendants eligible for release by statute or local court rule that the program assesses for release eligibility.
- Recommendation rate: The percentage of time the program follows its risk assessment criteria when recommending release or detention.
- Response to defendant misconduct: The frequency of policy-approved responses to compliance and non-compliance with court-ordered release conditions.
- Pretrial intervention rate: The pretrial services program's effectiveness at resolving outstanding bench warrants, arrest warrants, and capiases.

The mission critical data include:

- Number of defendants released by release type and condition: The number of release types ordered during a specific time, i.e., month or year.
- Caseload ratio: The number of supervised defendants divided by the number of case managers.
- Time from non-financial release order to start of pretrial supervision: Time between a court's order of release and the pretrial services program's assumption of supervision.
- Time on pretrial supervision: Time between the pretrial service's program's assumption of supervision and the end of program supervision.
- Pretrial detention rate: Proportion of pretrial defendants who are detained throughout the pretrial period.

SYSTEM-RELATED MEASURES

The system-related measures capture data on activities that lie outside the purview of the pretrial services program, such as citation releases by law enforcement, and overall system impact data.

Citations

- Percentage of cases where eligible defendants were issued a citation in lieu of full custodial arrest, by individual law enforcement agency.
- Percentage of defendants that are released on citation that appear for their first court hearing, by individual law enforcement agency.

Early prosecutorial screening of cases

- Percentage of cases screened by a prosecutor before initial appearance.
- Percentage of cases screened that were dismissed before the initial appearance.
- Percentage of cases screened where the charges were reduced before the initial appearance.
- Percentage of cases screened where a decision was made to offer the defendant pretrial diversion or participation in a specialty court.

Early representation by defense counsel for indigent defendants

- Percentage of cases where indigent defendants who requested counsel had representation at the initial appearance hearing.
- Percentage of cases where counsel for indigent defendants made representations on the defendant's behalf on the issue of pretrial release at the initial appearance.

Detention without bail in appropriate cases

- Percentage of cases where defendant was eligible for detention without bail under the jurisdiction's detention laws and the prosecutor moved for detention.
- Percentage of these cases where the court ordered detention.
- Percentage of cases where the defendant was eligible for detention without bail under the jurisdiction's detention laws and the prosecutor asked for a money bond.
- Percentage of these cases where the court set a money bond.
- Percentage of these cases where a money bond was set and the defendant was released after posting the bond.
- Percentage of cases where the defendant was eligible for detention without bail under the jurisdiction's detention laws and the prosecutor asked for a non-financial bond.
- Percentage of these cases where the court granted that request.

Overall system impact

- Total jail population.
- Percentage of the jail population composed of pretrial versus sentenced inmates.
- Number and percent of pretrial defendants in jail solely in lieu of bond.
- Average (mean, medium and mode) bond amounts for these defendants.
- Average (mean, medium and mode) length of stay in detention for these defendants.
- Operational costs for the jail.

VIII. CONCLUSION

Two significant issues that have faced the criminal justice system over the past 30 years have been the movement toward mass incarceration and the resulting disproportionate impact of that movement on racial, ethnic and economic minorities. Much of the attention in regards to those issues has been focused on law enforcement policies and sentencing practices and offender reentry. Very little attention has been paid to what happens between the time that law enforcement makes an arrest and the time the person is sentenced.

But mass incarceration and its impact on minorities is exacerbated every time a defendant who could have been safely released on citation is instead taken to the jail, every time a defendant has to stand in court at first appearance without an attorney, every time a defendant's access to cash determines whether he or she goes home to await trial or spends months in jail.

Mass incarceration numbs both society and the defendants themselves to incarceration. Rather than being a last resort, the decision to lock someone up is a casual one, made with little regard for the costs involved or whether less restrictive – and less expensive – measures are available. Being a casual decision, few really notice when a judge sets the price for a particular defendant's release from jail at \$1,000, and few pay any attention to whether that price is paid.

The cash-based bail process plays a large role in mass incarceration, but there is an alternative to that process that will make pretrial release safe, fair and effective, and do so in a way that is rational and transparent. The box on the next page, which summarizes the differences between the cash-based and the risk-based processes, illustrates how.

Many jurisdictions in the country have elements of both processes. In those jurisdictions, the complete abandonment of the cash-based process, while challenging, will not be as difficult as in those other jurisdictions where there are no features of the risk-based process.

CURRENT VERSUS PROPOSED BAIL PROCESS

The Current Cash-Based Bail Process	The Proposed Risk-Based Bail Process
Pretrial release opportunities before the initial appearance in court	
Those with access to cash can use a bond schedule to buy their way out a jail before seeing a judge.	Law enforcement or jail staff use established, objective criteria to select defendants who can be issued a citation to return to court in lieu of a custodial arrest.
Prosecutorial review of cases before initial appearance	
The case proceeds to initial appearance without any review by a prosecutor.	The case proceeds to initial appearance after receiving a careful screening by an experienced prosecutor.
Defense representation	
Indigent defendants have no representation by defense counsel at the initial appearance.	Indigent defendants are represented at initial appearance by attorneys who argue for release on the least restrictive conditions needed to assure safety and appearance.
Release decision criteria	
The release decision is based primarily on the charge, cash is the device used to select those who are released from those who are not, and the potential for profits for a private industry drive release determinations.	The release decision is based upon a validated objective assessment of risks conducted on all defendants, with conditions of release or orders of detention set commensurate with the identified risks.
Supervision of pretrial release conditions	
No supervision is provided when released on financial bond.	Conditions of non-financial release can be ordered by the court and supervised by a pretrial services program.

The Current Cash-Based Bail Process	The Proposed Risk-Based Bail Process
Court date reminder procedures	
It is up to individual bail bonding companies whether to remind defendants of upcoming court dates.	Every defendant receives a reminder about upcoming court dates.
Release opportunities after initial appearance where a money bond was set	
A bail bonding agent may or may not work with a defendant to obtain a release.	A pretrial services program systematically reviews the cases of all defendants in jail on bonds they cannot meet to determine if circumstances have changed to allow for a non-financial release or a reduction in the money bond.
Detention without bail	
Judges typically set very high money bails on defendants they don't want to be released in hopes that they will not be able to post the bond and stay in jail through trial.	Defendants for whom no condition or combination of conditions can reasonably assure safety or appearance are held without the possibility of release.
Measuring performance and outcomes	
The only performance measure for the bonding company is the bottom line – how much profit is the company making.	Comprehensive data are regularly kept, captured and reported on outcome and performance measures of the pretrial services program as well as the broader system. Research is conducted to identify evidence-based practices.