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

Ad Hoc Committee on Bail & Pretrial Services

July 22, 2016

AGENDA

I. Welcome and Introductions

II. Approval of April 28, 2016 meeting notes

III. Presentation by Mary Smith, Ohio Bail Agents Association

IV. Presentation by Jeffrey J. Clayton, Policy Director, American Bail Coalition

V. Work Group Reports

a. Evaluation/comparison of statutes, Constitution, court rules & ABA standards

b. Development of definition of bail and related terms

c. Data Collection

i. Utilization of pretrial services & screening tools

ii. Prosecutorial diversion availability, use

iii. Responses to release violations & alternative release options

iv. jail data and money map

d. Identification/evaluation of the Clerk of Court processes & process of release

e. Representation for the defendant and funding for the public defender

f. Identification of bondsmen processes, concerns and opportunities for collaboration

VI. Next Steps

VII. Adjourn

Ad Hoc Committee on Bail & Pretrial Services

April 28, 2016

Meeting Notes

Attendees:

Lara Baker-Morrish	Judge Cynthia Rice
Michele Mumford	Debra Weinberg
Julie Doepke	Mike Kochera
Penny Underwood	John Leutz
Susan Sweeney	Chrystal Alexander
Kari Bloom	Jim Lawrence
Dan Peterca	Judge Fritz Hany
Marta Mudri	Judge Beth Root
Josh Williams	Diana Feitl
Judge Nadine Allen	Lori Eville
Tim Schnacke	Sara Andrews
Jo Ellen Cline	Cyara Hotopp

1. **Introductions:** Sara Andrews welcomed everyone and introductions were made.

2. **Presentation by Tim Schnacke**

Tim Schnacke with the National Institute of Corrections presented the legal and evidence based practices in pretrial release and detention. After his presentation the committee engaged in robust discussion. A point was made that judges are fearful of media backlash that can come from a decision to release followed by another crime being committed by the defendant. It was suggested that there be a focus on talking to and educating judicial leaders on the issue. The point was made that judges need to understand that using excessive money bail can potentially lead to civil liability.

The committee also discussed due process issues with judges setting high bonds. Some suggestion that judges are not currently utilizing detention was made and that, in the alternative a high bond is set because there is no appeal from the bond decision. If a judge orders detention there is an expedited appeal and a fear of reversal.

The committee discussed Rule 46 of the Criminal Rules of Procedure as providing the skeleton for changes. It was explained that in Ohio, the Modern Courts Amendment allows the Supreme Court to adopt rules of practice and procedure that are subject only to disapproval by the General Assembly.

Money was another major topic of conversation for the committee. It was suggested that it is generally cheaper to hire people in pretrial services than it is to jail people and hold them. Summit County was discussed as a jurisdiction that has a more robust pretrial services systems, but many counties say that they don't have the resources to devote to this issue.

3. Ohio – Current Status

Ms. Cline and Ms. Hotopp gave a brief overview of a survey that was distributed on behalf of the committee to judges, jail administrators, and sheriffs. Discussion continued regarding victim issues, particularly in intimate partner crimes. It was stated that Ohio is often not holding DV offenders after conviction, but hold them pretrial which seemed illogical to some committee members. Mr. Schnacke noted that if a crime doesn't carry possibility of jail/incarceration then a jurisdiction probably shouldn't be holding the offender pretrial and that Kentucky has this concept in statute. The committee questioned where the floor for a risk assessment would be for the risk based system? For example, most places are not doing assessment on traffic violations, so where is the floor? The committee also wondered what discussion other states have had regarding the arrest decision when discussing bail reform.

The committee also engaged in discussions about a myriad of risk assessment tools already being utilized in Ohio, including in Lucas and Summit counties. The committee would like to follow up and see these instruments and how they were developed.

4. Presentation by Lori Eville – Essential Elements of a Pretrial Justice System

After a presentation by Ms. Eville the committee engaged in further discussion and identified priority issues including:

- Evaluation of statutes, rules, the U.S. Constitution, the Ohio Constitution and the ABA standards
- Development of a definition of bail and other related terms
- Data, including utilization of pretrial services entities, surveying counties on whether they have a dedicated pretrial services program if they use universal screening and a validated assessment instrument, what prosecutorial diversion exists, are there other release options, the response(s) to pretrial violations, and how many people in local jails on felonies v. misdemeanors.
- Evaluation of the process of release, including clerk of court processes and a money map
- Bondsmen
- Representation for the offender at pretrial and funding for the public defender

- Training and education for all the criminal justice system stakeholders, including judges, prosecutors, and defense counsel (access to justice issues), the public and the media.

5. Next Steps

The committee decided to take up the identified issues in a methodical method over the next several months and possible convene work groups to discuss smaller bits of the overall issue.

DRAFT

Pretrial Services Utilization Work Group – Survey Questions
[To be sent to Pretrial Services Agencies]
[To be sent to CP judges and Muni Judges]

Background Questions:

- Who is completing survey and contact information
- Size of jurisdiction
- Municipal or County

1) Does your court have a pretrial services department/process that provides information to the court on bail/detention decisions?

2) If not, does your court have a department, person, or group of people tasked with the following:
    a. Bail investigation (criminal history, community ties) and/or risk analysis regarding bail or detention decision
    b. Pretrial/bail supervision

3) Where is the agency or person(s) located, housed, under what authority?

4) Does the agency or person(s) do universal screening? If not, which defendants are being screened and why?

5) How many employees does the agency have (or equivalent people performing the functions of pretrial services)? What is their caseload? Do they receive specific training in providing pretrial services?

6) Does your court routinely or ever hold public safety hearings to detain individuals?

7) What information is utilized by the judge in making the initial bail or detain decision?

8) Do you use a validated risk assessment instrument? Please attach or, if not, what criteria does it use to help individualize bail setting recommendations?

9) What factors are included in your risk assessment? (Provide list as in NAPSA survey Q. 7)

10) Has your risk assessment scheme or system been validated?

11) When is the defendant provided counsel to discuss matters regarding bail?

12) If defendants are interviewed, describe the interview, what is asked, how long it takes, where it is done, whether or not statements are verified.

13) Are any defendants treated specially due to charge (e.g. domestic violence or OVIs)?

14) After the initial Bond is set does your jurisdiction systematically re-review the Bail/Bond for defendants remaining in custody (Example, any defendants remaining in custody 3 days after Initial Hearing are re-interviewed)?

15) Does your Jurisdiction assess defendants for Mental Health/Developmental Disabilities issues at booking?

16) Does the person or department make recommendations on bail/detain or just provide a report to the court?

    a. If you provide a written report to the court, please provide a copy.

17) What information about the defendant is provided to the court (provide list as in NAPSA survey Q. 15)

18) If you have a pretrial services agency, is it given any delegated release authority for certain defendants? If so, please describe.

19) Is supervision of pretrial release conditions provided in your jurisdiction?

    a. Pretrial services program
    b. Probation or other department
    c. No, no supervision

20) What options are used in your jurisdiction to supervise defendants on pretrial release? (provide list as in NAPSA survey Part 7, Q. 3)

21) Is supervision provided to anyone who is also ordered a commercial surety bond?

22) Does anyone in your court/program notify released defendants of upcoming court appearances? If so, how?

23) Does your court/program notify victims of crime of the pretrial release of the defendant?

24) Does your court/program calculate failure to appear rates?

a. If yes, what was your failure to appear rate for the last year?

25) Does your program capture information about, or are any comparisons made between, the FTA rates and recidivism rates of those charged with similar offenses released on OR as opposed to those released on monetary bonds? If so, provide the information or comparison.

26) Does your program calculate pretrial crime rates?

a. If yes, what was the pretrial crime rate for the last full year?

27) Does your program calculate release rates?

a. If yes, how many eligible defendants were released last year
b. Why were those not released not eligible?

Clerks Work Group Survey Questions
[To be sent to Clerks of Court – muni and county]

1) What is the process to be used to approve a surety?
2) Please provide a copy of your court's bond schedule.
3) Can you provide current and historical data on the Bail process and outcomes in your jurisdiction including (if not indicate "no information")
    a. Number or percentage of types of Bail/Bond outcomes including Cash only, 10% Bonds, ROR Bonds, ROR Bonds with Pretrial Supervision, 10% Bond with Pretrial Supervision, Surety Bonds, Surety Bond with Pretrial Supervision, Property Bonds and Public Safety concern Detention after hearing?
    b. Number of Bond/ Bail violations and hearings? Outcomes of hearings---- No finding of violation; Violation found, Bail Bond revoked; Violation found, conditions added or changed and Violation found, financial conditions added or increased?
4) What are your jurisdictions policies regarding Surety forfeitures?

Jail Work Group Survey Questions
[To be sent to jail administrators]

What was your jail capacity (design capacity)?

What was your average daily jail population in the past year?

Does your local jail have the capacity to separate pretrial defendants from convicted defendants?

What was the average daily percentage or number of pretrial defendants in jail in the past year? (Please include all persons brought in on a new crime violation (including violation of bond conditions)

What services (e.g., mental health, medical, job search, library access, specialized drug or alcohol services, etc), if any, does your jail provide to those incarcerated?

What is the average length of stay?

In 2015, of the pretrial detainees incarcerated, what was their average length of stay?

Please provide a one week snapshot of how many people made bail, what were the charges against those defendants, and what was the amount of bail.

Do you house any other inmates in your jail that you do not consider sentenced (convicted) or pretrial (unconvicted)? (e.g. courtesy holds)

What is the per diem rate that you would charge other agencies to house inmates in your jail? Example our commissioners only allow us to charge $86.50 per inmate, per day however our actual cost is greater per inmate, per day.

What is the actual per diem rate of your jail? Our actual is $99.35 per inmate, per day a $12.85 difference of what we charge other agencies and what our actual cost is.

Do you use a bail schedule for arrestees coming to your jail? Please attach a copy

Does your jail operate an electronic monitoring program?

If your jail operates an electronic monitoring program what are the total costs to operate the program? Of those inmates utilizing EM what is the cost per person, per day?

Does your jail operate any other program designed to manage defendants outside of secure confinement?

Does your jail operate a day reporting program for pretrial defendants?

If your jail operates a day reporting program what are the total costs to operate the program? What is the cost per person, per day?

Does your jail have a plan currently in place to work with your local courts as it relates to alternatives to incarceration for pretrial detainees, or any plan relevant to jail bed allocation? If you have a plan in place can you please describe the plan?

Do you regularly report to your local courts of basic population data from the jail?

Is your jail currently under a federal court order, or any other order, as it relates to an allowable maximum number of incarcerated inmates before you have to release inmates?

Does your jail operate any other pretrial programs that keep individuals from incarceration while awaiting trial? If so, describe the program and include total program costs.

Do you believe there should be more legal reforms in Ohio that keep pretrial detainees from incarceration while awaiting trial?

What might those legal reforms look like?

Are there any other systemic issues that interfere with getting inmates to their proper place.

Prosecutorial Diversion and Other Diversion Survey Questions
[Previously sent to OPAA members and OMPA members]
(To be sent to Municipal Court Judges Association)

1) Your court and geographic jurisdiction (municipality, county-wide, etc)?
2) Does your prosecutor's office offer a diversion program for misdemeanor offenders? If yes:
    - What type of diversion? (e.g., alcohol or drug treatment, defensive driving, etc.)
    - What are the eligibility requirements?
3) Does your prosecutor's office offer a diversion program for juvenile offenders? If yes:
    - What type of diversion?
    - What are the eligibility requirements?
4) Do you offer a specialized docket? If yes:
    - What type(s)?
    - Are the dockets pre- or post- conviction dockets? Intervention in Lieu?
5) Do you offer any other diversion programs ? (other than ILC or a specialized docket) If so, please list/describe them.
6) Point of contact name, phone and email (for the program and/or your office):

On other topics:

1) For municipal courts, what are the total # of felony bindovers?

2) Of that #, how many posted bond at the municipal level?

3) What is the median amount of the bonds set?

4) Do you use a bail schedule or, if not, what do you rely on.

    a. How do you handle warrants
    b. Do you do an ability to pay assessment

Ad Hoc Committee on Bail and Pretrial Release

Issue	Last Action	Subcommittee	Next Action, Person Responsible and Date Due
Evaluation and comparison of statutes, Constitution, court rules & ABA standards	Telephone Conference held on 6/8/16	Judge Beth Root* Susan Sweeney Diana Feitl Sara Andrews Marta Mudri Tim Schnake Jo Ellen Cline	• Thoughts on Ohio's Constitutional provision due by 6/15/16 • Comparison of Ohio statutes, rules and ABA standards (Allana Smith, OCSC) • Examples of other state Constitutional provisions on bail and bail reforms in those states (Allana Smith, OCSC)
Development of definition of bail and related terms and purpose of bail	Provide PJI glossary of terms to work group (Jo Ellen)	Jo Ellen Cline* Sara Andrews Tim Schnacke Lori Eville Judge Nick Selvaggio	• Feedback on glossary due by 6/17/16

* Denotes work group lead contact

Issue	Last Action	Subcommittee		Next Action, Person Responsible and Date Due
DATA Collection **1. Utilization of pretrial services & screening tools**	Survey finalized	Dan Peterca* Brenda Willis Jim Lawrence Mike Kochera	Lori Eville Tim Schnacke Diana Feitl Judge Ron Adrine	
2. Prosecutorial diversion availability, use	Survey finalized	Lara Baker-Morrish* Dave Phillips Judge Ken Spanagel Anne Gatti		• Survey sent to municipal prosecutors • Send to municipal judges (J. Spanagel) • Look at specialized docket list from SC commission (Cline)
3. Responses to release violations & identification of alternative release options	Other states/jurisdictions examples emailed to group on 7/6/16	Josh Williams* Judge Cynthia Rice Judge Nadine Allen Judge Beth Root	Julie Doepke Dan Peterca Lori Eville Paul Dobson	

Issue	Last Action	Subcommittee	Next Action, Person Responsible and Date Due
DATA Collection **4. jail data and money map**	Survey finalized	John Leutz* Sheriff Michael Heldman Ryan Kidwell Kari Bloom Sara Andrews	
Identification & evaluation of the Clerk of Court processes & process of release	Survey finalized	Penny Underwood* Marta Mudri John Leutz Judge Fritz Hany Branden Meyer Michele Mumford	• Rework flow chart on the processes in Clerks' offices regarding bail to reflect offense level (Underwood, Hany)

Issue	Last Action	Subcommittee	Next Action, Person Responsible and Date Due
Representation for the defendant and funding for the public defender	Telephone conference held 6/16/16	Kari Bloom* John Leutz Paul Dobson Chrystal Alexander Judge Selvaggio	• Gathering information on funding (Kari)
Identification of Bondsmen processes, concerns and opportunities for collaboration	Telephone conference held 6/17/16	Judge Allen Diana Feitl Tom Sauer Jim Lawrence Mike Kochera Dan Peterca Michelle Mumford	• Determination of current practices (All) • Other states' experiences with bondsmen (Jo Ellen)
Education/Training & Implementation Science		Sara Andrews* All	

CHAPTER NUMBER

COMMERCIAL BAIL BONDS

L. Jay Labe
Jerry Watson [1]

A. Introduction

Nationwide, an ever-growing number of insurance companies act as sureties on commercial bail appearance bonds in federal, state and municipal courts. Bail is the means through which our criminal justice system permits the release of an accused from custody pending trial, while ensuring his or her appearance at all required court proceedings. This chapter will focus on commercial bail, which involves the release of a defendant into the custody of a professional bail bonding agent who posts an appearance bond in lieu of the defendant principal's being held in custody.[2]

The inner workings of the commercial bail business can be confusing for several reasons. Bail wears two hats: criminal and civil. It is an integral part of a criminal case, yet any attempt to collect upon the bond following the principal's violation of bond conditions is strictly civil in nature.[3] In addition, statutory and regulatory variations currently exist between states with respect to bail forfeiture procedures, exoneration,

---

1. L. Jay Labe is a shareholder of Pendleton, Friedberg, Wilson & Hennessey, P.C. in Denver, Colorado. Jerry Watson is Senior Vice President of International Fidelity Insurance Company and National Legal Counsel, Bail, for Allegheny Casualty Company.
2. Commercial bail is authorized throughout the United States. The only exceptions are Illinois, Kentucky, Maine and Oregon.
3. *See*, *e.g.*, *United States v. Plechner*, 577 F.2d 596, 597 (9th Cir. 1978) (Enforcement of a bond forfeiture, although arising from a prior criminal proceeding, is nevertheless a civil action.); *United States v. Barger*, 458 F.2d 396, 396-97 (9th Cir. 1972) (forfeiting bail compensates for damages and is deemed civil, not criminal in nature; hence, it does not implicate the Double Jeopardy Clause when the defendant is also convicted of the crime of jumping bail); *United States v. Garcia-Trevino*, 843 F. Supp. 1134, 1134-1135 (S.D. Tex. 1994) (Entry of a civil forfeiture judgment serves a remedial purpose, is not punishment and is not a bar to subsequent criminal prosecution for failure to appear based on the same conduct).

remission and fugitive recovery requirements. Significant variations can also exist between political subdivisions of the same state as well as between state and federal criminal justice systems. Local court rules, procedures, standard practices and forms also vary widely.

A persistent lack of uniformity also exists in bail agent licensing and regulation. Since commercial bail involves contracts of suretyship, the majority of states regulate bail bond producers through departments of insurance. Each state has its own unique administrative requirements, forms, licensing standards and regulatory expectations.

The diversity of bail administrative and regulatory systems presents a monumental challenge to the many bail insurance companies that conduct business in multiple jurisdictions. As a result, the commercial bail insurance industry routinely supports more comprehensive regulation, enhanced administrative clarity and operational uniformity.

Perhaps the most confusing and misunderstood aspect of commercial bail arises from the multifaceted relationships that exist between the retail seller of the bail bond (the bail bonding agent), the insurance company surety, the governmental obligee and third party indemnitors. An accurate and functional understanding of the basics and resultant dynamics of these relationships is critical to legal analysis and the effective representation of a party in a commercial bail industry dispute. This chapter will discuss these relationships.

Finally, this chapter will also address two areas around which so much media-myth has been created: the bail bond business itself, and the process of retrieving and surrendering the absconding defendant, or the "skip," back into custody. The activities of bail bonding agents and fugitive recovery agents have been seized upon by Hollywood screen writers, crime novelists and reality television show producers to create a highly distorted picture of individuals who make important contributions to public safety and the administration of justice.

The purpose of this chapter is to make the reader more comfortable with commercial bail by addressing its basic legal principles in the context of its unique and frequently misunderstood operational details.

B. Background

Initially, appearance bonds were given to courts by individuals who pledged their own property as security. They did this for payment of a premium and came to be known as "property bondsmen." While a limited version of the property bondsman concept still exists in an ever-decreasing number of jurisdictions in a few Southern states, it is becoming a thing of the past. The property bond business model fell out of favor for two basic reasons: First, retail bondsmen found that it was

more advantageous to affiliate themselves with corporate sureties in order to take full advantage of their financial stability and administrative capabilities. Second, courts found that they were more comfortable relying on bail underwriters who were appointed by bail insurance companies and the financial assurance that exists when the bail bond is backed by an insurance company that can comply with stringent state-imposed requirements for a certificate of authority.

This chapter will focus on the commercial bail industry which involves bonds written by local retail bail bond sellers operating as authorized agents of insurance companies qualified to act as corporate sureties. Approximately twenty such commercial bail insurance companies are currently active in the United States, with thousands of licensed and appointed bail bond agents and producers.

1. Bail's Purpose

It has become increasingly more common for local government authorities to look upon bail bond forfeitures as a means of generating revenue. To view bail in this way, however, is a complete departure from bail's fundamental purpose. The primary objective of a bail bond is to assure the defendant's appearance at trial and all court proceedings where required.[4] Historically, the right to freedom before conviction is intertwined with the Anglo-Saxon doctrine that an accused is innocent until proven guilty.[5] The accused's freedom before conviction "permits unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction."[6] Accordingly, the right to bail is a fundamental underpinning of our criminal justice system[7] and is an essential safeguard of the presumption of innocence.[8] Bail should never

---

4. *United States v. Toro*, 981 F.2d 1045, 1049 (9th Cir. 1992); *Cohen v. United States*, 82 S. Ct. 526, 528, 7 L. Ed. 2d 518 (1962) ("The purpose of a bail bond is to insure that the accused will reappear at a given time by requiring another to assume personal responsibility for him, on penalty of forfeiture of property."); *United States v. Bass*, 573 F.2d 258, 260 (5th Cir. 1978) ("The purpose of a bail bond is not punitive; it is to secure the presence of the defendant."); *see also United States v. Nebbia*, 357 F.2d 303, 304 (2d Cir. 1966) ("It is not the sum of bail bond that society asks for, but rather the presence of the defendant. . . .'").
5. *See generally Ray v. State*, 679 N.E.2d 1364 (Ind. Ct. App. 1997).
6. *Stack v. Boyle*, 342 U.S. 1, 4, 72 S. Ct. 1, 3, 96 L. Ed. 3, 6 (1951) (citing *Hudson v. Parker*, 156 U.S. 277, 285, 15 S. Ct. 450, 453 (1895)).
7. *Sistrunk v. Lyons*, 646 F.2d 64, 70 (3d Cir. 1981).
8. *Stack*, 342 U.S. at 4, 72 S. Ct. at 3, 96 L. Ed. at 6.

be used as a means of punishing a defendant before conviction[9] or as a mechanism for public funding. When enforcing a bail forfeiture or considering a request for remission, it is improper for a court to weigh the impact of its decision upon the public treasury.[10] However, while assuring the appearance of the accused at all judicial proceedings is the primary reason bail is set, it is not the court's sole consideration. A court must also take essential public interests such as the protection of witnesses and public safety into serious consideration.[11]

2. How Bail Works

Upon probable cause of having committed a criminal offense an individual is arrested by law enforcement and incarcerated in a local detention facility. Bail is then set, meaning that conditions are established upon which the defendant can be released from custody. These conditions can be set by either a pre-arranged bail schedule or by a judicial officer at a hearing. A local bail bonding agent is contacted by the defendant, or someone acting on the defendant's behalf. Arrangements are made for the agent to post the appearance bond in consideration of a payment of premium. Collateral may or may not be required. After completion of an underwriting process, the bail bond and a power of attorney showing that the agent is duly authorized by a qualified bail insurance company are posted with the court or detention facility. After the bond is posted the defendant is released from custody. If the defendant fails to appear in court as order, the bond is forfeited and a warrant is issued for the defendant's arrest.

---

9. *See*, *e.g.*, *People v. Benmore*, *et al.*, 298 Mich. 701, 702, 299 N.W. 773, 775 (Mich. 1941); *Lucero v. District Ct.*, 532 P.2d 955, 957 (Colo. 1975); *McConathy v. State*, S.W.2d 594, 596 (Tex. Ct. App. 1975) (A bail forfeiture cannot be used as a means of imposing a fine).
10. *United States v. Velez*, 693 F.2d 1081, 1084 (11th Cir. 1982) ("Enrichment of the government is not the relevant purpose of a [bail] bond"); *In re Forfeiture of Bail Bond*, 531 N.W.2d 806, 808 (Mich. Ct. App. 1995) ("It is well settled that the purpose of a bond is to assure the appearance of a defendant and not to collect revenue."); *People v. Wilcox Ins. Co.*, 349 P.2d 522, 525 (Cal. 1960) ("In matters [relating to bail bonds] there should be no element of revenue to the state nor punishment to the surety").
11. *United States v. Solerno,* 481 U.S. 739, 752, 107 S. Ct. 2095, 2104, 95 L. Ed. 2d 697 (1987); *Bell v. Wolfish,* 441 U.S. 520, 538, 99 S. Ct. 1861, 1873, 60 L. Ed. 2d 447 (1979) ("This Court has recognized a distinction between punitive measure that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.").

C. Agreements Critical to the Process

1. The Bail Bond

A bail bond is a contract of suretyship by virtue of its tri-partite nature. The obligee of a bail bond is the state holding the defendant in custody. An insurance company is the surety.[12] The defendant is the bond principal. Bail bonds are conditioned primarily upon the defendant's agreement to make all required court appearances and to pay the entire bond penalty if he fails to appear. Bail bond forms tend to differ since they must be tailored to meet the statutory, regulatory and procedural requirements of the jurisdiction holding the defendant in custody.

2. The Power of Attorney

A specialized power of attorney is attached to and becomes a permanent part of the bail bond. This power of attorney is essential to the commercial bail industry. It establishes that the agent executing the bond does so as an attorney-in-fact with the authority of the surety to post the bond. It binds the bail insurance company the undertaking. It also establishes a unique number for each bail transaction. This important feature creates the foundation for commercial bail's business management systems.

Unlike powers of attorney used in construction and commercial surety arenas, bail powers do not contain the pre-printed names of specific individuals who are authorized as attorneys-in-fact. A bail power can be used to post appearance bonds by any licensed bail agent holding an appointment from the issuing bail insurance company. Bail powers are issued with expiration dates in sequentially numbered sets of various denominations. They are supplied to bail agents in a tightly controlled process. Agents are contractually obligated to report the execution and status of all bonds written with powers of attorney that are entrusted to them. They must also account for unexecuted powers.

---

12. *State v. Weissenburger*, 459 A.2d 693, 696 (N.J. Super. Ct. App. Div. 1983) ("It is well settled that a bail bond constitutes a surety agreement in which the defendant is the principal and the creditor is the State. Consequently, the legal principle applicable to the construction and consequences of surety agreements are equally applicable to bail bonds."); *Weigand v. State*, 768 A.2d 43, 49 (Md. Ct. App. 2001); *State v. Two Jinn, Inc.*, 228 P.3d 1019, 1023 (Idaho 2010).

3. The General Qualifying Power of Attorney

General qualifying powers of attorney are filed with the clerk of the county in which the agent/attorney-in-fact will post bonds. This document "qualifies" the agent's authority. It establishes the largest amount of single bond risk upon which the bail insurance company can be bound. It also provides that the bail insurance company has no liability on a bond if a bond execution power of attorney is not used when that bond is posted.

4. The Bail Application

This document incorporates a variety of risk control features. Executed by the defendant, it establishes certain duties to be performed by the defendant, such as setting the required office "check in" dates and times. It also captures essential underwriting personal details and contact information. The defendant must agree that breaching these conditions could result in the surety requesting the court's permission to surrender the defendant back into custody. Bail applications typically require applicants to verify the accuracy of all information supplied and authorize the surety to obtain further information from additional sources.

5. The Indemnity Agreement

On its face an indemnity agreement is a simple contract establishing the obligations of third parties to indemnify and hold the surety harmless. Its importance in the context of commercial bail is far greater. An executed indemnity agreement, whether collateralized or not, creates commercial bail's most fundamental and significant risk control device.

Practically speaking, third parties such as family and friends are the true "customer" of the surety, as opposed to the defendant himself. The indemnitors who are seeking his release, or who agree to assist him, are likely to be the very people the defendant least wishes to disappoint or harm. Individuals with significant long term relationships to the defendant give him an otherwise non-existent incentive to appear and meet his obligations. In the event the defendant fails to appear, the same disappointed indemnitors, now facing imminent financial loss, also tend to become the surety's best and most reliable source of information leading to his apprehension.

6. The Surety and Agent Agreement

An agreement between the bail bonding agent and his bail insurance company defines the rights, duties and authority of the agent. It establishes, among other things: (a) that the agent is firmly bound to indemnify and hold the bail insurance company harmless from loss, costs or damages connected with bonds he writes; (b) that the agent is a true independent contractor; (c) that the customers and risks undertaken are selected by the agent; and (d) that the bail insurance company will allow the agent to use its financial standing subject to the agent's full compliance with a variety of administrative requirements.

This agreement also establishes the amount of the commission the bail agent and bail insurance company will receive. Out of the premium paid by the customer, the agent's commission will be significantly larger than the commission due the bail insurance company. This arises from the fact that the bail agent indemnifies the bail insurance company, meaning that the agent has effectively assumed the primary risk of loss in the event of a forfeiture. The fact that the bail agent has thus assumed primary liability for loss, however, is not a defense to the bail insurance company's liability in a forfeiture enforcement proceeding initiated by the bond obligee.

D. The Regulatory Framework

Commercial bail is regulated in most states as a form of insurance. A bail insurance company must qualify for admission in each state under the same standards that apply to any other insurance company.[13] Bail insurance producers are generally licensed and regulated in the same manner as insurance producers for other standard lines of insurance.[14] Prelicensure and continuing education requirements for bail bond producers are common.[15]

---

13. Some jurisdictions require that bail insurance companies deposit collateral security. For example, the deposit requirements are $75,000 in Indiana and $50,000 in Louisiana. IND. CODE § 27-10-3-15 (2011); LA. REV. STAT. § 22:1025 (2011) ("Insurance Code").
14. Compare with New Jersey, which allows "limited insurance representatives" to write bail. *See* N.J. STAT. § 17:22A-16.1 (2011).
15. *See*, *e.g.*, WASH. REV. CODE § 18.185 (2011); COLO. REV. STAT. § 12-7-102.5 (Colorado requires only prelicensure education). Florida, Nevada and Tennessee require continuing education. *See* FLA. STAT. § 648.385 (2011); NEV. REV. STAT. § 697.230(1)(a) (2009); TENN. CODE ANN. § 40-11-401.

Bail regulations differ significantly from state to state. Retailers in New Jersey, for example, must qualify as "limited insurance representatives" whereas bail is regulated by county bail bond boards in Texas.[16] Formal appointment of retail sellers by a bail insurance company with the state commissioner of insurance is required in most states.[17] Some jurisdictions go one step further and require that a certified and current "qualification power of attorney" be filed with every court or county where the bail bond agent seeks to do business.[18] Qualification powers are provided by a bail insurance company and certify that an agent has authority to execute bonds up to a specified amount for the surety. Arizona, California and Nevada require retailers to provide a qualification bond, termed a "bond of bail retailer," in a specified penal sum, naming the state as obligee and conditioned upon the bail retailer's performance of statutory obligations.[19] In a limited number of jurisdictions qualified "cash" or "property" bond sellers are allowed to write a specified amount of bail liability, without the backing of an insurance company. [20] A separate system applies to bail bonds posted in federal courts.[21]

---

16. 17.TEX. OCC. CODE § 1704-160.
17. California requires notice of appointment for each bail agent by a surety insurer. California Insurance Code § 1802 (2011); *See* FLA. STAT. § 648.382(1). Colorado, a non-appointment state, requires bail insurance companies to maintain a list of their producers for inspection upon reasonable notice. COLO. REV. STAT. § 10-2-416.5.
18. *See*, *e.g.*, IND. CODE § 27-10-3-17; NEV. REV. STAT. § 697.270; N.C. GEN. STAT. § 58-71-140 (2010).
19. Arizona requires a $10,000 bond of bail agent. *See* ARIZ. REV. STAT. § 20-320 (2011). California requires a $1,000 bond. *See* CAL. INS. CODE §§ 1802, 1803.5 (2011). A $25,000 bond is required in Nevada. *See* NEV. REV. STAT. ANN. § 697.190.
20. Cash or Property bonding agents are permitted in Mississippi (MISS. CODE ANN. § 83-39-7), North Carolina (N.C. GEN. STAT. §§ 58-71-1, 58-71-145), Ohio (OHIO REV. CODE ANN. § 4.03 (2011)), South Carolina (S.C. CODE ANN. § 38-53-10 (2010)), Tennessee (TENN. CODE ANN. § 40-11-122 (2011)), Texas (TEX. CODE CRIM. PROC. ANN. arts. 17.01-.17.02 (2009)) and Washington (WASH. REV. CODE § 18.185.010 (2011)) up to specified limits based upon either financial qualifications or personal security posted. Colorado allows cash agents to write an unlimited amount of aggregate liability without the backing of an insurance company based only upon the filing of a single $50,000 qualification bond with the insurance commissioner. *See* COLO. REV. STAT. § 12-7-103(8)(a).
21. In the federal system, a judicial officer must determine that the bail bond was executed by a solvent surety. *See* 18 U.S.C. § 3242(c)(xii) (2011).

States use a variety of means and methods to ensure that bail bond forfeitures are paid. Forfeiture enforcement may be the responsibility of a state's department of insurance, its court system, or an independent regulatory entity.[22] A bail retailer who fails to pay a forfeiture judgment will risk license revocation, along with significant fines and penalties.[23] Some jurisdictions have enacted debarment procedures. Courts and detention facilities in these jurisdictions refuse to accept bail bonds from any agent who fails to timely satisfy a forfeiture judgment.[24] In a debarment forfeiture enforcement system, defaulting agents are placed "on the board," which is actually a regularly updated list of bail bonding agents with unsatisfied forfeiture judgments that is readily available to all courts and detention facilities in that jurisdiction.[25]

A bail insurance company may also find itself "on the board" if judgment against its agent remains unsatisfied. A bail bond cannot be posted using a power of attorney from an insurance company that is "on the board." This means that all agents appointed by that insurance company will be adversely affected, even those agents who have no outstanding forfeitures. Like bail agents, a bail insurance company will remain debarred until all forfeiture judgments are satisfied, exonerated or otherwise resolved.

E. The Nuts & Bolts

1. Setting Bail

Typically, federal courts will require that a bail insurance company be listed on the Department of the Treasury, Fiscal Service, List of Companies Holding Certificates Of Authority as Acceptable Sureties on Federal Bonds (Dept. Circular 570).

22. *See*, *e.g.*, FLA. STAT. § 648.45 (placing responsibility of forfeiture enforcement on Florida's state department of insurance). In Texas counties with populations of 110,000 or more, "Bail Boards," rather than the state department of insurance, are responsible for all commercial bail surety licensure and forfeiture issues. *See* TEXAS REV. CIV. STAT. ANN. art. § 2372p-3 (2011).
23. *See, e.g.*, CAL. PENAL CODE § 1308 (2011); MO. REV. STAT. § 374.763(1) (2010); N.C. GEN. STAT. § 58-71-80.
24. *See*, *e.g.*, FLA. STAT. § 648.44(1); NEB. REV. STAT. § 11-124.
25. Both the bail bonding agent and the bail insurance company can be placed "on the board" in Colorado if forfeiture judgments are not paid when due. *See* COLO. REV. STAT. § 16-4-112. While on the board, the agent is prohibited from writing bonds anywhere in the State. *See id.* § 12-7-109(1)(g).

The Eighth Amendment's excessive bail provision is integral to our concept of ordered liberty and is binding upon the states under the Fourteenth Amendment.[26] Excessive bail or denial of bail violates the Equal Protection Clause.[27] Because the practical effect of excessive bail is the denial of bail, logic compels the conclusion that the harm the Eighth Amendment seeks to prevent is the unnecessary deprivation of pretrial liberty.[28]

The Bail Reform Act of 1984,[29] state constitutions and statutes guarantee entitlement to bail in virtually all criminal cases, with the exception of capital offenses. Courts consider several factors when evaluating the amount of bail and the conditions of release that will reasonably assure both the appearance of a defendant and the safety of the community. These factors include: (a) the nature and seriousness of the charges; (b) the weight of the evidence; (c) the defendant's character; (d) family and community ties; (e) flight risk; (f) mental and physical condition; (g) criminal history; (h) drug and alcohol involvement; and (i) the danger posed to witnesses and the community.[30] The Bail Reform Act requires the release of an accused under the least restrictive conditions or combination of conditions that will reasonably assure appearance.[31] Only under rare circumstances will an accused be denied bail in a federal proceeding.

Commercial bail is not the only option when bail is set. Current methodologies include:

a. Financially secured release in the manner represented by commercial bail, which requires bail bonding agent, an insurance company and typically includes the indemnity of third parties.

b. Partially secured release or "deposit bail," where no surety is required and ten percent of the penal sum of the bail amount is paid to

---

26. *Meechaicum v. Fountain*, 696 F.2d 790, 791 (10th Cir. 1983).
27. *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1983).
28. *See*, *e.g.*, *Sistrunk v. Lyons,* 646 F.2d 64, 70 n.23 (3d Cir. 1981); *United States ex rel. Goodman v. Kehl,* 456 F.2d 863, 868 (2d Cir. 1972).
29. *See* Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1976 (1984) (codified as amended in scattered sections of 18 U.S.C.).
30. *See, e.g., United States v. Orena*, 986 F.2d 623, 631 (2d Cir. 1993) (danger to the community as a basis for refusing to grant bail); *United States v. Gebro*, 948 F2d 1118, 1121 (9th Cir. 1991) (discussing "flight risk"); *Ray v. State*, 679 N.E.2d 1364, 1367 (Ind. Ct. App. 1997) ("[B]oth insuring a defendant's presence at trial and community safety may be considered in setting bail for defendants…."); *see also* 18 U.S.C. § 3142(g) (2011).
31. *Gebro*, 948 F.2d at 1121; *see also* 18 U.S.C. § 3141 (2011).

the court. When all appearances are made a percentage of the deposit is returned.

c. Own recognizance release, where no surety is required and the defendant is released upon his promise to appear or pay the bond penalty in the event of a forfeiture.

Recent comprehensive studies demonstrate that in terms of getting persons to court for disposition of their case, the commercial bond approach is by far the most effective.[32] One such study did appearance comparisons of 55,000 state case felons in the nation's 75 most populous counties over an eight year span. One finding was that courts are moving dramatically toward fully secured commercial bail release instead of deposit or own recognizance release.[33] From a public safety perspective, it is also significant that these studies demonstrate that misconduct is higher when a financially secured commercial bail release is not used.

2. Underwriting

Operating through their appointed local agents, bail insurance companies have long had an effective system to achieve financial security and profitability despite their engagement in what would appear to the uninitiated to be a particularly risky business. The system they employ, however, has worked very well through the years. This is evidenced by the fact that some insurance companies have maintained active and profitable books of bail business for nearly a century.

The primary concern of bail underwriting is assuring the defendant's appearance. Its goal is the prevention of loss arising from a bail bond forfeiture. To underwriters in more customary lines of insurance, assessment of the risk of a bail forfeiture may seem unscientific in nature. Indeed, bail underwriting has always been more an art than a science. Nevertheless, bail underwriting centers on the same concerns that are applicable to more traditional lines of suretyship: risk analysis and risk control.

a. Risk Analysis

---

32. *See*, *e.g.*, U.S. BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS, NCJ-148818 (1994) 10. This study demonstrates the superior performance of commercial bonding, as compared to all other pretrial release methods, in getting persons back to court.
33. U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS, NCJ-214994 (2007) 2.

A bail underwriter must be thorough about gathering data prior to undertaking the risk that the defendant will not appear and that cannot be recovered in time to prevent paying a forfeiture. Complete information relative to several important issues is essential.

(1) The amount of the bail as set by the court (the size of the proposed bond).

A local agent is granted an "on site" underwriting authority limit in a specific amount on any individual defendant. This amount will increase depending upon the agent's financial qualifications, experience, and proven track record with the surety. If the risk being analyzed exceeds the agent's underwriting authority, express home office approval is required before the bond can be posted.

(2) Precise nature of the charges.

The incentive to avoid appearance at trial is always increased by the severity of punishment and the defendant's assessment of potential outcomes. Similarly, charges that give rise to a limited chance of future incarceration result in a greater likelihood of appearance.

(3) Complete defendant information.

The more detailed contact and personal information obtained from or about the defendant the better, all the way down to tattoos, hobbies, favorite pastimes, work and address histories and best friends. Extensive commercial bail bond application forms are aimed at capturing this critical information. It is essential for a bail underwriter to be as thorough as possible because this information will be essential should it become necessary to apprehend the defendant and return him to custody. Thoroughness also creates a favorable mind set on the part of the defendant; the more he thinks the agent knows about him the less inclined he is to abscond.

(4) Complete information on all indemnitors.

There are several good reasons for having a number of persons close to the defendant "co-sign" the risk by appearing as guarantors that the surety will be fully reimbursed on any loss or expense associated with the defendant's failure to appear. Not the least of these reasons is the fact that risk of flight decreases when a defendant understands that family and friends will bear financial losses associated with his failure to appear. In addition, third party indemnitors can be a valuable source of information regarding a fugitive defendant's whereabouts.

(5) Availability of collateral.

Collateral serves two primary purposes. It encourages appearance and can offset the surety's loss in the event of a forfeiture. The inability of a defendant or his indemnitors to post collateral enhances the risk of forfeiture. Typically, the more serious the charge the greater the need for for collateral security.

(6) Identity and experience of defendant's counsel.

On very large bonds the seasoned bail underwriter will insist upon speaking with defense counsel. He will seek non-privileged information about the theory of defense and the extent to which the defendant has been apprised of potential outcomes. The better the chance of a good outcome the defendant believes exists, the less fear the trial process holds for him. Most able defense attorneys are happy to visit with the bondsman. In addition, actuarial history demonstrates that an accused with highly competent legal counsel typically makes all court appearances. Defendants who are current in paying their attorney will normally be around for trial.

(7) Peculiarities in a given case.

A variety of unusual circumstances can adversely affect the likelihood of appearance that exceed the due diligence capacity of any bail underwriter. For example, if the prospective client is released on bond and later becomes a government witness the risk of his non-appearance could be greatly increased since he will be vulnerable to intimidation by those seeking to prevent his testimony. To the extent that a bail underwriter can anticipate circumstances that impact the risk of forfeiture, they must be seriously considered.

b. Risk Control

A bail risk must continually be monitored and the ultimate appearance outcome positively influenced. Just a few of the actions necessary on the part of the local bond agent in this regard are:

(1) Requiring the defendant make regular "check-ins." These can be done by telephone on smaller bonds. On larger monetary risks the defendant should be required to appear personally at the agent's office on a weekly basis. Personal meetings give the bondsman an opportunity to stay current on important information. This includes whether the defendant: (a) is still at the same address; (b) has the same phone numbers; (c) knows his next court date; (d) is employed; (e) is paying his attorney, and (f) is fully complying with court imposed conditions of release, such as participation in drug rehabilitation.

(2) Staying in communication. Responsible bail agents stay in communication with the bond principal. They understand that forfeitures are most likely when a risk is improperly managed. Losing touch with the defendant is begging for trouble.

As was related at the beginning of this section, bail underwriting is more an art than a science. It is an art that works best when practiced well. Consider that in most jurisdictions bail premium is ten per cent of the penal amount of the bail bond. Out of this premium must come agent

commissions, overhead expenses of the surety and agent, state insurance premium taxes and fugitive recovery expenses. Thus, if more than two percent of all bail bonds posted resulted in forfeiture losses, bail underwriters and agents could not survive. But survive they do, making a profit all the while.

3. Forfeiture

A defendant's failure to appear will violate the primary condition of a bail bond. It also triggers a series of related events, including the issuance of a warrant for the defendant's arrest and a declaration that the bail bond has been forfeited.[34] In some jurisdictions, breach of the condition of an appearance bond will also give rise to a separate criminal offense and additional charges.[35] While the prompt issuance of an arrest warrant is common to all jurisdictions, bond forfeiture procedures vary widely as to timing of the entry of judgment, rules concerning stays of execution and time limits for satisfaction of the forfeiture judgment. In deference to the primary purpose of the bond, which is to assure the defendant's appearance as opposed to enriching the state treasury,[36] a bondsman is generally allowed a reasonable window of opportunity to apprehend and surrender the fugitive before a judgment on the forfeiture must be paid.

Under the federal system, notice to the surety is required when the government moves for an entry of judgment.[37] Notice of the forfeiture, the show cause hearing and the entry of judgment are generally served upon the bail bond retailer. Most states' procedures require that the court give a bail insurance company notice of the entry of judgment. In practice, however, some jurisdictions consider service of notice upon the

---

34. *See, e.g.*, CAL. PENAL CODE § 1305 (2011); FLA. STAT. 903.26 (2)(b) (2011); *United States v. Nolan,* 564 F.2d 376 (10th Cir. 1977); *see* FED. R. CRIM. P. 46(e)(1). For further discussion on this issue, also see Nancy M. King, Annotation, *Forfeiture of Bail for Breach of Conditions of Release Other Than That of Appearance*, 68 A.L.R.4th 1082 (1989).
35. *See*, *e.g., People v. Aleman*, 823 N.E.3d 1136, 1140 (Ill. App. Ct. 2005); *People v.Allen*, 33 Ca. Rptr 2d 669 (Cal. Ct. App. 1994); COLO. REV. STAT. § 18-8-212 (2011).
36. *United States v. Velez*, 693 F.2d 1081, 1084 (11th Cir. 1982).
37. *See* FED. R. CRIM. P. 46(e)(3); *see also United States v. Lacey*, 778 F. Supp. 1137, 1140 (D. Kan. 1991) (setting aside the judgment against a bail insurance company when the government conceded that actual notice had not been given). *But see United States v. Navarrete-Martinez*, 776 F.2d 887 (10th Cir. 1985) (concluding that lack of notice was harmless error when the agent had actual knowledge).

retail seller to be "constructive notice" to the bail insurance company. When a defaulting retailer ceases business or changes insurance companies, however, "constructive notice" effectively means that the insurance company will not receive actual notice of the entry of judgment and its efforts to timely resolve the forfeiture will be impeded. The bail agent and the surety must be given reasonable notice that a forfeiture has occurred. In California, for example, the court must send notice of the bond forfeiture to the surety within thirty days. Failure to do so can result in jurisdictional impediments to the enforcement of the forfeiture judgment.[38]

The time allotted for payment of a forfeiture judgment can be as long as one year.[39] Some jurisdictions enter judgment very promptly upon the declaration of a forfeiture.[40] Other jurisdictions leave forfeiture procedures to the discretion of the court.[41] Typically, a show cause hearing is set to allow the bail agent an opportunity to explain why judgment should not enter, stays of execution should be granted or stays of execution should not expire. California, Nevada, Utah and Idaho allow the bail surety up to six months to surrender the defendant before payment of the forfeiture is required.[42]

Courts understand that forfeiture issues involve far more than the financial interests of the bail agent and the bail insurance company. Collateral tendered by a defendant's family, sometimes including the family residence, is held by the bail surety. As a result, family and friends of the defendant face significant liability for the bond forfeiture loss as well as the bail agent's investigation and apprehension expenses. Thus, it is in the best interest of an indemnitor for a fugitive family

---

38. *See*, *e.g.*, *County of Orange v. Lexington Nat'l Ins. Co.*, 45 Cal. Rptr. 3d 543 (2006) (surety exonerated due to lack of notice to the bail insurance company of the initial forfeiture).
39. Indiana allows the bonding agent 365 days to pay a forfeiture. *See* IND. CODE ANN. § 27-10-2-12 (2011). Hawaii and Nebraska allow thirty days. *See* HAW. REV. STAT. § 804-51 (2011); NEB. REV. STAT. § 14-227 (2011). Alabama (ALA. CODE § 15-13-136 (2011)), Idaho (IDAHO CODE ANN. § 19-2927 (2011)), Mississippi (MISS. CODE ANN. § 99-5-25), and Oklahoma (OKL. STAT. tit. 59, § 1332 (2011)) allow ninety days. Other states allow 180 days. *See, e.g.*, CAL. PENAL CODE § 1305; NEV. REV. STAT. § 178.508 (2011); TENN. CODE ANN. § 40-11-1399 (2011). Louisiana allows 210 days. LA. REV. STAT. ANN. § 15:85 (2011).
40. West Virginia gives only a ten-day notice to show cause why forfeiture should not be entered. W. VA. CODE. § 62-1C-9 (2011).
41. *See*, *e.g.*, ARIZ. R. CRIM. PROC. 7.6(c) (2011).
42. CAL. PENAL CODE § 1305(c)(1); NEV. REV. STAT. § 178.514; UTAH CODE ANN. § 77-20b102 (2011); IDAHO CODE § 19-2918 (2011).

member to be located and safely surrendered into custody. Indemnitors frequently provide meaningful assistance to bail agents. When courts are shown that material progress locating the defendant is being made, they tend to allow recovery efforts to proceed before compelling the forfeiture judgment to be paid.

Forfeiture judgments create civil liability that is typically enforced against bail bonding agents and insurance companies through regulatory proceedings. The forfeiture enforcement process is addressed in more detail at Section D. The Regulatory Framework, supra.

In some states, after all stays of execution and grace periods have expired, the names of bail agents who fail to timely pay forfeiture judgments are listed on electronic bulletin boards and detention facilities can no longer accept the bail bonds they ordinarily post.[43] Upon receipt of notice that an appointed agent has failed to timely pay a forfeiture an insurance company can also be placed "on the board" and barred, along with all of its appointed agents, from posting further bonds. Board systems provide a large measure of incentive and have been highly successful since non-compliant bail agents and insurance companies are placed at immediate risk. Board systems create a significant commercial incentive to comply with forfeiture orders without need of administrative intervention or civil collection proceedings.

In the real world, the failure of a defendant to appear does not necessarily mean the defendant has fled. More likely than not, the defendant will soon appear and voice a time-honored excuse such as a misunderstanding the time or place of the hearing, making a clerical error, oversleeping or problems with traffic. Once a forfeiture has been ordered, however, the appearance bond cannot be reinstated without the consent of the surety.[44]

Courts have wide discretion to set aside a forfeiture judgment.[45] If the defendant is promptly surrendered or if the court is satisfied that

---

43. In New Jersey bail agent with unpaid forfeitures are removed from the Bail Registry and prohibited from writing additional bonds. *State v. Simpson,* 839 A.2d 896, 899 (N.J. Super. 2003); *In re Preclusion of Brice*, 841 A.2d 927 (N.J. Super. Ct. App. Div. 2004). Missouri courts are supplied with an electronic list of licensed and qualified bail agents whose licenses are not subject to pending suspension or revocation proceedings. MO. REV. STAT. § 374.763(2) (2011); COLO. REV. STAT. § 16-4-112 (2011).

44. *People v. Maldonado*, 268 N.Y.S. 2d 271, (1966), *aff'd*, 295 N.Y.S. 2d 597 (N.Y. App. Div. 1968).

45. *United States v. Amwest Sur. Ins. Co.,* 54 F.3d 601, 602 (9th Cir. 1995); *see United States v. Nguyen,* 279 F.2d 1112; *see also* FED. R. CRIM. P. 46(e)(2) & (4) (2011).

appearance and surrender by the defendant is impossible and without fault, the forfeiture is likely to be set aside. A court may evaluate several factors when considering whether an injustice has been done by the forfeiture, including: (a) the willfulness of the breach of the bond conditions; (b) the cost, inconvenience and prejudice suffered by the government as a result of the breach; (c) explanatory or mitigating factors; (d) the appropriateness of the amount of the bond; and (e) the nature and extent of participation by the surety in apprehending and surrendering the defendant back into custody.

4. Revocation

A court can order the arrest of a defendant and the revocation of a bail bond for a variety of reasons. Prior to forfeiture, revocation can be ordered when the accused violates any condition of the release.[46] For example, when court imposes conditions of release such as drug testing and home detention, breach of the bond condition will routinely result in revocation. Bail is also likely to be revoked if the accused is charged with another criminal offense while released on bail.[47] Other important reasons for revocation arise when a court finds a reasonable probability that the accused will not appear or that the defendant presents a public safety risk.[48]

The term "revocation" is sometimes used to refer to the right of the bondsman to return the defendant to custody, with or without cause, in an effort to remove himself from further liability before a forfeiture occurs.[49] Although surrender of the defendant to custody may require

---

46. The sole exception to this rule is violation of the primary condition of the bond, namely failure to appear. In that event, the bond will be forfeited, not revoked.
47. *See, e.g.,* VA CODE ANN. § 19.2.135 (2011) ("A court may, in its discretion, in the event of a violation of any condition of a recognizance taken pursuant to this section, remand the principal to jail until the case is finally disposed of, and if the principal is remanded to jail, the surety is discharged from liability.").
48. *See*, *e.g.*, MICH. COMP. LAWS § 765.26 (2011); *United States v. Maack*, 25 F. Supp. 2d 586, 586 (E.D. Penn. 1998) (upholding revocation of defendant's bail because there was probable cause he would pose danger to the community); *United States v. McNeal*, 960 F. Supp. 245, 246-47 (D. Kan. 1997) (discussing the types of factors a judicial official must consider before revoking a defendant's pretrial release, including the issue of whether the defendant will pose a danger to the community).
49. *See, e.g., Johnson v. County of Kittitas,* 11 P.3d 862, 864 (Wash. Ct. App. 3d Div. 2000); *Kiperman v. Klenshetyn,* 35 Cal. Rptr. 3d 178, 180 (Cal. Ct. App. 2005).

return of all or part of the premium paid, courts do not require the bail bonding agent to involuntarily remain on a risk.[50]

If a bail bonding agent becomes aware of circumstances giving rise to an increased risk of flight it may become necessary to return the defendant to custody so the bond can be exonerated. The defendant's indemnitors are typically the first to know that trouble is on the horizon. They are frequently the triggering mechanism of bond revocation when they seek to extinguish their own liability. For example, indemnitors may believe that the risk of flight has become too great if they receive information that a defendant is violating bond conditions or that he faces serious new charges. Indemnitors are typically the first to learn when a defendant has lost a job or become embroiled in domestic disputes that jeopardize his ties to the community and increase the risk that he will fail to appear.[51] Indeed, third-party indemnitors sometime provide a critical source of intelligence to bail bonding agents that greatly enhances commercial bail's effectiveness and its ability to proactively manage risk.

5. Exoneration and Discharge

A bail surety is exonerated and relieved of further bond liability when the terms and conditions of the appearance bond are met. The ability of the agent to properly document his exoneration from liability on a bail bond is essential to the normal course of commercial bail business operations. Collateral securing bail liability cannot be released or returned to the bond principal or third party indemnitors until the surety's risk of loss has been extinguished.

Further, bail bonding agents must show their appointing bail insurance companies that existing liability written on that company has been resolved before new business can be written. Contracts between bail insurance companies and their indemnifying agents uniformly require agents to regularly and accurately report the status of bonds issued with old powers before new powers will be entrusted to the agent. Good business practice mandates that all bail insurance companies implement effective administrative controls to prevent their appointed agents from writing bail liability in excess of the agent's financial capacity to indemnify the insurance company.

---

50. *See, e.g., Knauf v. Cont. Bail Bonds, Inc.,* 549 So. 2d 805 (La. App. 1989); *Jordan v. Knight*, 35 So. 2d 178, 179-81 (Ala. 1948).
51. *See Johnson v. Hicks*, 702 S.W.2d 797, 798 (Ark. 1986) (concluding the agent had probable cause to believe the defendant committed a felony while released on his bond).

In the vast majority of criminal proceedings there is no bond forfeiture. The defendant appears at all court proceedings, the bond is discharged and the surety is exonerated when the defendant is convicted, acquitted, pleads guilty or nolo, or the charges are dropped.[52] When a disposition of the case has been reached, a bail bond may be exonerated automatically by statute.[53] Many states require the entry of a court order or finding to the effect that the bail bond has been discharged and exonerated.[54] Where a bond has been forfeited and the defendant has been returned to custody, the surety may be required to take affirmative action to set aside the forfeiture and document exoneration of the bond.[55] Generally, if the bond is to be continued until sentencing, the surety must consent.[56]

The defendant's compliance with the terms and conditions of a bond is not the only grounds for exoneration. Bail will be discharged or exonerated where performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law.[57] If the accused dies prior to the date of the scheduled appearance, the surety is

---

52. *See, e.g., People v. Henry*, 308 N.Y.S.2d 245 (N.Y. App. Div. 1970) (reversing lower court's order to reinstate released bail bond where the surety had performed all necessary contractual obligations and was exonerated from liability even though the judgment of conviction was reversed). *Cf. Commonwealth v. Hill*, 119 A.2d 572, 573 (Pa. Super. Ct. 1956) (reversing the lower court's decision to release the surety because the defendant appeared as required and "[u]nder the terms of the recognizance the condition had therefore been fulfilled and the subsequent forfeiture was unwarranted").
53. *See*, *e.g.*, N.M. STAT. ANN. § 31-3-10 (2011) (automatically exonerating all bail bonds and declaring them null, void and terminated upon a finding of guilt; *State v. Valles*, 143 P.3d 496 (N.M. 2004). *State v. French*, 945 P.2d 752, 761 (Wis. Ct. App. 1997).
54. When the conditions of a bail bond have been satisfied, the court may be required to discharge or exonerate a bond. *See*, *e.g.*, NEV. REV. STAT. § 178.522 (2011). Documentation of the order of discharge may require obtaining certification from a court clerk. *See*, *e.g.*, FLA. STAT. 903.31 (2011).
55. *People v. American Banker Ins. Co.*, 284 Cal. Rptr. 617 (Cal. Ct. App. 1991).
56. *Rodriguez v. People*, 554 P.2d 291, 292 (Colo. 1976) (holding that the consent of the surety is required after a guilty plea because the risk of the surety has materially increased). Events that materially increased the risk of the surety have the effect of terminating the obligation. *See* RESTATEMENT (SECOND) OF SECURITY § 128(b) (1941).
57. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 370, 21 L. Ed. 287, 290 (1872); *See United States v. Stephens*, 1 F. Supp. 33, 34 (S. D. Fla. 1932).

exonerated.[58] A surety is entitled to be exonerated upon payment of a forfeiture judgment.[59] A surety may also be entitled to exoneration if the bond is void because it was improperly taken by the court in the first instance.[60] Exoneration may also result from the obligee's failure to give the surety proper notice.[61]

Exoneration becomes significantly more complex after a forfeiture has occurred.[62] The rules and procedures relating to exoneration vary widely between jurisdictions. They are greatly affected by the stage of the proceeding at which exoneration is sought. For example, a bondsman will find that it is much easier to get a bond exonerated if the defendant is promptly apprehended and surrendered before the court enters judgment on the forfeiture. The difficulty in obtaining exoneration is likely to increase if the defendant is surrendered after entry of a forfeiture judgment.

6. Remission

Upon payment of a forfeiture judgment the surety may be able to qualify for return or "remission" of all or part of the payment by returning the defendant to custody or by showing that entry of the forfeiture judgment was improper. Whether the surety qualifies for remission depends entirely upon the local statutes and rules. New Jersey permits remission if a defendant is surrendered up to four years after the bail bond forfeiture.[63] In Maryland, remission is allowed under

---

58. *Taylor*, 21 L. Ed. at 290; *see also* J.P. Ludington, Annotation, *Death of a Principal as Exoneration, Defense, or Ground for Relief, of Sureties on Bail or Appearance Bond*, 63 A.L.R.2d 830 § 7[a] (1956).
59. *See, e.g.,* COLO. REV. STAT. § 16-4-108 (2011).
60. *See* Francis M. Dougherty, J.D., Annotation, *Liability of Surety on Bail Bond Taken Without Authority,* 27 A.L.R. 4th 246, § 3 (1984).
61. *People v. Ranger Ins. Co.*, Cal. Rptr. 3d 448, 141 Cal. App. 4th 867 (Cal. Ct. App. 2006).
62. *See, e.g.*, *People v. Lexington Nat. Ins. Co.*, 69 Cal. Rptr. 3d 738, 741 (Cal. Ct. App. 2007).
63. N.J. STAT. ANN. § 2A:162-8 (2011). The burden of establishing entitlement to remission is on the bail agent who must show that it would be inequitable or that it was not in the public interest. *State v. Mercado*, 747 A.2d 785, 788, 265, 269-270 (N.J. Super. Ct. App. Div. 2000). New Jersey, among other states, evaluates entitlement to remission on multiple factors, including the effort made by the surety for recapture, whether the applicant is a commercial bondsman, the degree of surety supervision, the length of time the defendant was a fugitive, the interests of the state, whether the defendant committed a crime while a fugitive and the amount

limited circumstances for up to ten years after the bond was posted.[64] Shorter time periods are far more common. In Colorado, Connecticut, Florida, and Michigan, for example, the limit is one year.[65] Ordering remission is left entirely to the discretion of the court in many states, including Arizona, Missouri, North Carolina, Ohio and Tennessee.[66] California allows a bail bondsman six months to surrender the defendant into custody or pay the forfeiture judgment. After the forfeiture judgment is paid however, remission is not allowed.[67] Other preconditions may also apply. For example, in Florida, a surety's entitlement to remission is preserved only if there is no breach of the bond conditions.[68] Entitlement to remission may also require direct involvement by the bail surety in the apprehension and surrender of the defendant.[69]

Appearance bond defaults and forfeitures often occur if the defendant is incarcerated on other charges when a court appearance date arrives. If the defendant is incarcerated by the bailing state, the majority rule is that the forfeiture must be set aside because the state is in a position to produce the defendant in court, while the bondsman cannot.[70] The law is less favorable to the surety when the defendant is incarcerated in a state other than the bailing state.[71] Although some states refuse to grant relief, the majority of states will grant a bail surety relief from the forfeiture depending upon the voluntary nature of the circumstances of

---

of bail. *See*, *e.g.*, *State v. Ramirez*, (N.J. Super. Ct. App. Div. 2006); *State v. Wilson*, 928 A.2d 851 (N.J. Super. Ct. App. Div. 2007).

64. MD RULE 4-217 (j)(1)(A) allows for remission if the surety produces evidence the defendant is incarcerated in a foreign jurisdiction and the state will not issue a detainer or extradite.

65. *See* COLO. REV. STAT. § 16-4-112 (5)(j) (2011); CONN. GEN. STAT. § 54-65a(b) (2011); FLA. STAT. 903.28(5) (2011). Mississippi permits remission up to eighteen months after bond forfeiture. MISS. CODE. ANN. § 99-5-25(3) (2011).

66. *See* ARIZ. REV. STAT. ANN. § 13-4309 (2011); MO. REV. STAT. § 544.640 (2011); N.C. GEN. STAT. ANN. § 15A-544.8(c)(4) (2011); OHIO REV. CODE § 2937.39 (2011); TENN. CODE ANN § 40-11-204(a) (2011).

67. CAL. PENAL CODE § 1305 (2011).

68. FLA. STAT. 903.28(8) (2011).

69. *See*, *e.g.,* FLA. STAT. § 903.28(2); *see also, e.g., People v. Johnson*, 395 P.2d 19, 23 (Colo. 1964).

70. *See* Lee R. Russ, J.D., Annotation, *Bail: Effect on Surety's Liability Under Bail Bond of Principal's Subsequent Incarceration In Same Jurisdiction*, 35 A.L.R. 4th 1192 (1981).

71. *See*, *e.g., State v. Fields*, 347 A.2d 810, 811 (N.J. Super. Ct. App. Div. 1975).

the defendant's departure from the bailing state, the nature of the charges pending against the defendant, and whether the bailing state has sought extradition.[72]

Entitlement to remission may also be affected by the Uniform Criminal Extradition Act ("UCEA") which has been enacted by the majority of states.[73] The UCEA establishes a mandatory series of court proceedings that a foreign bondsman must follow to obtain an arrest warrant and remove a fugitive from bail from another jurisdiction.[74] In Hawaii, for example, the Court of Appeals found that a retailer did not show sufficient good cause to set aside a forfeiture judgment where the retailer failed to exercise any of the options available under American Samoa's UCEA to secure the defendant's arrest as a fugitive.[75]

7. Recovery

A bondsman has the right and authority to take the defendant into custody for the purpose of exonerating the surety's liability on the bail bond. This authority is founded upon common law, contract and statute.

---

72. *See generally* Russ, *supra*.
73. 11 Uniform Crim. Extrad. Act 36 (1936 & Supp. 1993); *see Cuyler v. Adams*, 449 U.S. 433, 435, 101 S. Ct. 703, 705, 66 L. Ed. 2d 641, 646 (1981).
74. Under the terms of the UCEA, as enacted in New Jersey, a fugitive in an asylum state may not be delivered to the demanding state unless he is first taken before a court and advised of the extradition demand, the crime charged and asked if he desires to contest extradition. N.J. STAT. § 2A:160-1, *et seq.* Only four issues are "open for consideration before the fugitive is delivered up: (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." *McGeachy v. Doe*, 2011 U.S. Dist. LEXIS 59686 Civ. No. 10-3342, at *10 (D. N.J. June 2, 2011); *see State v. Lopez*, 734 P.2d 778, 782 (N.M. Ct. App. 1986), *cert. denied*, 499 U.S. 1092, 107 S. Ct. 1305 (1987) (addressing the New Mexico version of the Uniform Criminal Extradition Act found at N.M. STAT. ANN. §§ 31-4-1 to 31-4-30) (2011).
75. *See State v. Flores*, 962 P.2d 1008, 1015-1017 (Haw. Ct. App. 1998). Under the UCEA the bail agent could have petitioned a judge or magistrate for an arrest warrant of a person alleged to have violated the terms of bail and upon meeting the UCEA's procedural requirements a warrantless arrest could have been made by the bail surety and the defendant promptly taken before a judge or magistrate to be held pursuant to the UCEA.

The common law basis for the surety's authority is enunciated by the United States Supreme Court in *Taylor v. Taintor*:[76]

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by retailer. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.

The extensive common law authority of the bail agent recognized in *Taintor* is supplemented by the contractual relationship that exists between the bail surety and the defendant.[77] A bail bond agreement executed by the defendant during the underwriting process provides that, in consideration of the surety posting the bail bond, the principal agrees that the surety can retake him at any time, even before forfeiture of the bond.[78] By entering into this agreement, not only does the principal voluntarily consent to the custody of the surety but, under common law, he also implicitly agrees that the bondsman may use reasonable force in apprehending him.[79] The bail contract underscores the private nature of

---

76. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 373, 21 L.Ed. 287, 295 (1872).
77. *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 553 (9th Cir. 1974) (holding that California's version of the UCEA abrogated a foreign bonding agent's common law right to pursue, apprehend and remove his principal from California without resort to process); *State v. Mathis*, 509 S.E.2d 155 (1998); *State v. Tapia*, 468 N.W.2d 342, 344 (Minn. Ct. App. 1991).
78. *See, e.g.*, *State v. Nugent*, 1999 Conn. 537, 543, 508 A.2d 728, 731 (Conn. 1986). Indiana's specimen form of agreement between the surety and principal provides that the surety has "control and jurisdiction over the principal during the term for which the bond is executed and shall have the right to apprehend, arrest, and surrender the principal to the proper officials at any time as provided by law." 760 IND. ADMIN. CODE 1-6.2-10 (2011).
79. *Fitzpatrick v. Williams*, 46 F.2d 40, 42 (5th Cir. 1931) (holding that the surety's right to arrest is "an original right that arises from the relationship between the principal and his bail, and not one derived through the state"); *In re Von Der Ahe*, 85 F. 959, 960 (W.D. Pa. 1898);

the surety's right of recapture and is the basis for the expectation that the government will not interfere.[80] Thus, this common law right of recapture establishes that the seizure of the principal by the surety is not technically an "arrest" and may be accomplished without process of law. Since the bail bonding agent is likely be contractually obligated to satisfy any forfeiture judgment entered against the insurance company the contractual rights of the bail insurance company as a surety flow to the bail bonding agent. State[81] and federal[82] statutes have modified and supplemented traditional common law rights of the bail surety to apprehend and return a bail jumper to custody.

The synergistic relationship between private sector fugitive recovery and the criminal justice system results in over thirty thousand apprehensions per year at no public expense.[83] Nevertheless, in recognition of the need for better training for bail recovery agents, the commercial bail industry has taken the lead, through its national trade association, to craft model legislation supporting initiatives for bail recovery agent licensing, better training and greater responsiveness to the needs of law enforcement.[84]

Nugent, 508 A.2d at 731; *Livingston v. Browder*, 285 So. 2d 923, 925 (Ala. Civ. App. 1973).

80. *Reese v. United States*, 76 U.S. (13 Wall.) 22, 25, 19 L. Ed. 541, 544 (1869).

81. In Colorado, a bail bonding has statutory authority to seize and surrender a defendant. COLO. REV. STAT §16-4-108(1)(c). The bonding agent's common law privilege does not exist. *Oram v. People*, 255 P.3d 1032 (Colo. 2011) (holding that bail agents knew their entry into a residence was unlawful); *see, e.g.,* ALA. CODE § 15-13-162; N.C. GEN. STAT. § 58-71-30; *see Livingston,* 51 Ala. App. at 369, 285 S.2d at 926.

82. 18 U.S.C. § 3149 (2011).

83. *See*, *e.g.*, Adam M. Royval, *United States v. Poe: A Missed Opportunity to Reevaluate Bounty Hunters' Symbiotic Role in the Criminal Justice System*, 87 DENV. U. L. REV. 789 (2010); A. Tabarrok, The Bounty Hunter's Pursuit of Justice, 35 WILSON QUARTERLY 56 (2010); Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on the Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 118 (2004) ("These finding indicate that bond dealers and bail enforcement agents (bounty hunters) are effective at discouraging flight and at recapturing defendants. Bounty hunters, not public police, appear to be the true long arms of the law.).

84. ALEC model policy, Bail Fugitive Recovery Persons Act, June 2000); (Adopted by ALEC's Criminal Justice Task Force at the Spring Task Force Summit May 5, 2000, approved by ALEC Legislative Board of Directors June, 2000).

A bondsman may use reasonable means to ensure that the principal appears in court.[85] If the principal is apprehended in the state where the bond was taken, and there are no statutes to the contrary, the defendant can clearly be apprehended without any judicial or administrative process.[86] In many states a bondsman must follow specific procedures to apprehend a fugitive bond principal. For example, in Connecticut a bondsman or recovery agent must notify local authorities of their intent to arrest a fugitive.[87] The bondsman surrendering a defendant may be required to supply the sheriff a certified copy of the bond.[88] A statute may also require that an apprehended defendant be brought before a court within a specific period of time.[89] Failure to follow statutory procedures of the state where the arrest is made can expose the arresting bondsman to civil[90] and criminal[91] liability.

It is not necessary for a bondsman to use the extradition process.[92] Although a state cannot arrest a fugitive in another state without using formal extradition proceedings,[93] a bail bondsman has the right to cross state lines to apprehend defendants. Under the UCEA, however, a foreign bondsman must seek a court warrant. If the fugitive is arrested without a warrant, the bondsman must produce the fugitive in court in the state of the arrest so that proceedings can be initiated to determine if the arrestee is the wanted person and whether the charges are extraditable.[94] The few cases that have directly addressed the impact of the UCEA in the context of bail fugitive recovery have diluted the

---

85. *See generally State v. Nugent*, 508 A.2d 728, 732 (Conn. 1986).
86. *Kear v. Hilton*, 699 F.2d 181, 182 (4th Cir. 1983).
87. CONN. GEN. STAT. § 29-152k (2011).
88. NYCL CRIM. PROC. § 530.80(1)(A) (2011); COLO. REV. STAT. § 16-4-108 (Upon the delivery of the fugitive and a certified copy of the bail bond by a bail bonding agent, the sheriff must take custody of the defendant and acknowledge the surrender in writing.).
89. *See* CAL. PENAL CODE § 1301 (stating that the defendant is required to be delivered to the court without undue delay, within 48 hours).
90. *See generally O.K. Bonding Co. Inc. v. Milton*, 579 S.2d 602 (Ala. 1991).
91. *See, e.g.*, *Oram v. People*, 255 P.3d 1032 (Colo. 2011); *Collins v. Commonwealth*, 702 S.E.2d 267 (Va. Ct. App. 2010).
92. *See Lopez v. McCotter*, 875 F.2d 273, 277 (10th Cir. 1989); *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 554 (9th Cir. 1974); *U.S. v. Goodwin*, 440 F.2d 1152, 1156 (3d Cir. 1971).
93. *See, e.g., California v. Superior Ct.*, 482 U.S. 400, 407 107 S. Ct. 2433, 2438, 96 L. Ed. 2d. 332, 340 (1987). The extradition process is also required in federal cases pursuant to 18 U.S.C. § 3182 (1994).
94. *See generally State v. Epps*, 585 P.2d 425, 428 (Or. 1978).

common law and contractual recovery rights of the bondsman.[95] The extent to which an express waiver executed by a bond principal during the underwriting process will be enforced remains to be decided.[96]

Freelance bounty hunters frequently locate and retrieve defendants on forfeited bonds.[97] They accept unilateral offers or negotiate with the bail bonding agent to surrender the absconder back into custody for an agreed price, which is typically a percentage of bond penalty. In this recovery activity the bounty hunters are viewed as acting with the authority of executing agent and with the same rights to pursue and arrest suspects.[98] The activities of bail recovery agents, however, are subject to a variety of specific state requirements and limitations over and above requirements applicable to executing agents.[99]

---

95. *See, e.g., Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 206 (5th Cir. 1996) (holding that the Texas UCEA required the surrender of a Louisiana fugitive to Texas court); *McCotter*, 875 F.2d at 277 (holding that a commercial surety could not reasonably anticipate that the common law rights of a bail agent were proscribed and was thus deprived of due process); *Ouzts*, 505 F.2d at 552-53 (holding that a California UCEA abrogates common law rights of bail surety); *Commonwealth v. Wilkinson*, 613 N.E.2d 914, 917 (Mass. 1993) (Common law rights of bail surety abrogated by UCEA in Massachusetts); *Epps*, 585 P.2d at 429 (recognizing that Oregon abrogates a foreign bonding agent's common law right to pursue, apprehend and remove principal from state without resort to due process); *State v. Lopez*, 105 N.M. 538, 542, 734 P.2d 778, 782 (N.M. Ct. App. 1986), *cert denied*, 499 U.S. 1092, 107 S. Ct. 1305 (1987) (holding that the UCEA must be followed in the absence of the consent of bond principal).
96. *See Lopez*, 734 P.2d at 782 (holding that the UCEA must be followed in the absence of the consent of bond principal). *But see Epps*, 585 P.2d at 427 (holding that the use of force obviates "consent" as the term is used in the UCEA).
97. Florida and South Carolina prohibit free lance bounty hunting. FLA. STAT. § 648.30(2)(3) (2011) (It is unlawful to hold oneself out as a "bounty hunter" or "bail recovery agent"); S.C. CODE. ANN, §§ 15-17-740, 38-53-50 & 60 (2010). In North Carolina, bounty hunters must work for only one bonding company and cannot act on a free lance basis. N.C. GEN. STAT. § 58-71-65 (2011).
98. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 761 (1996).
99. For example, bail enforcement licenses are required in Arizona, C Connecticut, Georgia, Iowa, Indiana, Nevada, Louisiana, Mississippi, Nevada, South Dakota, Utah and West Virginia. *See* ARIZ. REV. STAT. § 20-340.02 (2011); CAL. PENAL CODE § 1299.06 (2011); CONN. GEN.

E. The Administration Of Justice And Economic Benefits Of Commercial Bail

Commercial bail is an effective, functional and significant tool in our system of criminal justice. It also gives rise to several important economic advantages that are frequently overlooked. These concepts deserve additional attention.

1. The Impact of Secured Release on the Administration of Justice

The administration of justice is impossible if the means chosen for pretrial release does not assure a defendant's appearance. Secured release through commercial bail provides the most effective mechanism to achieve this goal.

Under the terms of the bail bond contract a defendant binds himself to pay the penal sum of the bond if he fails to appear. A defendant's obligation can be either secured or unsecured. When a defendant is released solely upon his promise to reappear or pay the bond penalty, but without any assurance beyond that agreement, it is an "unsecured release." In the context of commercial bail, a "secured release" is a process through which a defendant's promise to appear or pay the entire bond penalty is guaranteed by a bail bonding agent, a bail insurance company surety and in most instances, financial commitments given by one or more third party indemnitors.

STAT. (2011); GA. CODE ANN. §§ 16-11-129 and 17-6-56 to 58 (2011); IOWA CODE 80A.3; INDIANA CODE 27-10-3-6; NEV. REV. STAT. § 648.30, 697.173; L.A. ADMIN CODE §§ 4905 to 4907 (2011); MISS. CODE ANN. § 83-39-3; NEV. REV. STAT. § 178.526; S.D. CODIFIED LAWS § 23A-43-29 (2011); UTAH CODE ANN § 53-11-122 (2011); W. VA. CODE §§ 51-10A and 56-3-34. In Arkansas, only a licensed private investigator, the bail agent, or a person under the bail agent's direct supervision can arrest the fugitive. ARK. CODE ANN. §16-84-114. A recovery agent cannot be employed in Colorado without a background investigation. COLO. REV. STAT. § 12-7-105.5 (2011). When a bail enforcement agent is used in Arizona, the department of insurance must be promptly notified. Annual reports are also required. *See* ARIZ. REV. STAT. § 13-39885C, D. In Florida, it is unlawful to represent oneself as a "bounty hunter" or "bail enforcement agent." No one other than a certified law enforcement officer is authorized to apprehend, detain, or arrest a principal on a bond in Florida, unless that person is qualified, licensed, and appointed as a bail bond agent in Florida, or by the state where the bond was written. FLA. STAT. § 648.30(2) and (3).

At first blush "secured" can be understood to mean that money or property collateralizes a defendant's promise to appear. This understanding, however, is far too limited. It fails to appreciate that much more than tangible property is involved in a typical commercial bail release scenario. To understand this important concept requires a brief explanation of the many layers of financial commitments that are unique to commercial bail transactions where the corporate surety is not the only party assuming a financial risk if the defendant absconds.

Typically there are at least three categories of commitments in each commercial bail transaction:

(a) The undertaking of the bail insurance company as surety on the bond agreement. This commitment is straightforward and requires no further explanation.

(b) The bail bonding agent's indemnity agreement to the bail insurance company. Through this commitment, the bail insurance company is, in effect, guaranteed reimbursement of any loss. In addition, the bail insurance company holds security in the form of a build up fund, also known as a "BUF" account, consisting of the agent's own funds that secure the agent's indemnity obligations. The risk of loss of his own assets significantly motivates the agent to take all necessary steps to assure defendant compliance.

(c) Third party indemnitors provide a critical third commitment in the secured release triangle. Typically, the true "customer" in a commercial bail transaction is not the defendant himself, but it is the third party, typically a family member or friend, who wants the defendant out of custody. To induce the agent to accommodating them, these third party indemnitors must agree to make the surety whole should there be a bond loss, sometimes even putting up "collateral" to secure that agreement. Immediately upon his release it is made clear to the defendant that if he fails to appear he will be directly harming these people who came to his rescue. Thus, not only the agent, but other financially interested parties become personally involved and have a vested interest in the defendant's compliance; so much so that should the defendant abscond these indemnitors will be a recovery agent's best source of information leading to the recovery of the defendant.

The term "secured release" in the context of a commercial bail bond refers to more that the surety's commitment. It means all of these commitments and risk control factors operating in concert. The practical upshot of this is that in a secured release a number of parties have much to lose and thus support defendant compliance while in an unsecured release, only the defendant's promise is at stake should he flee. Neither his conscience nor his wallet is likely to be affected.

The largest and most comprehensive study comparing secured and unsecured release methodologies for assuring the defendant's presence in court found that the failure to appear rate on secured release was 28% lower than the rate for unsecured release.[100] Increased recognition of the effectiveness of secured release through commercial bail has caused the four remaining states with no commercial bail (Oregon, Kentucky, Illinois and Wisconsin) to reconsider. In Kentucky, Louisville trial judges consider the statewide pretrial services program to be unworkable and are demanding changes.[101] Oregon, Illinois and Wisconsin have commercial bail reintroduction bills in the wings.

2. Positive Economic Impact

Commercial bail results in many economic benefits to state and county governments including:

(a) Insurance premium taxes.

Just as with the sale of any other insurance product, each bail bond posted results in payment of the attendant premium tax.

(b) Forfeitures.

If the surety is unable to produce the defendant as promised a forfeiture is paid to the court. While the percentage of cases where this occurs is small, the aggregate losses paid are substantial. Counties anticipate this revenue source. Some even build forfeiture payments into their fiscal planning, allocating the anticipated monies to their road and bridge funds, school administration and the like.

(c) Savings from higher appearance rates.

Every failure to appear costs the jurisdiction money in terms of wasted personnel time, among other things. The only study ever done on the subject placed the per-failure to appear cost at $1,750.00 (American Legislative Exchange Council Report Card on Crime, 1977). The cost would be much higher today since this study involved 1977 dollars. This translates into significant savings for local governments since commercial bail has fewer failures to appear.

(d) The "uncalculated cost" of recidivism.

Just as commercial bail has a lower failure to appear rate than unsecured release, it also has a lower misbehavior rate of its defendants pending trial. The Federal Bureau of Justice Statistics studies found that

---

100. ERIC Helland & Alexander Tabarrok, *The Fugitive: Evidence on the Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L & ECON. 93, 118 (2004).

101. Jason Riley, JUDGES ORDER FIXES IN PRETRIAL RELEASE, Louisville Courier Journal, April 18, 2007.

the misconduct rate of defendants released before trial on an unsecured basis was over twice as high as that of defendants whose release was secured.[102] The same report showed the percentages of defendants still a fugitive after one year from release date being almost twice as high for unsecured as opposed to secured.

The effectiveness of commercial bail, coupled with its indisputable economic benefits, supports the proposition that commercial bail is a greater boon to public safety than unsecured release.

F. Conclusion

Bail is the least understood and most under appreciated form of suretyship. Industry leaders calculate that well in excess of two million criminal court appearance bonds are written each year by commercial sureties. The fact that this method of release dramatically outperforms all others in reappearance rates and has the lowest recidivism among its charges causes it to be seen with increasing favor among judicial officers. This no doubt accounts for its steady growth both in terms of size and reputation.[103]

Another significant benefit of commercial bail is that it is "user funded." The same financial incentives that drive the commercial bail industry also keep the responsibility for recovering fugitives within the private sector, placing no additional burden on taxpayers. In addition, commercial bail is an effective means of reducing jail overcrowding at no expense to local government. A more comprehensive understanding of commercial bail will facilitate the enactment of reasonable and more uniform laws that will enhance the efficiency of the industry and augment its long record of accomplishment.

Glossary

Attorney-in-Fact

Attorneys-in-fact have the authority to execute a bail bond on behalf of a qualified bail insurance company surety. In the commercial bail industry, a licensed bail bonding agent holding an authentic power of attorney from a bail insurance company with whom that agent has been

---

102. U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS, NCJ-214994 (2007).
103. Morgan O. Reynolds, Privatizing Probation and Parole, National Center for Policy Analysis, NCPA Policy Rep. No. 233, ISBN# 1-56808-089-1 (June 2000), *available at* http://www.ncpa.org/pdfs/st233.pdf.

appointed may use that power of attorney to write a bail bond in the name of that insurance company.

Bail Bond

A tri-partite agreement conditioned upon a defendant's appearance upon which the government is the bond obligee, the defendant is the principal and an insurance company is the surety.

Bond Conditions

The primary condition of a bail bond is that defendant bond principal must appear in court as ordered. Breach of a bond condition can result in forfeiture of the bail bond or revocation of bail. Typical supplemental bond conditions include orders mandating forbearance from further criminal activity, forbearance from communications with victims and witnesses, drug testing and other forms of monitoring.

Bondsman

A retailer, also known as a bail bonding agent, who sells bail bonds to the public. The bondsman selects and secures the risk, controls and monitors the defendant for court appearances. The bondsman, as attorney-in-fact, executes the bond using a power of attorney supplied by the bail insurance company. Typically, bondsmen operate as independent contractors and hold their appointing bail insurance company harmless from all loss and adjustment expense.

Consent of Surety

If the conditions of a bail bond have been met, or if the bail bond is forfeited, a surety cannot be compelled to remain liable on the appearance bond while the defendant is free. Reinstatement of a bond after forfeiture always requires surety consent. Further, after conviction or a guilty plea, defendants must ask for a consent of surety if the bail bond is to remain in effect and allow the defendant to be released from custody until sentencing.

Co-signer

A third party indemnitor of the surety's liability. Typically co-signers are friends or relatives of the bond principal who seek release of the

defendant from custody and sign an agreement to indemnify the surety from loss if the defendant fails to appear.

Discharge and Exoneration

A bail surety is discharged when the primary condition of a bond is fulfilled, the bond penalty paid, or the bond is otherwise terminated by order of court or by operation of law. Discharge of the bond is typically a condition precedent to the return of collateral and replenishment of the stock of powers the bail agent will require to write new liability.

Forfeiture

A declaration by the court, upon the defendants failing to appear as directed, that the government, as the bond obligee, may now pursue a claim under the bond.

Forfeiture Judgment

A formal order of court following the declaration of a forfeiture, entering judgment against principal and surety in the penal amount of the bail bond.

Power of Attorney

A power of attorney, also known in the commercial bail industry as a "power," is a serially numbered and stringently controlled instrument that is issued by bail insurance companies to a licensed, qualified and duly appointed bail bonding agent. These powers of attorney authorize an agent to bind the bail insurance company as the surety on a single bail bond undertaking in a specific penal sum.

Recognizance

Recognizance is the promise of the bond principal to appear, or pay, in event of unexcused failure to appear.

Recovery Agent

A recovery agent is an independent contractor hired to return a fugitive to custody. Terms may vary, but compensation typically includes a percentage of remission paid when the fugitive is returned to custody. A

"bounty hunter" is another term for a recovery agent, referring primarily to those working on a freelance basis.

Remission / Remittitur

A court order directing that all or part of the monies paid by the bail surety on a forfeiture judgment be returned to the bail surety. Remission is typically ordered when an absconding defendant is surrendered as a result of actions by the bail surety.

Revocation

When a defendant violates a bond condition the court can order return of the defendant to custody. A bail surety also has the right to revoke the bond and return the defendant to custody, with or without probable cause, before a forfeiture occurs.

Set-Aside

A ruling by the court at a hearing prior to the entry of a forfeiture judgment, that the defendant's failure to appear was excusable and the forfeiture should not be enforced.

No. 16-10521

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAURICE WALKER, on behalf of himself and others similarly situated,

Plaintiff-Appellee,

v.

CITY OF CALHOUN, GA,

Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Georgia,
No. 4:15-cv-00170-HLM

BRIEF FOR *AMICI CURIAE* AMERICAN BAIL COALITION, GEORGIA ASSOCIATION OF PROFESSIONAL BONDSMEN, AND GEORGIA SHERIFFS' ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL OF THE PRELIMINARY INJUNCTION

PAUL D. CLEMENT
Counsel of Record
MICHAEL H. MCGINLEY
MEGAN M. WOLD
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com
Counsel for Amici Curiae

June 21, 2016

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, Amici hereby certify that no publicly held corporation owns 10% or more of any of the Amici's stock. Amici also certify that the following is a complete list of the trial judge and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case on appeal.

American Bail Coalition, Amicus

American Contractors Indemnity Corporation, Contributed Amicus Funding

Bail USA, Inc., Contributed Amicus Funding

Beacham III, A. Franklin, Attorney for Appellant

Brinson, Askew, Berry, Seigler, Richardson & Davis, LLP

Carlock, Copeland & Stair LLP

City of Calhoun, Georgia, Appellant

Clement, Paul D., Attorney for Amici

Davis, J. Anderson, Attorney for Appellant

Equal Justice Under Law

Geraghty, Sarah, Attorney for Appellant

Georgia Association of Professional Bondsmen, Amicus

Georgia Sheriffs' Association, Amicus

Govignon, George P., Attorney for Appellant

Grozine, Abby C., Attorney for Appellant

Karakatsanis, Alec, Attorney for Appellee

Lucas, Samuel L., Attorney for Appellant

McGinley, Michael H., Attorney for Amici

Murphy, Honorable Harold L., United States District Judge

Palmetto Surety Corporation, Contributed Amicus Funding

Primerano, Ryan, Attorney for Appellee

Root, David F., Attorney for Appellant

Southern Center for Human Rights

Walker, Maurice, Appellee

Wold, Megan M., Attorney for Amici

Dated: June 21, 2016

s/Paul D. Clement

PAUL D. CLEMENT
Counsel of Record
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

STATEMENT OF THE ISSUE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Bail Is A Liberty-Promoting Institution As Old As The Republic 4

A. The Modern System of Bail Is Deeply Rooted in the American Legal Tradition 5

B. Modern Commercial Sureties Are the Most Effective and Efficient Means to Balance the Interests of Defendants and Communities 8

1. The costs of abandoning monetary bail 9

2. The efficacy of commercial sureties 12

II. The City Of Calhoun's Bail System Is Constitutional 17

A. Monetary Bail Is Constitutional 17

B. Plaintiff's Constitutional Challenge to the City of Calhoun's Bail System Is Meritless 21

C. The City of Calhoun's Bail Schedule and Standing Order Are Rationally Related to a Legitimate Government Interest 26

CONCLUSION 30

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES*

Cases

Albright v. Oliver,
510 U.S. 266, 114 S. Ct. 807 (1994)..... 22, 27

Atwater v. City of Lago Vista,
532 U.S. 318, 121 S. Ct. 1536 (2001).....27

Bearden v. Georgia,
461 U.S. 660, 103 S. Ct. 2064 (1983).....23

Bell v. Wolfish,
441 U.S. 520, 99 S. Ct. 1861 (1979).....29

Collins v. Ainsworth,
382 F.3d 529 (5th Cir. 2004).....26

**County of Riverside v. McLaughlin*,
500 U.S. 44, 111 S. Ct. 1661 (1991)..... 27, 28

Ex parte Milburn,
34 U.S. (9 Pet.) 704 (1835)..... 7, 18

Fields v. Henry Cty.,
701 F.3d 180 (6th Cir. 2012)..... 20, 26

Gerstein v. Pugh,
420 U.S. 103, 95 S. Ct. 854 (1975).....27

Graham v. Connor,
490 U.S. 386, 109 S. Ct. 1865 (1989).....22

Griffin v. Illinois,
351 U.S. 12, 76 S. Ct. 585 (1956)..... 22, 23

Herman v. Jeuchner,
15 Q.B.D. 561 (1885) 8

* Citations upon which Amici primarily rely are marked with asterisks.

Maher v. Roe,
432 U.S. 464, 97 S. Ct. 2376 (1977).....24

**Pugh v. Rainwater*,
572 F.2d 1053 (5th Cir. 1978)..... 18, 20, 23, 24

Reese v. United States,
76 U.S. (9 Wall.) 13 (1869).....8

Ross v. Moffitt,
417 U.S. 600, 94 S. Ct. 2437 (1974).....25

**San Antonio Indep. Sch. Dist. v. Rodriguez*,
411 U.S. 1, 93 S. Ct. 1278 (1973)..... 24, 25, 26

**Stack v. Boyle*,
342 U.S. 1, 72 S. Ct. 1 (1951)..... 18, 19, 20, 21

Tate v. Short,
401 U.S. 395, 91 S. Ct. 668 (1971).....23

United States v. Feely,
25 F. Cas. 1055 (C.C.D. Va. 1813) 7

United States v. MacCollom,
426 U.S. 317, 96 S. Ct. 2086 (1976).....25

**United States v. Salerno*,
481 U.S. 739, 107 S. Ct. 2095 (1987)..... 19, 23, 28, 29

Woods v. Michigan City,
940 F.2d 275 (7th Cir. 1991).....27

Constitutional Provision

U.S. Const., amend. VIII.....18

Statutes

Ga. Code §17-6-50.1.....1

Ga. Code §17-6-56.1.....1

Other Authorities

James Austin et al., *Evaluation of the Current and Future Los Angeles County Jail Population* (Apr. 10, 2012) 16

William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33 (1977) 5, 6, 8

Equal Justice Under Law, Litigation: Ending the American Money Bail System, http://bit.ly/1TXOgJv (last visited June 21, 2016).....18

Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93 (2004) 10, 11, 13, 14

Daraius Irani et al., *Estimating the Cost of the Proposed Maryland Pretrial Release Programs* (2014), http://bit.ly/1ttuwFn 15

Daraius Irani & Zachary Jones, Regional Economic Studies Institute, *Estimating the Cost of the Proposed New Jersey Pretrial Service Unit and the Accompanying Legislation* (2014), http://bit.ly/1UQKz90 15

Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 Pace L. Rev. 800 (2012).....15

Robert G. Morris, Dallas County Criminal Justice Advisory Board, *Pretrial Release Mechanisms in Dallas County, Texas* (Jan. 2013), http://bit.ly/1tttqJD..... 10, 13

Philadelphia Inquirer, *Justice: Delayed, Dismissed, Denied*, Dec. 13-16, 2009.....12

Pretrial Release of Felony Defendants in State Courts (2007) (revised Jan. 2008).....11, 13, 14

Report of the Advisory Committee on the Criminal Justice System in Philadelphia (Jan. 2013), http://bit.ly/25Y8c8s 11

The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation (2011).....11

STATEMENT OF INTEREST

American Bail Coalition is a non-profit professional trade association of national bail insurance companies that underwrite criminal bail bonds throughout the United States. The Coalition's primary purpose is to protect the constitutional right to bail by bringing best practices to the system of release from custody pending trial. The Coalition works with local communities, law enforcement, legislators, and other criminal justice stakeholders to use its expertise to develop more effective and efficient criminal justice solutions. Coalition member companies currently have 17,368 bail agents under appointment to write bail bonds in the United States.

The Georgia Association of Professional Bondsmen is a non-profit professional trade association dedicated to encouraging professionalism among bondsmen, providing educational opportunities to its members, and promoting cooperation between the bail bonding profession and the criminal justice system. The Association has over 175 members who represent bonding companies and agents throughout Georgia. By Georgia law, the Association is responsible for approving and conducting all mandatory continuing education programs for all bail bond and bail recovery agents operating in Georgia. Ga. Code §§17-6-50.1, 17-6-56.1. The Association thus educates and trains approximately 1,500 bail agents in the State of Georgia.

The Georgia Sheriffs' Association is a non-profit professional organization for Georgia's 159 elected sheriffs. Among other things, the Association provides training for sheriffs and related personnel, and it advocates for crime control measures and laws that promote professionalism and enhanced effectiveness in the Office of the Sheriff throughout Georgia.[1]

The outcome of this case will determine the extent to which bond schedules remain a constitutional way for communities to set bail for defendants when a judge is not present. Amici believe that bond schedules and bail systems like Appellant's are constitutionally permissible and, when set appropriately, allow for the timely and expedited release of defendants.

The parties have consented to the filing of this amicus brief, which Amici file in support of Appellant. No counsel for any party authored this brief in whole or in part, and no counsel or party other than those listed made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE

The question addressed in this brief is whether plaintiff is likely to succeed on the merits of his constitutional claim.

[1] American Contractors Indemnity Corporation, Bail USA, Inc., and Palmetto Surety Corporation, which are not members of the amici, also contributed funds to support the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Plaintiff would have this Court effectively abolish monetary bail on the theory that any defendant is entitled to *immediate* release based on an unverified assertion of indigency. Nothing in the Constitution supports that extreme position. Instead, the text and history of our founding charter conclusively confirm that monetary bail is constitutional.

Since long before the Founding, bail has enabled communities to protect themselves and secure a defendant's appearance for trial while allowing the accused to avoid pretrial detention. And monetary bail facilitated by the commercial surety industry is the single most effective and efficient way to achieve those goals. Defendants bailed by a commercial surety are far more likely to appear in court and far less likely, if they fail to appear, to remain at large for extended periods of time. Moreover, by enabling defendants to post bail with only a fraction of the required amount, the commercial bail industry allows individuals of all financial means to leverage their social networks and community ties to obtain pretrial release.

The City of Calhoun's monetary bail system is clearly constitutional. The Constitution prohibits only *excessive* bail. Yet, plaintiff has not claimed that his bail was excessive under the Eighth Amendment. Instead, he attacks the City's bail system—and monetary bail in general—alleging that it discriminates against the indigent. But it does no such thing. Under the City's bail schedule, a defendant's

bail amount is initially set to match the crime he is accused of committing. And under the City's Standing Order, within 48 hours, each defendant is afforded an individualized hearing where he has the opportunity to demonstrate that his bail should be reduced or eliminated.

Under the Fourteenth Amendment, distinctions based on wealth must only be rationally related to a legitimate government purpose, and the City's bail system is eminently rational. Its bail schedule efficiently serves the twin goals of bail by enabling defendants to obtain pretrial release (often without having to wait for a hearing) while protecting the community. And the City's Standing Order is consistent with the constitutional deadline for holding a probable cause hearing under the Supreme Court's decision in *County of Riverside v. McLaughlin*. No more rapid timeline is required for assessing a claim of indigency. In fact, the Supreme Court expressly contemplated that probable cause and bail hearings would occur in tandem. It thus simply cannot be that *any* defendant arrested for *any* crime must be *immediately* released based on a bare assertion of indigency, as plaintiff's theory would require. The District Court's injunction should be reversed.

ARGUMENT

I. Bail Is A Liberty-Promoting Institution As Old As The Republic.

Since before the Founding, American communities have employed systems of bail to guarantee criminal defendants' appearance for prosecution while enabling the

accused to secure their liberty before trial. The American colonies developed bail procedures based on English practices, and they retained those practices at independence. While bail practices have evolved with the times, their chief purpose remains the same: Since our Nation's birth, systems of bail like the City of Calhoun's have protected both the liberty interests of defendants and the security interests of communities. Plaintiff's constitutional challenge is a frontal attack on this well-founded tradition.

A. The Modern System of Bail Is Deeply Rooted in the American Legal Tradition.

Even before independence, bail existed within the American colonies, modeled largely on the English bail system. For example, in colonial Virginia as early as 1689, sheriffs were responsible for administering a system of bail. They could release a defendant before trial so long as the sheriff accepted a sufficient bail to ensure the individual's appearance in court proceedings. In the event a defendant failed to appear, the sheriff would be liable to pay the award to the court himself, which encouraged sheriffs to be judicious in their allowance of bail. William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 77-78 (1977). In 1705, Virginia reformed its system to require that individuals accused of bailable crimes be held first in county jail and not transferred to the public jail at Williamsburg for at least twenty days. *Id*. at 78. These reforms kept the accused

closer to home and thus increased the likelihood of him obtaining bail through access to friends and relatives who could provide the surety. *Id*.

Other colonies operated similar systems. In colonial Massachusetts, the law prohibited restraint before conviction for bailable offenses if the person could be "put in sufficient security, Bayle or Mainprise for his appearance, and good behavior in the meantime." *Id*. at 79. And in colonial Pennsylvania, all prisoners were bailable "by one or more sufficient sureties … unless for such offenses as are made felonies of death by the laws of this province." *Id*. at 80.

Upon independence, the newly confederated States retained their bail systems, and some added bail provisions to their constitutions. Virginia's 1776 constitution stated that "excessive bail ought not to be required," *id*. at 81, and Georgia and North Carolina followed suit by adopting similar provisions, *id*. at 82, n. 293. Following the Philadelphia Convention in 1789, when the idea of amending the new federal Constitution to include a Bill of Rights gained traction, North Carolina proposed that an excessive bail provision be among the suggested amendments considered. *Id*. at 83. Thus, the Eighth Amendment to the U.S. Constitution provides that "excessive bail shall not be required." On the same day that Congress passed that amendment as part of the Bill of Rights, it also passed the Judiciary Bill, which required bail to be admitted in all cases "except where punishment may be by death." *Id*. at 85.

These statutory and constitutional provisions and the early case law applying them underscore how bail has always struck a balance between the liberty of the accused and the security interests of the community. In 1813, while riding circuit, Chief Justice John Marshall eloquently explained: "The object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty." *United States v. Feely*, 25 F. Cas. 1055, 1057 (C.C.D. Va. 1813). And in 1835, Justice Story, writing for a unanimous Supreme Court, echoed that sentiment: "A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon." *Ex parte Milburn*, 34 U.S. (9 Pet.) 704, 710 (1835). Thus, bail has always been understood "as a means of compelling the [accused] party to submit to the trial and punishment, which the law ordains for his offence," and not as a form of punishment or discrimination against the poor. *Id*.

The modern bondsman likewise has deep roots in our legal tradition. Intrinsic to the common law tradition of bail in both England and the United States was the role of a surety, who would guarantee the accused's appearance in court and undertake to produce the accused in the event of non-appearance. This concept was well-developed by the seventeenth century in England, where bail became a procedure permitting an individual to be released from jail and delivered into the

custody of a surety—who was, in essence, a jailer of his choice. *The Right to Bail*, at 70. Under this view, it was essential that a surety be "bound at his peril to see that his principal obeys the Court." *Id*. at 71 (quoting *Herman v. Jeuchner*, 15 Q.B.D. 561, 563 (1885)).

American courts adopted this view of suretyship. In 1869, the Supreme Court explained that "[b]y the recognizance the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing." *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869). While that does not mean the principal "can be subjected by [the surety] to constant imprisonment," the surety was empowered to "surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty." *Id*. Under this arrangement, the government also agreed "that it will not in any way interfere with th[e surety] covenant" or "take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him." *Id*. at 22.

B. Modern Commercial Sureties Are the Most Effective and Efficient Means to Balance the Interests of Defendants and Communities.

Consistent with its history, the commercial bail industry provides the single most effective and efficient means of allowing defendants to obtain pretrial release while ensuring the protection of local communities and their resources. While pretrial detention imposes burdens on criminal defendants, pretrial release poses serious risks to communities. Like the historical surety system, the modern

commercial bail industry exists to strike the balance between those interests. By enabling defendants to post bond at a fraction of the required amount, the industry facilitates the pretrial liberty of the accused. And by assuming responsibility for the defendant's appearance at trial, the industry protects the community's interest in prosecuting criminals for their offenses.

1. The costs of abandoning monetary bail

The alternatives to monetary bail—uniform release or uniform detention—are both unpalatable. A system of uniform pretrial detention would promote community safety and secure every defendant's appearance at trial, but impose significant burdens on criminal defendants' liberty interests. While in jail, a criminal defendant has less access to his defense attorney and the materials useful in preparing a defense. Pretrial detention can also reduce a defendant's ability to raise money to hire counsel, particularly where incarceration results in job loss. Detained individuals, moreover, suffer in their employment and familial relationships, leaving lasting ramifications even for defendants who are later acquitted. And uniform pretrial detention would impose a significant cost-burden on local communities, while placing additional stress on overcrowded jail facilities.

But releasing all accused on the mere promise to appear would wreak untold consequences on our communities. Released defendants would have significantly less incentive to appear for their court hearings and might commit additional crimes

while released. *See, e.g.*, Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 94 (2004). When a defendant fails to appear, local courts must reschedule proceedings, wasting the time of court personnel, judges, lawyers, and testifying witnesses, including victims, and inhibiting the community's ability to enforce its laws. *Id.* Studies conservatively estimate that the cost to the public for each failure to appear is approximately $1,775. *See* Robert G. Morris, Dallas County Criminal Justice Advisory Board, *Pretrial Release Mechanisms in Dallas County, Texas* 17 (Jan. 2013), http://bit.ly/1tttqJD. Most communities, quite logically, have no interest in inviting these harms.

A defendant who fails to appear for a scheduled court hearing also incurs an additional criminal charge and an associated warrant, which imposes more costs on law enforcement who must track down missing defendants, diverting scarce community resources from other law enforcement efforts. *The Fugitive*, at 98. This is no trifling concern. To take an example, Philadelphia releases approximately half of its criminal suspects on personal recognizance and for a long time prohibited commercial bail. As of November 2009, Philadelphia's "count of fugitives (suspects on the run for at least a year) numbered 47,801," and in 2007 and 2008 alone, "19,000 defendants each year—nearly one in three—failed to appear in court for at

least one hearing." *Report of the Advisory Committee on the Criminal Justice System in Philadelphia* 19 (Jan. 2013), http://bit.ly/25Y8c8s.

Outlawing monetary bail or commercial sureties would produce similarly high failure-to-appear rates throughout the country. Law enforcement is not staffed or funded to re-arrest defendants who fail to appear. Thus, without monetary bail and the commercial surety system, the community risks encouraging further criminal behavior and losing any incentive for securing appearance, which adds to the public costs of crime—which already total in the hundreds of billions of dollars, *see* National Institute of Health, *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation* 1-2 (2011)—and further diminishes the rule of law. Surety bonds are the best way of preventing these risks to the public because the probability of being recaptured while released on a surety bond is 50% higher than for those released on other types of bonds or on their own recognizance. *The Fugitive*, at 113.

Even *with* the protection of bail, 16% of felony defendants in large urban counties are rearrested before trial based on 1996 statistics compiled by the Justice Department. Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* 8 (2007) (revised Jan. 2008) (overall pretrial misconduct rates of released defendants ranged from 31% to 35% annually between 1990 and 2004). Without any surety to guarantee appearance, these rates are sure to increase. And

innocent Americans bear the brunt of these additional crimes, through additional victimization and the deterioration of communities. *See, e.g.*, Philadelphia Inquirer, *Justice: Delayed, Dismissed, Denied*, originally published in four parts from December 13-16, 2009 (describing how Reginald Strickland, free on bail, "went on a rampage, raping or assaulting four women within days of each other").

Monetary bail systems strike an efficient balance between these competing interests. Pretrial release is preferred only so long as courts can assure communities of their safety and ensure the appearance of defendants in court. Thus, through commercial sureties, criminal defendants are able to gain pretrial release, while maintaining a strong incentive to appear for trial and to avoid additional arrest. The accused thus suffer minimal disruption to their family life and employment and maximize their ability to prepare a defense. And local communities can be confident in defendants' appearance at trial without the significant costs of wide-scale pretrial detention or the significant concerns with an unsecured system of pretrial release.

2. The efficacy of commercial sureties

Any attack on the modern bail system thus bears the heavy burden of proposing a workable alternative. But plaintiff has offered none. And the evidence suggests there is none. The modern commercial surety system has statistically proven to be the most effective means of enabling defendants to obtain pretrial release while ensuring they appear in court.

In a commercial surety system, a court or bail schedule sets the amount required for bail based on the defendant's risk of flight and danger to the community. A defendant may then post the amount of bail either with the court directly or through a private party. With a third-party commercial surety, the defendant pays a portion of the bail amount to the surety (usually 10%) and the surety posts the full amount with the court. If the defendant fails to appear, the surety forfeits the posted bail unless he can produce the defendant, and the defendant becomes liable to the surety for the full bail. *The Fugitive*, at 97.

Statistical studies show that a commercial surety provides the greatest protection against failure to appear. One report determined that "[d]efendants released on a surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time." *The Fugitive*, at 118. Another study of pretrial release mechanisms in Dallas County, Texas concluded that defendants released on surety bonds were the least likely to abscond. *Pretrial Release Mechanisms*, at 5. And a Special Report from the United States Department of Justice reached the same conclusion: "Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances." *Pretrial Release of Felony Defendants in State Courts*, at 1. Specifically, in the federal government's study, a surety bond had the second lowest

failure-to-appear rate at 18%, bested only by a 14% failure-to-appear rate for property bonds, which accounted for just 1% of releases. *Id*. at 8. The highest failure-to-appear rates belonged to emergency release (45%) and unsecured bonds (30%), *id.*, which the District Court's injunction effectively imposes here.

These statistical results comport with common sense. Defendants who obtain release through a commercial surety owe a bondsman the full amount of bail in the event they fail to appear. But since defendants often lack the resources to pay the full amount, a commercial surety is incentivized to produce the defendant rather than pursue the repayment of the bond. To do so, they often enlist the help of a defendant's community by obtaining contact information for friends and family, using cosigners on the surety, and requiring periodic check-ins and monitoring. *The Fugitive*, at 97. Bondsmen are able to pursue these strategies without public expense and without diverting the resources of law enforcement. And because the bondsman earns his living in the industry, his incentives for returning defendants are very high. By some estimates, a bondsman requires a 95% appearance rate from defendants just to break even. *Id*.

Other systems, like state-facilitated pretrial supervision, are incredibly costly. For instance, researchers have predicted that bail reform proposals in Maryland, which would provide pretrial supervision and social services for all defendants released without a surety, would cost the state between $102 and $200 million

annually. Daraius Irani et al., *Estimating the Cost of the Proposed Maryland Pretrial Release Programs* 10 (2014), http://bit.ly/1ttuwFn. A 2012 analysis predicted that New Jersey's similar pretrial supervision program would cost $16 million to initiate and about $375 million to operate year-to-year. Daraius Irani & Zachary Jones, Regional Economic Studies Institute, *Estimating the Cost of the Proposed New Jersey Pretrial Service Unit and the Accompanying Legislation* 4 (2014), http://bit.ly/1UQKz90. The analysis also predicted an additional $65 million of indirect costs caused by additional public defender and courtroom usage and the failure-to-appear and recidivism of released defendants. *Id*. Given the financial constraints already faced by states and municipalities, these types of costs are simply unreasonable for most communities.

By contrast, the commercial bail system often involves a defendant's social and community network to secure his appearance, thus furthering the twin goals of our bail tradition. Commercial bonds give criminal defendants the opportunity to rely on their network and reputation in obtaining pretrial release, by asking relatives, friends, and neighbors to assist them with posting bail. And a defendant with significant community ties is more likely to appear. *See* Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 Pace L. Rev. 800, 841 (2012). Commercial sureties also permit bail for only a fraction of

what the court requires and often offer installment plans to facilitate payment. Thus, rather than *discriminating* against the poor, the system is designed to *support* those of lesser means by enabling them to secure their liberty through limited funds while enlisting the assistance of their social network and a commercial bondsman to assure their appearance at trial and the safety of the community.[2]

* * *

Understood within its historical context and sound policy objectives, our modern system of bail is fundamentally not about poverty or wealth, but instead about preserving liberty while ensuring community safety and appearance in court. Defendants who cannot post bail are not detained because they are poor, but instead because the government had probable cause to arrest them and charge them with a crime, and wishes to secure their appearance at trial. The lead plaintiff in this case is a prime example: He was not arrested because he is impoverished. He was arrested because he violated the law. But on plaintiff's view the City had no choice but to release him *immediately* once he said he could not post bail under the bail schedule—whether or not the City had any meaningful assurance that he would

[2] Nor is it true, as plaintiff has suggested, that pretrial detainees remain in jail solely because they cannot afford bail. In many cases, a detained defendant is not eligible for bail because, for instance, he previously failed to appear, he is accused of an especially dangerous crime, or there are other outstanding warrants against him. *See, e.g.*, James Austin et al., *Evaluation of the Current and Future Los Angeles County Jail Population* 25-26 (Apr. 10, 2012).

appear at any future adjudication. This automatic system of catch-and-release is fundamentally inconsistent with American tradition, makes zero practical sense, and is by no means compelled by the Constitution.

II. The City Of Calhoun's Bail System Is Constitutional.

Plaintiff mounts a frontal constitutional attack on monetary bail. He insists that the City release any defendant who says he cannot post bail—and that it do so *immediately*, without any reasonable time for a hearing. But the Constitution requires neither of those demands. The Supreme Court has repeatedly recognized that monetary bail is a constitutional means of protecting society and securing the accused's appearance at trial. Indeed, the text of the Constitution pre-supposes that bail is permissible by prohibiting only *excessive* bail. The Court has likewise held that, to the extent an initial hearing is required, state and local governments need only act within a reasonable amount of time, not immediately upon arrest. And the City's bail schedule and Standing Order fall well within the bounds of reason.

A. Monetary Bail Is Constitutional.

At its root, plaintiff's suit is an assault on the traditional American system of secured monetary bail. Plaintiff demands that anyone arrested in Calhoun who merely states that he cannot afford bail must be released on his own recognizance. Indeed, the practical effect of the District Court's injunction is to require precisely that system of mandatory unsecured bail. According to plaintiff, an individualized

indigency determination within 48 hours is not enough. And this is hardly an isolated case: Plaintiff's attorneys have sought similar injunctions across the country, while touting their goal of "ending the American money bail system." Equal Justice Under Law, Litigation: Ending the American Money Bail System, http://bit.ly/1TXOgJv (last visited June 21, 2016).

But the Constitution clearly permits communities to adopt monetary bail procedures aimed at securing appearance at trial and protecting society from dangerous individuals. As a textual matter, the Eighth Amendment pre-supposes the permissibility of monetary bail. If plaintiff's theory were correct, the Eighth Amendment would read: "no bail shall be required." But instead it provides only that "*[e]xcessive* bail shall not be required." U.S. Const., amend. VIII (emphasis added). And the American criminal justice system has long relied on secured bail to balance the interest of pretrial liberty with the interest in protecting the community.

The Supreme Court's decisions underscore this fact. In *Stack v. Boyle*, the Court emphasized that "[t]he right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." 342 U.S. 1, 4, 72 S. Ct. 1, 3 (1951) (citing *Ex parte Milburn*, 34 U.S. (9 Pet.) at 710); *accord Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978). "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture" the Court explained, "serves as additional assurance of the

presence of an accused." *Stack*, 342 U.S. at 5, 72 S. Ct. at 3. Thus, far from prohibiting monetary bail, the Constitution simply requires that it not be excessive. And that question turns primarily "on standards relevant to the purpose of assuring the presence of th[e] defendant," not on whether the defendant is capable of posting bail at the moment of arrest. *Id.*

Indeed, the mine-run of bail cases take the constitutionality of monetary bail as given. In *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095 (1987), for instance, the Court rejected a facial attack on the federal Bail Reform Act, holding that neither the Due Process Clause nor the Eighth Amendment prohibited the government from detaining especially dangerous defendants, *without bail*, in order to protect the community from danger. The Court's analysis, and the parties' arguments, never questioned that pretrial detention and monetary bail are constitutional, and that "a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants." 481 U.S. at 753, 107 S. Ct. at 2104. The only dispute was whether the government may *also* set bail or insist on pretrial detention based on its desire to protect the community from especially dangerous individuals. As to that question, the Court found there to be no constitutional problem.

The same principles apply to monetary bail schedules, which set default bail amounts for various crimes based on the severity of those offenses. *See, e.g.*, *Fields*

v. Henry Cty., 701 F.3d 180, 184 (6th Cir. 2012). Especially for small localities, like the City of Calhoun, this routinized process is much more efficient than requiring an individualized bail hearing for every single offense by every single offender. By setting presumptive bail amounts, a "bond schedule represents an assessment of what bail amount would ensure the appearance of the average defendant facing such a charge" and is "therefore aimed at assuring the presence of a defendant." *Id.* Moreover, because they apply to all alike, "bond schedules are aimed at making sure that defendants who are accused of similar crimes receive similar bonds," *id.*, consistent with Eighth Amendment interests in avoiding excessive bail. *Cf. Stack*, 342 U.S. at 5, 72 S. Ct. at 3.

This efficient process saves time for both the government and the accused. "Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements." *Rainwater*, 572 F.2d at 1057. And for those who have difficulty in meeting the presumptive bail amount, the government can provide a hearing at which a magistrate can adjust bail appropriately. That is precisely what the City does here. The City's Standing Order requires that any individual who cannot post the amount required by the bail schedule receive a bail hearing within 48 hours of arrest, the same amount of time required under the Fourth Amendment for a probable cause hearing.

Thus, as with any other system of monetary bail, bail schedules serve the same well-founded interests in enabling defendants to obtain pretrial release—in many cases even more quickly than in traditional systems—while protecting the community and securing the defendants' later appearance for prosecution and sentencing. That the method begins with a presumption that can be adjusted to meet the needs of unique cases renders it logical and efficient, not unconstitutional.

B. Plaintiff's Constitutional Challenge to the City of Calhoun's Bail System Is Meritless.

Plaintiff would have this Court ignore the deep history of monetary bail in this country, the significant societal interest in securing appearance for prosecution, and the reasonable nature of the City's bail schedule and Standing Order in favor of sound-bites and invective. He has not alleged that the bail assigned to him is "excessive" under the Eighth Amendment, which is the constitutionally prescribed avenue for challenging the amount of bail. *See, e.g.*, *Stack*, 342 U.S. at 1, 72 S. Ct. at 1. Instead, he claims that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require the *immediate* release of *any* defendant who says he cannot *afford* the required bail. And he accuses the City of "jailing the poor because they cannot pay a small amount of money." Doc. 1 Compl. ¶1.

But this gets things exactly backwards. As a factual matter, criminal defendants like Mr. Walker are jailed because there is probable cause to believe they committed crimes and because society has an interest in securing their appearance

at trial. As a legal matter, the Fourteenth Amendment cannot be employed to invalidate bail procedures that the Eighth Amendment allows. Instead, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 813 (1994) (plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989)).[3] And the Court has never accepted—in fact, it has rejected—the sort of wealth-based disparate impact claims plaintiff asserts.

Plaintiff principally relies on a series of Supreme Court cases holding that the government cannot deny access to the courts or impose harsher punishment based on the inability to pay a fine or fee. But the City's bail schedule and Standing Order do neither of those things. In *Griffin v. Illinois*, 351 U.S. 12, 13, 76 S. Ct. 585, 588 (1956), the Supreme Court struck down a state policy that "den[ied] adequate appellate review to the poor while granting such review to all others" by requiring a mandatory fee to obtain trial transcripts. The inability to obtain transcripts, the Court

[3] For similar reasons, challenges to bail are ill-suited to class actions. The Eighth Amendment contemplates an individualized assessment of whether a defendant's bail is excessive, not broadside attacks on generally applicable bail systems. For that reason and those advanced by the City, if the Court addresses the question, it should reverse the District Court's order granting class certification.

reasoned, effectively required defendants to accept their conviction and sentence without challenge, and thus an individual's indigency directly affected his ultimate punishment. *See id.* at 17-18, 590 (plurality). Here, defendants are not denied the ability to appeal their convictions or otherwise precluded from defending the charges against them. Nor was the force of the State's interest in *Griffin*—lowering court costs—anything remotely approaching the City's interests here.

The Supreme Court's decisions in *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668 (1971), and *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064 (1983), are similarly off-point. In both cases, the government increased a convicted criminal's punishment because he could not afford a fine. Thus, as in *Williams*, a defendant's sentence was directly tied to his financial status. *See Tate*, 401 U.S. at 397-98, 91 S. Ct. at 670. But, again, the City's bail schedule has no direct effect on a defendant's actual sentence, and the Supreme Court clearly held in *Salerno* (which post-dates *Williams*, *Tate*, and *Bearden*) that "pretrial detention … does not constitute punishment." 481 U.S. at 748, 107 S. Ct. at 2102. Moreover, while pretrial detention may make preparing a defense more difficult, the Court has held that the community's interests in security and preserving the judicial process outweigh that interest (except in cases of excessive bail, of which there is no claim here).

Nor does the Fifth Circuit's (pre-split) decision in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), support plaintiff's position. If anything, it confirms

that the City's procedures are constitutional. In *Rainwater*, the court upheld Florida's monetary bail schedule against an attack similar to the claims leveled in this case. The class of plaintiffs there, like plaintiff here, argued that the "inevitable result" of the bail schedule would be uniform "pretrial detention of indigents." *Id.* at 1058. But the court noted that Florida's policy required "that 'all relevant factors' be considered in determining 'what form of release is necessary to assure the defendant's appearance,'" and when necessary a "judge w[ould] determine the amount of a monetary bail." *Id.* That was enough to ensure the policy's constitutionality. The Standing Order provides a similar safety-valve by guaranteeing all defendants a hearing within 48 hours of arrest.

Without support in any precedent, plaintiff's argument resolves to no more than a wealth-based disparate impact claim under the Equal Protection Clause. But the Supreme Court has repeatedly rejected such claims. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973), the Court turned away a claim by students in districts with lower property tax revenues (and thus lower funding for their schools), holding that strict scrutiny does not apply to wealth-based claims and more broadly that, "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 24, 1291; *see also Maher v. Roe*, 432 U.S. 464, 471, 97 S. Ct. 2376, 2381 (1977) (rejecting the notion that "financial need alone identifies a suspect class for purposes

of equal protection analysis"). Refusing to extend *Griffin* to all wealth-based disparate-impact claims, the Supreme Court explained that *Griffin* and its progeny involved "an absolute deprivation of the desired benefit," while the students in *Rodriguez* were not denied an education. 411 U.S. at 23, 93 S. Ct. at 1291. And the Court has since clarified that, even "[i]n the context of a criminal proceeding, [equal protection] require[s] only 'an adequate opportunity to present (one's) claims fairly.'" *United States v. MacCollom*, 426 U.S. 317, 324, 96 S. Ct. 2086, 2091 (1976) (plurality) (quoting *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S. Ct. 2437, 2447 (1974)).

Those standards are plainly met here. The City does not deny defendants the opportunity to obtain pretrial release; nor does it deny them an adequate opportunity to present a defense. On the contrary, it allows indigent defendants to secure pretrial liberty. At most, it simply requires them to demonstrate, at a hearing held within 48 hours of arrest, that they are in fact indigent. The mere fact that those who can promptly assure their appearance at trial are released more quickly than those who cannot does not render the City's bail system unconstitutional—it makes it rational. Indeed, at its core, plaintiff's demand of immediate release without bail is not a request for *equal* treatment; it is a request for a constitutional windfall. The Standing Order already allows indigent defendants to obtain release on personal recognizance—on their mere promise to appear—while many other arrestees must provide financial security. The Equal Protection Clause hardly requires that this

more lenient treatment be offered instantaneously, without any hearing to determine whether a defendant is actually entitled to the benefit of release without bail.

C. The City of Calhoun's Bail Schedule and Standing Order Are Rationally Related to a Legitimate Government Interest.

Moreover, even if Calhoun's policies resulted in some brief period of unequal treatment, that would not render them unconstitutional. Because indigence is not a suspect class under the Equal Protection Clause, the bail schedule and Standing Order need not satisfy strict scrutiny. Instead, the City's policy must only be rationally related to a legitimate government interest. *See, e.g.*, *Rodriguez*, 411 U.S. at 55, 93 S. Ct. at 1308. It clearly meets that standard. As explained above, monetary bail rationally serves the government's legitimate interest in securing the appearance of the accused at trial. And the City's bail schedule rationally serves its legitimate interest in providing an efficient bail process that reduces the costs associated with individualized bail hearings and enables many defendants to quickly post bail. The City's Standing Order, meanwhile, provides an opportunity to establish indigency and secure release within 48 hours of arrest. Thus, indigent defendants are not denied the opportunity to secure their pretrial release at all. At most, they have to wait two days to be excused of the normal obligation to post a secured bond.

That minor delay is not unconstitutional. As other courts have recognized, "[t]here is no constitutional right to speedy bail." *Fields*, 701 F.3d at 185; *see also Collins v. Ainsworth*, 382 F.3d 529, 545 (5th Cir. 2004) ("There is no right to post

bail within 24 hours of arrest."); *Woods v. Michigan City*, 940 F.2d 275, 283 (7th Cir. 1991) (Will, D.J., concurring) ("Nothing in the eighth amendment … guarantees instant release for misdemeanors or any other offense."). "The Framers considered the matter of pretrial deprivations of liberty and drafted the [Eighth] Amendment" to address concerns with bail. *Albright*, 510 U.S. at 274, 114 S. Ct. at 813. But they imposed no time requirement on that process.

Nor does any other provision of the Constitution require an immediate bail determination. If anything, the Supreme Court's decisions in other areas confirm the opposite. The Supreme Court has long recognized that "States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S. Ct. 1661, 1668 (1991). To that end, the Court has held that, under the Fourth Amendment, law enforcement may constitutionally arrest individuals without a warrant and detain them for a reasonable period of time, not to exceed 48 hours from arrest, before holding a probable cause hearing. *Id*. at 54-56, 1668-70; *accord Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975). This reasonable safe harbor reflects "a practical compromise between the rights of individuals and the realities of law enforcement." 500 U.S. at 53, 111 S. Ct. at 1668. And it applies to both serious felonies and misdemeanors punishable only by a fine. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536 (2001).

No shorter period of time can possibly be required for setting bail. Like the competing interests in *Riverside*'s Fourth Amendment analysis, the Court's bail cases have always recognized the need to weigh society's "interest in preventing crime by arrestees" and "safeguard[ing] the courts' role in adjudicating the guilt or innocence of defendants" against "the individual's strong interest in liberty." *Salerno*, 481 U.S. at 749-50, 753, 107 S. Ct. at 2103-04. Calhoun has chosen to strike this balance by tying the deadline for an individualized bail assessment to the deadline for a probable cause hearing under *Riverside*. There is no reason why that timeframe would be reasonable in one context but not the other. Indeed, the Supreme Court "explicitly contemplated" that local governments might prefer to "[i]ncorporat[e] probable cause determinations 'into the procedure for setting bail or fixing other conditions of pretrial release.'" *Riverside*, 500 U.S. at 54, 111 S. Ct. at 1668 (quoting *Gerstein*, 420 U.S. at 124, 95 S. Ct. at 868)). And *Riverside* set the outer limit at 48 hours precisely so that this "flexibility" would be possible. *Id.* The City's Standing Order is plainly consistent with that purpose.

Plaintiff's theory, by contrast, would require through the Fourteenth Amendment precisely what the Supreme Court has avoided reading into the Fourth and Eighth Amendments. In doing so, it would upset the delicate balance struck in *Riverside*, *Salerno*, *Stack*, and many other cases by elevating the accused's interest in release over society's interests in security and the judicial process. But, if the

scales tip in either direction, it is the opposite one: The Supreme Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Salerno*, 481 U.S. at 748, 107 S. Ct. at 2102. It is equally settled that "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, [and] that confinement of such persons pending trial is a legitimate means of furthering that interest." *Bell v. Wolfish*, 441 U.S. 520, 534, 99 S. Ct. 1861, 1871 (1979). Thus, "the Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt." *Id.* And nothing in the Constitution requires that a defendant properly held for trial be afforded a bail hearing immediately upon arrest. Plaintiff's claims thus necessarily fail, and the District Court's injunction cannot stand.

CONCLUSION

This Court should reverse the preliminary injunction.

Respectfully submitted,

s/ Paul D. Clement
PAUL D. CLEMENT
Counsel of Record
MICHAEL H. MCGINLEY
MEGAN M. WOLD
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com
Counsel for Amici Curiae

June 21, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type.

Dated: June 21, 2016

s/ Michael H. McGinley
Michael H. McGinley

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Paul D. Clement
Paul D. Clement

The City University of New York

John Jay College of Criminal Justice

PRI Prisoner Reentry Institute

Pretrial Practice:

Building a National Research Agenda for the Front End of the Criminal Justice System

A Report on the Roundtable to Develop a National Pretrial Research Agenda

October 26-27, 2015

Pretrial Practice:

Building a National Research Agenda for the Front End of the Criminal Justice System

A Report on the Roundtable to Develop a National Pretrial Research Agenda

October 26-27, 2015

John Jay College of Criminal Justice
New York City

Acknowledgments

The Prisoner Reentry Institute of John Jay College wishes to thank the Laura and John Arnold Foundation (LJAF) for the opportunity to partner with them in convening a series of roundtables on pretrial practice. This is the report on the second roundtable which was focused on Building a National Agenda for the Front End of the Criminal Justice System. The roundtables were inspired by conversations between Anne Milgram, LJAF Vice President of Criminal Justice, and Jeremy Travis, President of John Jay College and were framed to elevate the national conversation on pretrial practice. PRI particularly appreciates our close working relationship with Virginia Bersch, Deputy Director of National Implementation, Criminal Justice, and the support of Matt Alsdorf, LJAF Director of Criminal Justice.

We were honored by the generous and thoughtful participation of all the Roundtable invitees, and want to give special thanks to the seven academics who prepared presentations to stimulate conversation at the Roundtable. We also want to thank the professionals who joined us as observers and the eleven organizations and individuals who took the time to contribute their perspective to identify pretrial research priorities.

Carol Petrie, former Director of the Committee on Law & Justice at the National Academy of Sciences, provided invaluable consultation in the development of the roundtable agenda, the selection of potential discussants, and the synthesis of research questions that emerged from the conversation.

We are especially grateful to have benefitted again from the significant talent of Cynthia Reed, who is responsible for writing this report. This publication was designed by Damian Vallegonga from Echo.

Special thanks are due to PRI staff members Aimee Baker, Danielle Petrilli and Daonese Johnson-Colon for their work on the production of the Roundtable, the associated logistics, the production and dissemination of this report. Thanks also to the many John Jay staff members in audio-visual services, facilities management, security and catering who helped make this event possible.

Ann Jacobs, Director
Prisoner Reentry Institute

Table of Contents

About The Laura and John Arnold Foundation ..... *ii*

About The John Jay College of Criminal Justice & The Prisoner Reentry Institute ..... *iii*

Roundtable Discussants ..... *iv*

Presentations ..... *v*

Executive Summary *1*

Part I | Setting the Context: The Pretrial Landscape In America *4*

Part II | A Step-by-Step Review of the Pretrial Process *10*

- *A. Arrest and Initial Citizen-Police Interactions* *10*
- *B. Charging and Prosecutorial Discretion* *12*
- *C. Pretrial Release Decisions* *14*
- *D. Case Processing* *16*
- *E. Case Dispositions* *20*

Part III | Behavioral Economics as a Lens for Examining Pretrial Behavior *23*

Part IV | Building a National Research Agenda: Recommendations from the Field *26*

- *A. Presentations from Stakeholder Organizations* *26*
  - *Pretrial Justice Institute* *26*
  - *The Center for Effective Justice at the Texas Public Policy Foundation* *27*
  - *Vera Institute of Justice* *28*
  - *American Bail Coalition* *30*
- *B. Submissions from the Field* *31*
  - *Council of State Governments Justice Center* *31*
  - *Justice Research and Statistics Association* *32*
  - *National Center for Victims of Crime* *33*
  - *The National Judicial College* *34*
  - *NCJA Center for Justice Planning* *34*
  - *Professor Shima Baradaran Baughman, College of Law, University of Utah* *36*
  - *Texas Criminal Justice Coalition* *36*

Part V | A Call to Action: A Proposed National Research Agenda *37*

Appendix A | Participants' Biographies *41*

Appendix B | A Summary of Research Questions Raised by Roundtable Participants *49*

About The Laura and John Arnold Foundation

Laura and John Arnold established the Laura and John Arnold Foundation in 2008. LJAF believes philanthropy should be transformational and should seek through innovation to solve persistent problems in society. Our core objective is to address our nation's most pressing and persistent challenges using evidence-based, multi-disciplinary approaches. We strive to create functional solutions that target the root causes, not just the symptoms, of these problems. The solutions must be both scalable nationally and sustainable without permanent philanthropy.

Our strategy is to systematically examine areas of society in which underperformance, inefficiency, concentrated power, lack of information, lack of accountability, lack of transparency, lack of balance among interests, or other barriers to human progress and achievement exist. We then apply a rigorous and comprehensive entrepreneurial problem-solving approach to these areas, considering all possible strategies, tactics, and resource allocations to effect solutions. Our approach is not limited to what has been tried, or even what has been proposed, in the past. Instead, we seek to incentivize bold, creative thinking and effort, with the goal of igniting a renaissance of new ideas and approaches applied to persistent problems.

LJAF's Criminal Justice initiative aims to reduce crime, increase public safety, and ensure the criminal justice system operates as fairly and cost-effectively as possible. In order to achieve these goals, we develop, incubate, and spread innovative solutions to criminal justice challenges. We assemble teams of experts from both inside and outside the criminal justice field to conduct research projects, create tools for practitioners, and partner with local jurisdictions to pilot and test new policies and practices. Our projects use data and technology to drive innovation and accelerate the adoption of proven reforms.

Laura and John Arnold Foundation

Laura & John Arnold, Co-Chairs
Dennis Calabrese, President
Anne Milgram, J.D., Vice President of Criminal Justice
Matt Alsdorf, Director of Criminal Justice

Houston | New York City | Washington, D.C.
ARNOLDFOUNDATION.ORG

About John Jay College Of Criminal Justice & The Prisoner Reentry Institute

John Jay College of Criminal Justice of The City University of New York is an international leader in educating for justice, offering a rich liberal arts and professional studies curriculum to upwards of 15,000 undergraduate and graduate students from more than 135 nations. In teaching, scholarship and research, the College approaches justice as an applied art and science in service to society and as an ongoing conversation about fundamental human desires for fairness, equality and the rule of law.

John Jay is a community of motivated and intellectually committed individuals who explore justice in its many dimensions. The College's liberal arts curriculum equips students to pursue advanced study and meaningful, rewarding careers in the public, private, and non-profit sectors. Its professional programs introduce students to foundational and newly emerging fields and prepare them for advancement within their chosen professions.

The Prisoner Reentry Institute (PRI) is one of twelve institutes that collectively comprise the Research Consortium of John Jay College of Criminal Justice. The mission of PRI is to spur innovation and improve practice in the field of reentry by advancing knowledge, translating research into effective policy and service delivery, and fostering effective partnerships between criminal justice and non-criminal justice disciplines. PRI works towards this mission by focusing its efforts on the following types of projects and activities:

- **Developing, Managing, and Evaluating Innovative Reentry Projects**
- **Providing Practitioners and Policymakers with Cutting Edge Tools and Expertise**
- **Promoting Educational Opportunities for Currently and Formerly Incarcerated Individuals as a Vehicle for Successful Reentry and Reintegration**
- **Identifying "Pulse Points" and Creating Synergy Across Fields and Disciplines**

John Jay College of Criminal Justice Prisoner Reentry Institute

Jeremy Travis, President, John Jay College of Criminal Justice
Ann Jacobs, Director, Prisoner Reentry Institute

New York City
JJAY.CUNY.EDU
JOHNJAYPRI.ORG

Roundtable Participants

Rachel Barkow
Segal Professor of Regulatory Law & Policy New York University School of Law
New York, New York

Dr. Saurabh Bhargava
Assistant Professor of Economics
Carnegie Mellon University
Pittsburgh, Pennsylvania

Barbara Broderick
Chief Probation Officer
Maricopa County Adult Probation Dept.
Phoenix, Arizona

John T. Chisholm, J.D.
District Attorney
Milwaukee County
Milwaukee, Wisconsin

Elyse Clawson
Principal & Founder
Justice System Partners
Portland, Oregon

Dr. Mona Danner
Professor of Sociology and Criminal Justice
Old Dominion University
Norfolk, Virginia

Leah Garabedian, Esq.
Defender Counsel
National Legal Aid & Defender Assoc.
Washington, D.C.

Dr. James P. Lynch, Professor
Chair, Dept. of Criminology & Criminal Justice
University of Maryland
College Park, Maryland

Dr. Barry Mahoney
President Emeritus
The Justice Management Institute
Denver, Colorado

Anne Milgram, Esq.
Vice President of Criminal Justice
Laura and John Arnold Foundation
Former New Jersey Attorney General
New York, New York

Jennifer M. Perez
Director of Trial Court Services
New Jersey Judiciary
Trenton, New Jersey

Janice Radovick-Dean, Director
Fifth Judicial District of Pennsylvania's Pretrial Services Department
Pittsburgh, Pennsylvania

Dr. Carla Shedd
Assistant Professor of Sociology & African-American Studies
Columbia University
New York, New York

Dr. Faye S. Taxman, Professor
Criminology, Law & Society Department
George Mason University
Fairfax, Virginia

Chief John Scott Thomson
Chief of Police
Camden County Police Department
Camden, New Jersey

Jeremy Travis, President
John Jay College of Criminal Justice at the City University of New York
New York, New York

Dr. Marie VanNostrand
Justice Project Manager
Luminosity: Data Driven Justice Solutions
St. Petersburg, Florida

The Honorable Roger K. Warren
President Emeritus
National Center for State Courts
Williamsburg, Virginia

Dr. Robert E. Worden
Director, John F. Finn Institute for Public Safety
Associate Professor of Criminal Justice
University at Albany, State Univ. of New York
Albany, New York

Roundtable on Pretrial Practice Staff

John Jay College of Criminal Justice Prisoner Reentry Institute:

Ann Jacobs
Director

Carol V. Petrie
Consultant, Former Director of Committee on Law & Justice at National Academy of Sciences

Danielle Petrilli
Administrative Associate

Laura and John Arnold Foundation:

Virginia Bersch
Deputy Director of National Implementation, Criminal Justice

Matt Alsdorf
Director of Criminal Justice

Presentations

The following academics made presentations at the Roundtable to stimulate and guide discussion at various points in the agenda:

1. *Dr. James Lynch, Chair, Department of Criminology and Criminal Justice, University of Maryland, "Developing a National Pretrial Research Agenda: Setting the Context."*

2. *Dr. Robert Worden, Professor, School of Criminal Justice, University at Albany, State University of New York, "Police Decision-Making at the Point of Arrest: What We Know, What We Don't Know."*

3. *Rachel Barkow, J.D., Segal Family Professor of Regulatory Law and Policy, New York University School of Law, "Charging Decisions."*

4. *Dr. Marie VanNostrand, Justice Project Manager, Luminosity, "Pretrial Release Decisions."*

5. *Dr. Barry Mahoney, President Emeritus, The Justice Management Institute, "Pretrial Case Processing: Thoughts about Contemporary Practices and about Research Needs and Opportunities."*

6. *Dr. Faye Taxman, Director, Center for Advancing Correctional Excellence, George Mason University, "Dispositions."*

7. *Dr. Saurabh Bhargava, Assistant Professor of Economics, Carnegie Mellon University, "Behavioral Economics (and Psychology) as a Lens for Examining Pretrial Behavior."*

Contributing Presenters:

- *Dr. Michael Jones, Director of Implementation, Pretrial Justice Institute*
- *Marc Levin, Esq., Director, Center for Effective Justice & Right on Crime, Texas Public Policy Foundation*
- *Jim Parsons, MSc, Vice President and Research Director, Vera Institute of Justice*
- *Nicholas Wachinski, Esq., Executive Director Emeritus, American Bail Coalition*

Report On The Roundtable To Develop A National Pretrial Research Agenda

Executive Summary

"There's no question in my mind that the greatest opportunity we have is before people are deep into the system and having done years in jails and prisons."

Anne Milgram, Vice President of Criminal Justice
Laura and John Arnold Foundation

"We need better data, a better definition of the data we capture, and we need the data to be available for research and to the people who make decisions."

Jeremy Travis, President
John Jay College of Criminal Justice

From October 26-27, 2015, the John Jay College of Criminal Justice and the Laura and John Arnold Foundation (LJAF), held a Roundtable to Develop a National Pretrial Research Agenda as a follow-up to its earlier Roundtable in March 2015, which focused on pretrial practice and ways of rethinking the front end of the criminal justice system. "The national conversation on criminal justice is open to reform like never before," President Jeremy Travis of the John Jay College of Criminal Justice stated. "There's an urgency. It feels like we're in the process of important policy discovery."

At that initial Roundtable, participants were, in the words of Anne Milgram, Vice President of Criminal Justice for the Laura and John Arnold Foundation, "stunned by the lack of information in the space. All we could talk about was the need for research." This report details the results of the follow-up to that conversation – a Roundtable devoted solely to the development of a national research agenda to move reform forward on the front end of the criminal justice system.

Goals

The goals of the Roundtable were several – a what, who, and how of pretrial research and reform:

- ***Determine what core questions need to be answered in the pretrial phase;***
- ***Ascertain who can undertake such studies; and***
- ***Once that work comes to fruition, establish how to implement those results, so that practices, policies, and outcomes can be improved.***

Milgram phrased the inquiry as follows: "What are the things we want to solve? What are the things we don't know that would really change the way we run the front end of the criminal justice system?" Our ultimate goal, Travis stated, "is to define a research agenda for the next decade."

Travis emphasized that the research agenda must be conscious of three things: data and data analytics, evidence-based best practices, and a normative framework. This latter consideration echoed a theme from the first Roundtable about the importance of ensuring that policies and practices in the pretrial phase are guided by value propositions and a human dignity context. These include considerations of procedural justice and legitimacy, proportionality, parsimony, citizenship, and social justice. "Our research should be guided by the question of how state power is applied vis à vis individuals who are thought to be engaged in antisocial behavior," Travis stated in his introduction. He also encouraged participants to define the front end of the system very broadly, to include how citizens and police first encounter each other.

The identification of research priorities will contribute valuable insight into thinking in the field for both LJAF and others concerned about front end reform. In Milgram's view, "This work will set us up to dramatically change the criminal justice system in America."

Participants

In order to construct a robust national agenda, the Roundtable included the voices of those with backgrounds in academics, policy, advocacy, and practice. Participants spanned the fields of law, economics, sociology, criminal justice, political science, criminology, statistics, and African American studies. In the room were practitioners from all stages of the process – law enforcement, prosecution, defense, probation, bail, pretrial and court services, and the judiciary. Detailed biographies of the participants can be found in **Appendix A**.

This report is organized as follows:

Part I

Setting the Context: The Pretrial Landscape in America establishes the framework for a larger conversation about building a research agenda. Using statistics, participants looked at big picture trends in pretrial, showing changes in arrests, pretrial detention, and forms of release over time. These trends raised questions that provided a basis for discussion: What do we know about the pretrial landscape? What are the problems in pretrial? How has pretrial changed over time? Why are these macro-changes taking place? Why are some aspects of pretrial studied more than others? How can we build data infrastructures to assist future researchers?

Part II

A Step-by-Step Review of the Pretrial Process frames the dialogue about research goals in terms of the stages of the front end of the criminal justice system. With experts in each phase introducing the discussions, the Roundtable considered decision points all along this process to assess the nature of existing research into what does and doesn't work, and the gaps in our knowledge. The Roundtable focused on five stages, always with an eye to how each stage interconnects with and impacts upon the others: arrest and initial police-citizen interactions, charging and prosecutorial discretion, pretrial release decisions, case processing, and case dispositions.

Part III

Behavioral Economics as a Lens for Examining Pretrial Behavior provides an alternative way to interpret pretrial decision-making using approaches from economics and psychology. The pretrial process is comprised of a series of decisions by a variety of individuals in various organizational contexts, and we often know little about how those decisions are made. Behavioral economics offers potential methods to focus on ways to increase efficacy and reduce biases and decision-making errors through offering incentives, examining the individual outlooks and backgrounds of decision-makers, and altering the way in which information is presented.

Part IV

Building a National Research Agenda: Recommendations from the Field provides an overview of the conversations by participants and presenters about creating and prioritizing issues for research. Dozens of potential research questions from stakeholders representing all stages of the pretrial process were considered. This section provides an overview of this dialogue as well as a list of stakeholders' specific recommendations for areas of inquiry.

Part V

A Call to Action: A Proposed National Research Agenda narrows the Roundtable participants' myriad ideas into a formal agenda. This agenda identifies and prioritizes key topics for research that will have the most impact in pretrial reform. Suggestions for research include:

- *Studies that provide an overview of existing pretrial practices and outcomes*
- *Studies on police behavior and law enforcement organizational culture*
- *Studies on policing and racial bias*
- *Studies on arrest and alternatives to arrest*
- *Studies on prosecutorial discretion in charging, diversion, and bail*
- *Studies on the impact prosecutors have on case processing*
- *Studies on prosecutorial discretion and racial bias*
- *Studies on the availability and impact of defense counsel at various pretrial stages*
- *Studies on the validity and validation of risk assessment tools*
- *Studies on the development of risk assessment tools for domestic violence and DUI*
- *Studies on how decision-makers use risk assessment tools*
- *Studies on the potential for embedded racial bias in risk assessment tools*
- *Comparative analyses of the effectiveness of various forms of pretrial release*
- *Studies on the impact of bail on failure to appear and public safety*
- *Studies on the efficacy of types of pretrial supervision on failure to appear and public safety*
- *Studies on incentives to ensure pretrial supervision compliance*
- *Cost-benefit analyses of pretrial release forms vs. pretrial detention*
- *Micro-analysis of the jail population to determine who is in jail pretrial and why*
- *Studies on the reasons why pretrial detention leads to negative outcomes*
- *Studies on the efficacy of various case processing procedures and reforms*
- *Studies to assess how judges exercise their discretion*
- *Studies on judicial education to improve decision-making*
- *Studies on judicial discretion and racial bias*
- *Studies to evaluate a full range of disposition options, including behavioral health pathways, triaging minor offenses, restorative justice, offender mediation, and individually-designed sentences*
- *Studies assessing the level and impact of victim participation in the pretrial process and the impact of pretrial decisions on victims*
- *Studies that assess community values and expectations related to pretrial*
- *Studies to evaluate a public health model of crime prevention, considering the needs of the mentally ill and those with substance abuse issues*
- *Studies on how best to disseminate innovation and implement evidence-based best practices in pretrial*

Such research would further the goal to build a field of scholarship dedicated to the pretrial stage and provide evidence for policy and procedural changes that can profoundly impact the fairness, efficacy, and costs of the criminal justice system.

Part I

Setting the Context: The Pretrial Landscape in America

"We need to take a look at the decision points in pretrial and ask the questions: Can we make these decision points more effective? Can we make them fairer? Can we make them in a way that reduces the amount of coercion that is imposed upon the population?"

Dr. James T. Lynch, Chair
Department of Criminology and Criminal Justice,
University of Maryland

What is the pretrial process? Why is it important to study? What do we need to study and what resources do we need to accomplish that? These were some of the questions that Dr. James Lynch, Chair of the Department of Criminology and Criminal Justice at the University of Maryland, raised in the Roundtable's opening presentation to set the context for the larger conversation about building a national pretrial research agenda.

As an initial matter, "pretrial" must be defined, in order to delimit the scope of what must be studied. What are the components of the pretrial process, also known as the "front end of the system"? Lynch outlined the following stages:

- *Arrest*
- *Booking*
- *Assignment of Counsel*
- *Custody*
- *Diversion*
- *Charging*
- *Filing*
- *Plea Negotiation*

Roundtable participants expanded on these stages, with President Travis suggesting that a pretrial definition could be broadened to the "front of the front end of the system," and include calls from victims or citizen-witnesses to initiate police involvement. Others stressed the importance of the first appearance, a stage at which many defendants remain unrepresented by counsel.

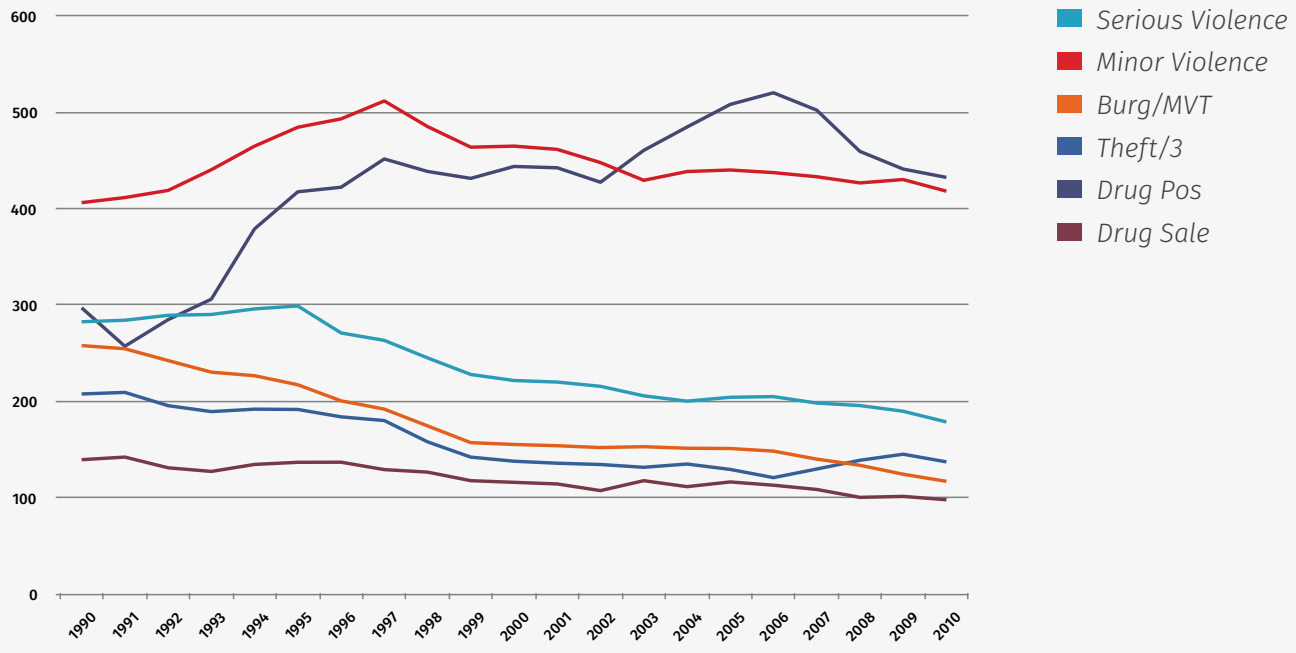
In considering these stages, Lynch outlined several key overarching issues for research to determine:

- *Can we reduce the pretrial custody population?*
- *Are the decisions in the pretrial process made fairly and effectively?*
- *What do we need to know to monitor the health of the pretrial process?*

In charts showing statistics related to arrest and pretrial release and detention over time, Lynch highlighted the following trends:

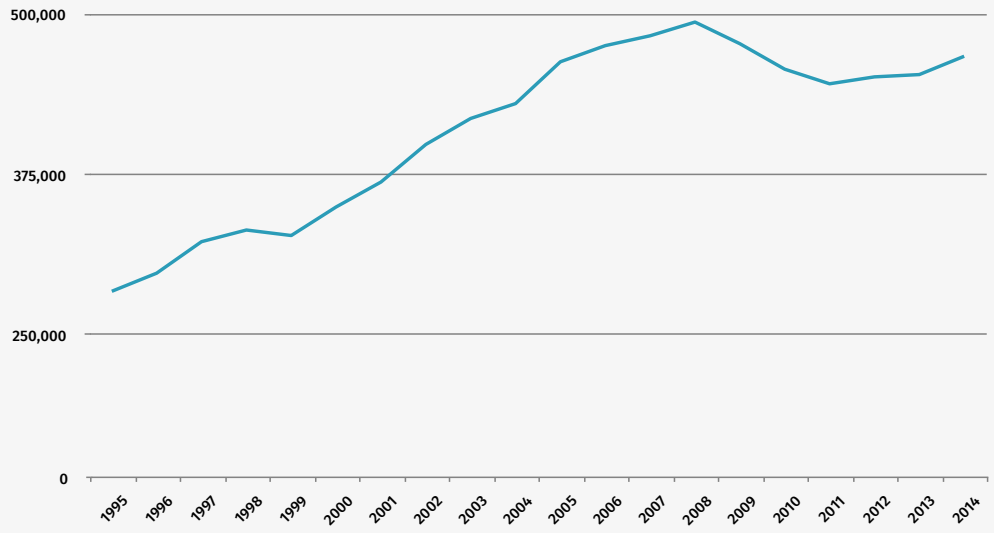
1. While crime overall, and violent crime in particular, is down, arrests have risen in two categories: minor violence (simple assaults) and drug possession. Looking at arrest rate data from the Bureau of Justice Statistics between 1980 and 2009,[1] Lynch asked, "If we're thinking of reducing pretrial population, we need to scrutinize the idea, why have these two things gone up?"

Arrest Rates by Time & Crime



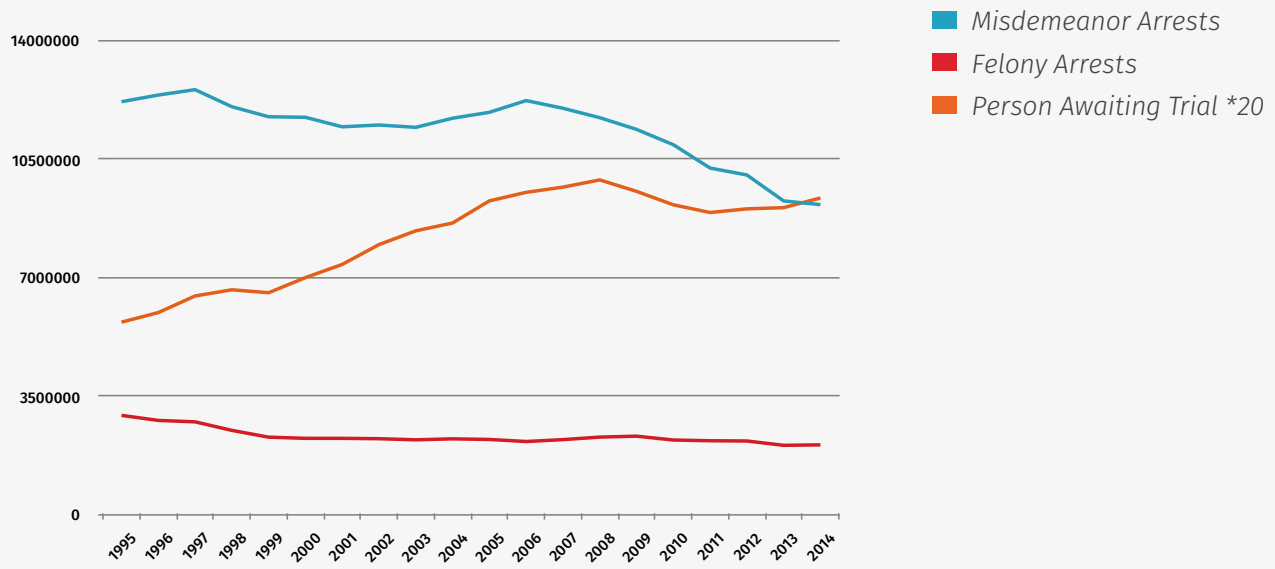
2. There have been increases in the pretrial custody population even as arrests for serious crime have declined. Trends in the stock of pretrial inmates from 1995 to 2014 are presented in the chart below, based on data gathered by the Bureau of Justice Statistics' Annual Survey of Jails:[2]

Trends in Stock of Pretrial Inmates

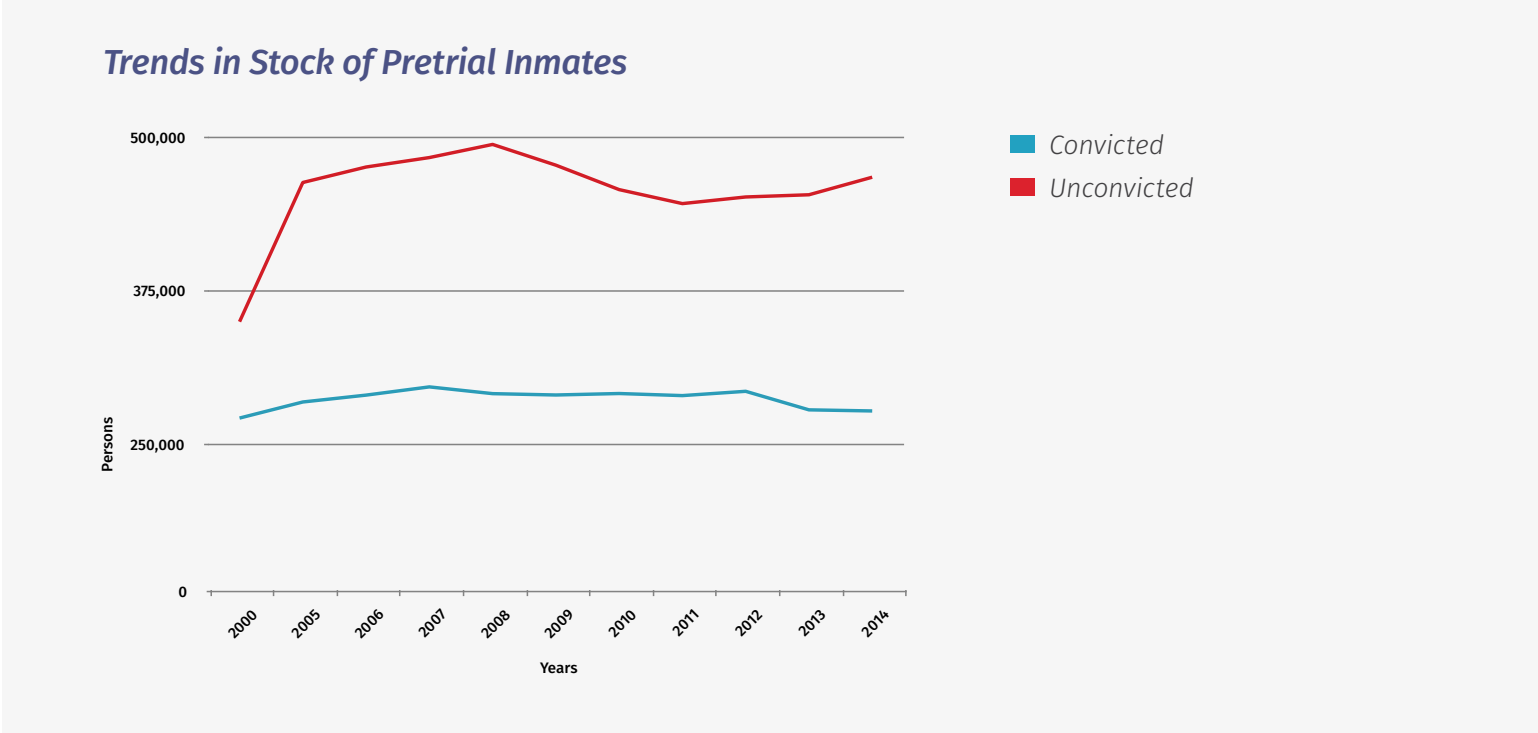


3. Even as arrest rates for both felonies and misdemeanors have declined,[3] the number of persons awaiting trial has continued to increase:[4]

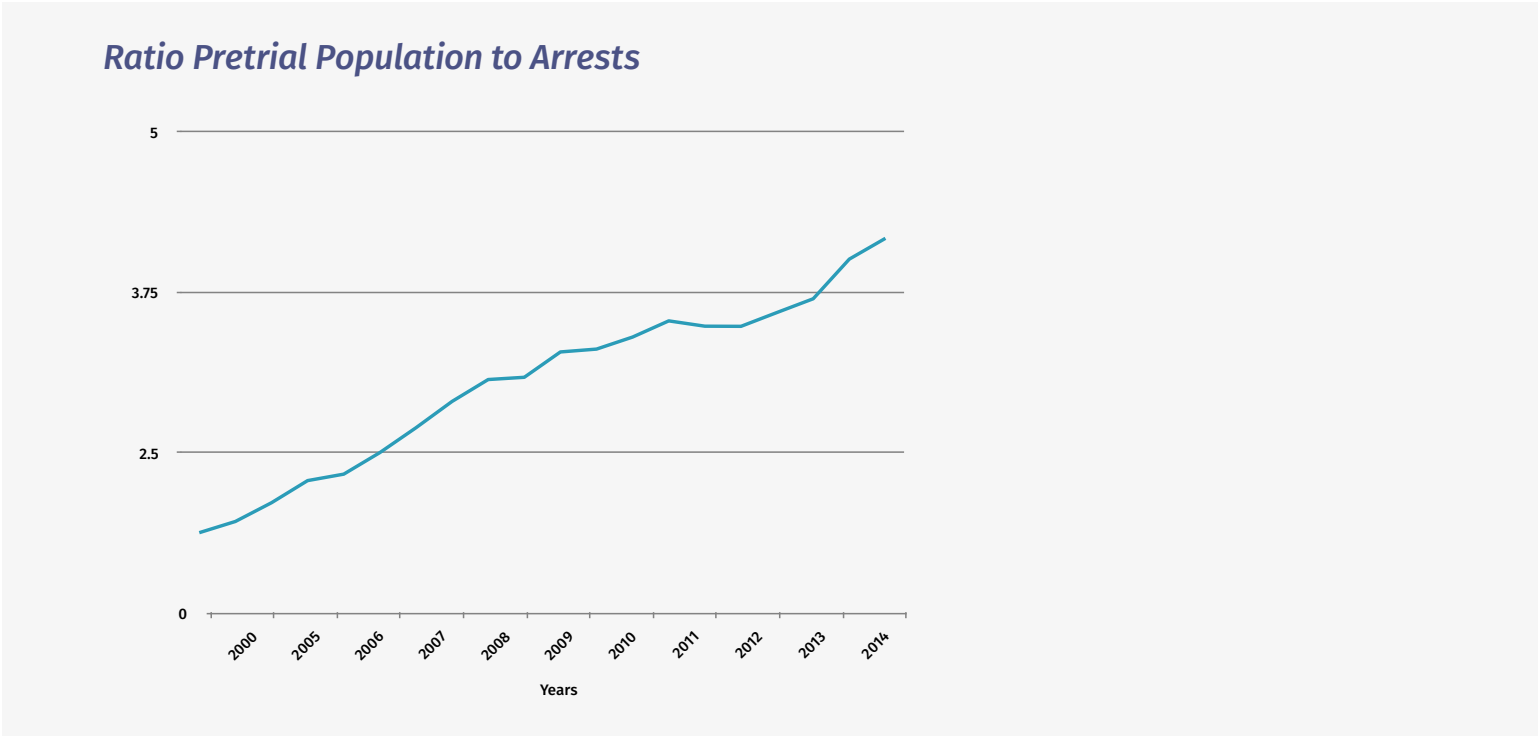
Arrests & Pretrial Popultion Trends



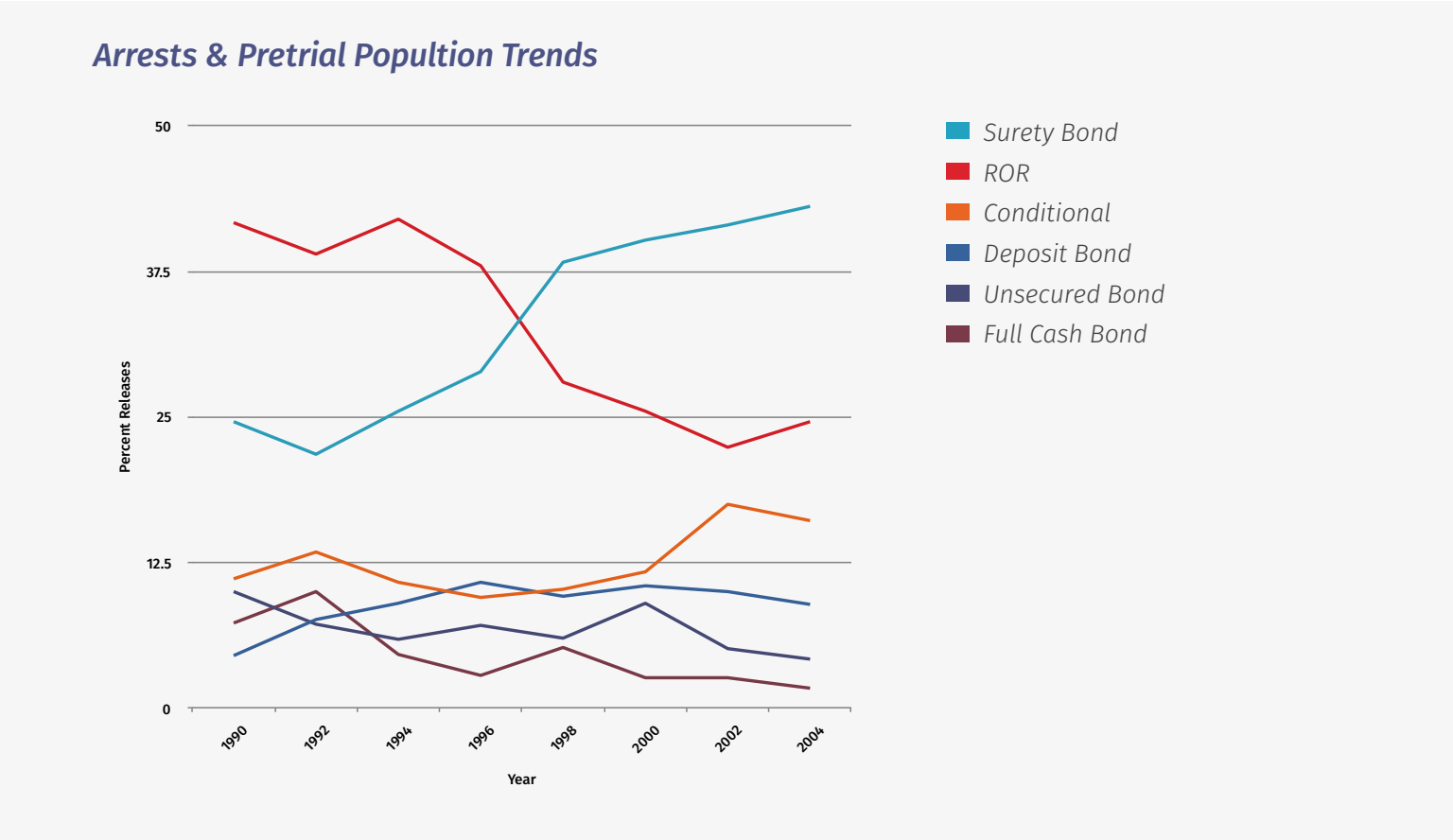
4. While the population of convicted jail inmates has remained steady since 2000, the population of unconvicted inmates has climbed:[5]



5. Though arrests are down, the ratio of the pretrial population to arrests has risen significantly:[6]



6. At the pretrial release stage, there have been substantial declines in the use of release on recognizance (ROR), with simultaneous increases in the use of surety bonds. The following chart illustrates trends in release type for state court felony defendants in the 75 largest counties in the U.S. between 1990 and 2004:[7]



The reasons for these trends aren't known, Lynch suggests, primarily because we do not have the data to study them. Some aspects of pretrial have been studied more than others simply because the data exist. As Lynch told the Roundtable, "The research gets done where the data are. If the data are there, they will plumb it. The problem is, the data are not there." Data collection is complicated by a number of factors, according to Lynch. The pretrial process is highly decentralized. Data are rarely kept on a case-level linked across decision-makers. Data are often maintained by elected officials such as prosecutors and sheriffs who may be risk averse and disinclined to open their files. One solution, Lynch suggested, is to influence national associations to apply leverage to elected officials to disclose data.

What is most needed in pretrial research, in Lynch's view, is simply information: Case-level data on decisions that is linked across decision-makers. Data from multiple jurisdictions to facilitate the evaluation of organizational context. Criminal history data, since many decisions in pretrial involve the weighing of risk. Only with such data can the actions of many people making a sequential set of decisions on cases be assessed as a whole.

To solve this problem, Lynch proposed "the building of a statistical infrastructure" to produce case data linked across many agencies in the system. "This is not easy," Lynch said, "because you have to get them all cooperating. But that's the kind of data that would allow it to shine the

light on the dark parts." He also emphasized the importance of building a culture of sharing data: "You need to get people to share data not on a case by case basis, but share it on a continuous basis, so that they think of this as infrastructure, not as a particular project." The next issue becomes who can build such an infrastructure. "We have a federated system that makes it really, really difficult," Lynch noted. "Who can fill that void? Is it the Center for State Courts? Is it the prosecutors' association? Who do you bring to the table to give cogency and cooperation in this very decentralized system?"

With good, accessible data, Lynch contended, research can identify ways of making decisions in the pretrial process that can increase system fairness and efficacy. Then the challenge becomes the adoption of such evidence-based practices. "When you find something that works," Lynch asked, "How do you disseminate it? How do you bring it to scale? What sort of incentive structure needs to be in place to get people to adopt a tool?" Highlighting what he terms the "dissemination of innovation," Lynch emphasized that one aspect of pretrial reform must be to encourage jurisdictions in the decentralized pretrial system to adopt innovations that have been proven to be effective elsewhere.

Roundtable participants discussed some of the potential reasons for the trends Lynch highlighted, some using words like "stunning" and "shocking" to describe the information. Dr. Marie VanNostrand, a pretrial researcher with Luminosity, noted that what might be driving the pretrial population is both the number of people and their increased length of stay. Dr. Barry Mahoney, President Emeritus of the Justice Management Institute, was struck that while ROR is going down, other types of supervised release were increasing, so that the ultimate "liberty change" might not be as altered as it appears. Elyse Clawson, the Founder of Justice System Partners, looked at both the increase in arrests for drug possession and the decrease in ROR and speculated if "in some ways those conceivably are linked: that increased arrests for drug possession and reductions in ROR may have some relationship." Dr. Faye Taxman, a professor at George Mason University, wondered about the impact of misdemeanors on these numbers. "The system is very stuck on how to handle a lot of misdemeanor crimes," she noted. "People look too unstable to release." Taxman also suggested looking at the creeping definition between misdemeanors and felonies over the past 20 years, especially for drug possession. Could that be driving the increase in population?

Dr. Carla Shedd, a professor at Columbia University, noted the potential impact of case continuances on the pretrial population. Leah Garabedian, Defender Counsel for the National Legal Aid & Defender Association, suggested that state legislatures may be effectuating more restrictions on release rules, which could be a factor in release rate changes. She proposed that researchers could "do a scan of state legislative changes around what you can and cannot permit in terms of releasing with or without conditions."

Many participants cautioned against an assumption that the pretrial population is in jail solely because they cannot make bail. Janice Radovick-Dean, the Director of the Fifth Judicial District of Pennsylvania's Pretrial Services Department, noted that there are many types of holds that can result in an inmate being detained pretrial and that it is important, if we are to truly understand the nature of the jail population, to make those classifications and to ensure that those classifications are defined consistently for research purposes. "If you create those definitions for systems to classify people coming into jail," she said, "ideally on a national level – then everyone's comparing the same thing." VanNostrand agreed: "The jail is much more than pretrial and post-conviction."

Some of the questions to be answered include, as Anne Milgram of LJAF put it, "What is the list of the data we would want from the jails? What is the information we would need to be able to answer the questions people are asking? Is that being collected and, if not, could we start a national incentive campaign on it?"

Part II

A Step-By-Step Review Of The Pretrial Process

In order to provide a baseline of knowledge about the pretrial process, expert presenters on each of its phases offered Roundtable participants an overview of the state of research in their respective areas, detailing what is known and underscoring what is not known. Though the agenda was divided into the traditional stages of pretrial, participants were encouraged to think on a system-wide basis and even to consider broadly the very definition of pretrial. These presentations then stimulated discussions of potential topics for further research. The presentations were divided into five stages. **Part A** covers arrest and initial police-citizen interactions. **Part B** looks at the decisions of what offenses to charge and, in particular, how the exercise of prosecutorial discretion affects these choices. **Part C** considers the pretrial release or detention decision, focusing on the methods by which those decisions are made, the measurement of risk and the use of risk assessment tools, and the management of risk through pretrial supervision conditions. **Part D** takes a step back and looks systemically at pretrial case processing – those practices, procedures, and events that take place from the time charges are filed until the commencement of trial or other disposition of the case. Finally, in **Part E**, we look at case dispositions and how research might spur novel thinking about alternatives to traditional sentences to incarceration.

A. Arrest and Initial Police-Citizen Interactions

"We haven't learned a lot about the forces that shape the discretionary decisions of police officers and their use of authority, even though that's been a recurring issue for decades."

Dr. Robert Worden
University at Albany
State University of New York

The pretrial process begins at the point of a police-citizen interaction. A victim or citizen asks law enforcement to intervene in a situation, or a police officer makes a discretionary decision to stop, question, frisk, arrest, or cite an individual. Dr. Robert Worden, the Director of the John F. Finn Institute for Public Safety, Inc., and an associate professor of criminal justice at the University at Albany, State University of New York, provided the Roundtable with an overview about the state of research into these initial contacts with the criminal justice system.

Police and Arrest: The Research Landscape. Worden offered a detailed outline of what is known and not known about the decision to arrest, the decision to undertake alternatives to arrest, and the individual and organizational factors that influence those behaviors. Worden told the Roundtable that research over the last 15 years has dwelled largely on crime control, even as crime has plummeted. "There's been much less attention," he said, "to questions about the justice and propriety with which police act."

According to Worden, we know quite a bit about the most immediate, or "situational," influences on arrest decisions by uniformed patrol officers. The following factors have substantively significant effects on that decision: the strength of the evidence, the seriousness of the offense, the preference of the victim/complainant for arrest or non-arrest, and the suspect's demeanor toward the police.

We know much less, according to Worden, about the impact of other factors on police arrest decisions, such as the backgrounds and outlooks of individual officers: "We don't know a lot about the ways in which individual officers exercise their discretion and the ways in which variation in that is patterned by their backgrounds and their characteristics, even though we often prescribe that we should seek changes in those backgrounds and characteristics when we talk about changes in police culture."

Worden also indicated that little is known about the formal and informal characteristics of police organizations, including their policies, procedures, incentives and disincentives, workload, supervision, training, or peer group norms, as well as bureaucratization, decentralization of authority, job specialization, geographic deployment, and management accountability mechanisms. Worden emphasized how little is known about the impact of forms of external oversight, including that by local elected officials, citizen oversight mechanisms like civilian review boards, and other structures like police auditors.

Moreover, Worden noted, we know very little about the determinants of officers' choices to exercise forms of authority that are associated with arrest, such as the use of physical force and especially the misuse of force; decisions to frisk, search, or ask for consent to search; and decisions to stop citizens. Nor is there much research on how arrest and these other forms of authority are exercised – that is, the procedural justice and injustice with which police apply their authority – and about the forces that shape these behavioral patterns. There is also very little research into the forces that shape officers' choices among non-arrest alternatives, such as warning, advising, or referral to social services. "Officers on the street make decisions about whom to refer and whom to divert," Worden noted, "and as far as I know we don't have a clue about how they make those decisions."

Worden then turned to citizens' perceptions of police. "We know that citizens' subjective experiences in their contacts with the police are related to their pre- and post-contact levels of trust in the police," he said, "but we know hardly anything about how and to what extent citizens' subjective experiences are affected by officers' actions."

Research Challenges. Worden provided an overview of the nature of research methodology for observational studies of police. Previous research on police behavior and decision-making has relied largely on systematic social observation (SSO). In SSO, data on police-citizen encounters are coded by observers in numerical terms. Forms of police behavior are treated as the dependent variable in regression equations that include, as explanatory variables, features of police-citizen interactions, including characteristics of the citizens, from which inferences are drawn about the factors that influence decision-making.

In Worden's view, SSO is particularly well-suited for analyzing the situational factors that impinge on decision-making, but it has its limits. It is less well-suited for analyzing the effects of officers' backgrounds and outlooks or of organizational structures. In-person observation is also expensive, and so the last large-scale observational projects were undertaken 15-20 years ago, with only some small-scale projects since then.

Coupling observations with "debriefings" of officers – inviting officers to recount their thinking shortly after their resolutions of police-citizen interactions – has been done on a limited basis and shows some promise for enriching our understanding of the cognitive processes of discretionary decision-making.

The advent of dash-mounted and body-worn cameras in policing has opened up new possibilities for observational studies of policing – what Worden referred to as "armchair observation." Armchair observation is much more economical and allows for more flexibility in sampling, so that we might better analyze and understand differences in individual patterns of police behavior, inter- and intra-organizational differences in police behavior, and behavioral responses in "critical incidents," in which differences in officers' knowledge, skills, and abilities are more likely to be manifested.

Judge Roger Warren, the President Emeritus of the National Center for State Courts, raised the relationship between departmental strategies or priorities about arrest – things like hot spots policing and zero tolerance – and arrest rates. "Law enforcement has been in the business of going out and deciding to arrest as a matter of law enforcement policy certain kinds of people in certain kinds of neighborhoods for certain kinds of things," Warren said. "Do we know what the relationship is between those arrest polices and the arrest rates?" Chief Scott Thomson of Camden, New Jersey concurred. Often, he said, referencing the Department of Justice report on Ferguson, who gets arrested "comes down to political mandates." Looking at non-arrest alternatives, Radovick-Dean asked: "How do we measure crime prevention as opposed to making the arrest? How do you measure *not* making the arrest?"

Shedd proposed looking at the police-citizen interaction from a sociological perspective: Looking at the race of officers and how that intersects with the race of citizens and whether that dynamic changes citizens' assessment of these interactions. Garabedian also emphasized the importance of race: "Race underlies every aspect of the decision points and research, particularly with the police-citizen interaction." She suggested tracking the races of officers, the racial make-ups of departments, and the make-up of departments as compared to the communities they serve, and analyzing how that affects outcomes like arrest.

B. Charging and Prosecutorial Discretion

"We don't know very much about why prosecutors choose to charge cases as felonies versus misdemeanors, or why they dismiss or divert."

Rachel Barkow
Professor of Law
New York University

The nature of the charge against a particular defendant can impact bail amount, pretrial release and detention decisions, risk assessment scores, plea agreements and other disposition alternatives, and the ultimate length of a sentence to incarceration. Professor Rachel Barkow, the Segal Family Professor of Regulatory Law and Policy at New York University, opened the Roundtable discussion on the question of charging with a particular focus on prosecutorial discretion.

Barkow presented four areas of research questions that could be posed about the charging stage of the pretrial process: (1) decisions to charge offenses as felonies; (2) decisions to charge as part of the misdemeanor docket; (3) decisions to divert; and (4) decisions to make particular bail requests.

1. What Factors Influence a Prosecutor's Decision to Bring Felony Charges in a Case? What drives a prosecutor's decision to charge a case as a felony? Barkow hypothesized that the increased issuance of felony charges could be one of the drivers in the increase in incarceration. Yet, she said, we don't know very much about why prosecutors make these decisions. She made a number of research suggestions in this area.

First, she said, it would be helpful to find out if, within prosecutor's offices, there are particular charging guidelines to assist in making this decision. Perhaps, she suggested, prosecutors are looking at a defendant's prior record of multiple misdemeanors and making a decision to charge as a felony in the instant case because of this past history. She also suggested it might be helpful to consider whether prosecutors could use an internal risk assessment tool in making these charging decisions, so that they could direct their felony case resources toward those defendants who pose higher public safety risks.

Second, Barkow wondered if prosecutors are charging cases as felonies in order to ultimately obtain a particular sentence. If this is the case, Barkow suggests further asking why prosecutors are making such a determination: Why do they think a particular sentence makes sense in a particular case? Have they considered split sentences, programming, or other factors, or are they just interested in a particular length of sentence or whether there is a mandatory minimum involved?

Third, Barkow questioned whether what's driving the decision to charge a case as a felony is the potential to use the charge as leverage in future plea negotiations. If this is the case, Barkow suggested, the felony charge is more likely to result in pretrial detention for the defendant, which might not be necessary or wouldn't have been issued given the ultimate charge the prosecutor hopes that individual will plead to.

2. How is Prosecutorial Decision-Making Affecting the Misdemeanor Docket? In light of the ten million petty cases filed each year, Barkow offered the following key questions for study:

- *Do we know why prosecutors dismiss misdemeanors?*
- *Can we track what prosecutors are doing internally to improve office systems to move misdemeanor cases more quickly?*
- *What information do prosecutors have about the impact of case continuances when making decisions about misdemeanor case management? Are they considering that the length of pretrial detention might be criminogenic in the long run, so that there is a worse public safety outcome by allowing cases to drag on? Do prosecutors have access to this sort of information? Do they perform any kind of cost-benefit thinking about these factors?*

3. How Do Prosecutors Make Decisions about Diversion? Prosecutors are making decisions about who should and should not be diverted, allowing certain defendants to avoid charges or obtain an adjournment in contemplation of dismissal if they complete a diversion program. Barkow suggested that we know next to nothing about how these decisions are made. As research matters, she suggested the following areas of study:

- *Are there racial biases involved in decisions to divert?*
- *Who do prosecutors think are eligible to participate in diversion?*
- *On what facts are prosecutors making these decisions?*
- *On what facts should prosecutors be making these decisions?*
- *What level risk of offender can and should be diverted?*
- *Are people being required to plead guilty as a condition of diversion? How does that type of model compare to one that does not require a guilty plea?*
- *What kind of reward or incentive should be given to someone who participates in a diversion program? Reductions in sentence? Outright dismissal? How is success measured?*

Barkow also raised the issue of categories of offenders who aren't eligible for diversion either by statute or office policy. Sex offenders, for example, are barred from most programs. This issue raised a question of whether these statutory exclusions comport with what we know about risk. She posed this potential study: Track those categorical bars as well as the factors that make someone eligible for diversion and then try to determine if there is a fit problem between the people we're barring from the programs and the people we allow in. A similar study might look at whether or not these eligibility criteria lead to overlap with racial disparities.

4. What Influences Prosecutors to Make Bail Requests? Barkow also raised the issue of prosecutorial decisions to request bail, asking "What is prompting prosecutors to make bail requests? Are they just reflexively doing it? Is it based on charge severity or criminal history?" She suggested as research possibilities looking at how prosecutors could be incentivized to use risk tools to help them with some of these decisions, or a study considering what kind of system impact might be felt if prosecutors began to waive bail in certain cases. Would this lead to a domino effect to help judges rethink the perfunctory setting of bail?

Roundtable participants suggested a number of potential research questions related to the charging phase. John Chisholm, the Milwaukee County District Attorney, asked "What is the effect of the officer's presentation of the case to the prosecutor?" Milgram wondered how the victim response affected prosecutorial decision-making. Chief Thomson noted that in his experience, with the exception of homicide, most charging decisions lie with the police, who may charge as much as they can to see which charge or charges ultimately stick.

C. Pretrial Release Decisions

"Most research is not on HOW we should make the decisions, it just shows how horrible the consequences are."

Dr. Marie VanNostrand
Justice Project Manager
Luminosity

For every arrestee, a decision must be made whether to detain or release that individual and, if released, on what conditions, whether under various methods of pretrial supervision and/or secured bonds. Dr. Marie VanNostrand, an expert on the pretrial phase of the criminal justice system and the Justice Project Manager at Luminosity, provided the Roundtable with an overview of how pretrial release decisions are currently being made, as well as the state of research in this area.

How Pretrial Release Decisions are Made. For every defendant, a judicial officer has to decide: "Should I release this person and, if so, under what conditions?" The legal considerations that underlie those decisions are the risk that person poses to public safety and the risk that the person will fail to appear in court if released. These potential risks must be balanced against the legal and constitutional rights of pretrial defendants: the presumption of innocence, the right to release on the least restrictive terms and conditions, and the right to equal protection. VanNostrand shared, anecdotally, that judges sometimes make that decision in less than a minute.

Pretrial release decisions in America are primarily made in one of the following three ways:

- ***Bond Schedules.*** *A large number of jurisdictions rely on bond schedules to guide the release decision. In most cases, this simply equates a particular charge with a particular bond amount. According to VanNostrand, this practice results in 'dual system errors.' Many low risk defendants are detained solely due to their inability to pay the bond amount, while many high risk defendants are released because they have the ability to pay. As VanNostrand stated, "People are treated the same, but what happens to them is not fair."*

- ***Subjective Decision-Making.*** *In some jurisdictions, release decisions are based solely on a subjective appraisal of each defendant. The result is decision-making that varies greatly from one location to another and even within a single jurisdiction. The people who make the decisions vary widely, as do the information, tools, and procedures that are used.*

- ***Risk-based Decision-Making.*** *In risk-based determinations, the risk to public safety and of non-appearance is measured and the risk posed by pretrial defendants released into the community is managed. In VanNostrand's words, "Judicial discretion is used but the decision is informed by a formalized objective system which usually involves a risk assessment." A pretrial risk assessment measures the risk to public safety and of non-appearance in court for pretrial defendants and a structured decision-making tool is used to identify release recommendations designed to manage risk in the most effective manner. The goal of risk-based decision-making is to identify and (1) release low-risk defendants with minimal or no conditions at the earliest point; (2) release moderate-risk defendants with supervision and services targeted to mitigate risk; and (3) detain, when allowable, the highest-risk defendants.*

State of the Research

Legal Issues Surrounding Pretrial Release. According to VanNostrand, considerable peer-reviewed articles have been published relating to the legal considerations associated with pretrial justice, such as maintaining the integrity of the judicial process and honoring the legal and constitutional rights afforded to accused persons awaiting trial.

Impact of Release and Detention Decisions. She also noted that extensive research has been conducted and published in peer-reviewed journals related to the impact of the release and detention decision. "If you're looking in the literature about the release and detention decision," she told the Roundtable, "most of what you're going to find particularly in peer-reviewed journals is about the negative consequences of detention." Research has shown that being detained pending trial impacts (1) the likelihood of receiving a sentence to incarceration; (2) the length of the sentence to incarceration; (3) public safety in both the short- and long-term; (4) court appearance; and (5) the legal and constitutional rights afforded to pretrial defendants. The negative consequences of pretrial detention are amplified for low-risk, low-income defendants, especially those of color.

Risk Measurement. VanNostrand stressed that in order to be effective, risk assessment instruments must be research-based, objective, and fair. She noted that fewer than ten percent of jurisdictions nationally employ risk assessment instruments to inform pretrial release decisions and, of those, "many are not based on research and they haven't been validated."

VanNostrand outlined the state of research into risk measurement:

- *Multi-jurisdictional pretrial risk assessments have been developed for use in seven states (Colorado, Connecticut, Florida, Kentucky, Maine, Ohio, and Virginia);*
- *A pretrial risk assessment is used in the federal court system;*
- *There have been two meta-analyses of pretrial risk assessments; and*
- *LJAF developed the Public Safety Assessment (PSA), a national model for risk assessment instruments.*

Research also establishes that the strongest predictors of pretrial outcome are measures of criminal history and court appearance history. However, VanNostrand observed, little, if any, pretrial risk assessment research has been peer reviewed.

Risk Management. Limited research has been done to identify effective risk reduction strategies for pretrial defendants. VanNostrand noted that the research to date provides support for the following:

- *Court reminders reduce failure to appear;*
- *Pretrial supervision reduces failure to appear; and*
- *The risk principle applies to pretrial release.*

In VanNostrand's words, we need to know "nearly everything." This stage of pretrial is ripe for studies that would:

- *Expand knowledge of pretrial risk assessment generally;*
- *Explore risk assessment for defendants charged with domestic violence and driving under the influence; and*
- *Identify risk management strategies that are consistent with legal and constitutional rights.*

Roundtable participants raised questions about the ways in which decision-makers are using risk tools. Taxman noted that "We don't really know how system actors understand what's in the tools, how to use the tools, and how to integrate that into key decisions." Barbara Broderick, Chief Probation Officer for the Maricopa County Adult Probation Department in Arizona, mentioned the need for implementation science around the use of risk tools to test for quality assurance: "Do we have fidelity to the program?" she queried.

Others worried about the use of criminal histories in risk tools and the potential such factors have to introduce bias into the pretrial release decision, based on historically increased contact with the system for people of color; a concern that was echoed later in the recommendations panel portion of the Roundtable. Chisholm noted, however, that "we've seen the consequences of the bond schedule and mandatory minimums and codified restrictions on discretion – the National Academy report shows that subjective decision-making has led to incarceration rates that are simply disproportional."

D. Case Processing

"It is worth investing in research on ways to build and use information systems that cut across agency and court silos and provide much better information than is currently available for at least four purposes: (i) individual case decision-making; (ii) agency and court management purposes; (iii) statistical analysis; and (iv) policy development and implementation."

Dr. Barry Mahoney
President Emeritus
The Justice Management Institute

Case processing comprises those practices, procedures, and events that take place in criminal cases from the time charges are filed against a defendant until the commencement of a trial or the disposition of the case by dismissal, diversion, or plea of guilty. Dr. Barry Mahoney, the President Emeritus of the Justice Management Institute and a researcher and consultant on court and justice system operations, provided the Roundtable with a holistic look at what is known and not known about how case processing decisions are made and whether those decisions are effective. In Mahoney's view, the optimal characteristics of a system of pretrial case processing are (i) processes that are fair, timely, understandable, respectful, and economical/cost effective; and (ii) outcomes that have legitimacy and proportionality.

The current state of researched-based knowledge about case processing, however, is mixed. Mahoney noted that there is a dearth of hard national data on case processing, especially in limited jurisdiction courts, but that there is plenty of material that can be useful in shaping future research and developing a comprehensive agenda for needed reforms. This existing research includes:

- *Studies of individual courts and local criminal justice systems;*
- *Some work on the dynamics of decision-making in felony courts;*
- *A few multi-jurisdiction studies of case processing and court delay issues;*
- *Some research on specific aspects of the process, such as decisions on release/detention and plea bargaining practices; and*
- *Recently, work on limited jurisdiction court processes has documented egregious abuses in the imposition of economic obligations and related use of jail.*

In Mahoney's view, there are a number of what he terms "long-standing abuses in pretrial case processing" that merit consideration in a research agenda. These include:

- *Detention (often for long periods) of low risk defendants who cannot afford bail;*
- *Bail decisions made without the judicial officer having information about the defendant or about the nature and severity of risks potentially posed by defendant's release;*
- *Defendants in "minor" cases induced to plead to charges without legal assistance and without awareness of the consequences of a guilty plea;*
- *Lengthy (and costly) duration of cases, with multiple continuances;*
- *Outcomes of the process that have resulted in mass incarceration and over-representation of people of color in prisons, jails, and probation caseloads; and*
- *Imposition of fees, fines, court costs, and other economic obligations during the pretrial process and at sentencing, without regard to a defendant's ability to meet them.*

In Mahoney's view, research in this area – especially multi-jurisdiction comparative research – could identify fairer and more effective alternatives to avoid the negative outcomes he raised. Research is desirable to examine practices at all levels of courts, in different environments, and especially in less visible courts that deal with minor offenses. "These courts handle cases that involve and affect vastly greater numbers of people than the more visible felony cases," Mahoney stated. In addition to studying individual courts, research is needed that compares processes and outcomes across jurisdictions to determine what differences emerge, and what factors correlate with case processing practices and outcomes that are closest to the optimum characteristics of a system.

He listed these questions for comparative analysis:

- *What key differences exist in the legal frameworks for case processing?*
- *What options are available to relevant decision-makers (e.g., prosecutor, defendant, defense attorney, judicial officer) at key stages and decision points of the process?*
- *What information is available and to whom at these stages?*
- *What legal assistance/advice is available to the defendant at these stages?*
- *What restrictions and economic obligations is the defendant under at these stages?*
- *What is the duration of the process, both in total length in time and number of scheduled court dates?*
- *What are the outcomes, in terms of restrictions on the defendant's liberty and imposition of economic obligations?*

Mahoney also identified opportunities for research that assesses experiments with changes in procedural and substantive criminal law and the introduction of new case processing practices, such as:

- *De-criminalization of specific minor offenses*
- *Elimination of mandatory minimum sentences*
- *Elimination of reliance on surety bail*
- *Increased use of risk assessment in pretrial decision-making*
- *Use of alternatives to jail for non-criminal violation of release conditions*
- *Rapid access to relevant behavioral health background information about individuals*
- *Active implementation of case processing time standards*
- *Renewal and re-design of day fine experiments*
- *Caps on maximum amounts of economic obligations that can be imposed on a defendant*
- *Procedures that can enable offenders facing unpayable economic obligations imposed by the justice system to reduce the burden*
- *Alternative ways of providing legal advice/assistance to defendants, especially in minor cases*
- *Electronic recording of all proceedings in courts that handle minor offenses*

Who could provide such research? According to Mahoney, "There are knowledgeable organizations and individual researchers working in and with jurisdictions throughout the country who can be valuable resources in designing and carrying out research aimed at markedly improving pretrial case processing." He identified university-based researchers, researchers in nonprofit and for-profit organizations specializing in court and criminal justice system operations, foundations, and federal agencies.

Mahoney summarized his top priorities for research on pretrial case processing:

- *Basic descriptive research to develop data-based typologies of case processing policies, practices, and outcomes in different levels of courts and different socio-political environments;*
- *Comparative analysis to contrast jurisdictions with less optimal outcomes with processes in jurisdictions that have good or promising practices;*

- *Studies to assess the effectiveness of innovations designed to increase the fairness and timeliness of case processing and the legitimacy and proportionality of outcomes; and*
- *Education and outreach to engage practitioners and policymakers at all levels in shaping policies that are responsive to evidence produced by the research.*

Roundtable participants focused particularly on the effect of the presence of counsel in case processing, particularly in municipal courts. Garabedian noted that although the constitution mandates that defendants facing a liberty decision have counsel present, this isn't always the case. "There's no data on how many defendants go to first appearance without counsel," she said. Worden suggested that research could determine "whether and how much outcomes change with counsel at first appearance."

Milgram suggested that perhaps there should be a challenge or incentive grant focused on case processing time: "Why do defendants come back to court twelve times? Why do defendants come back when they're not needed? How do we translate that into research?"

Barkow proposed studying the effect of who in the prosecutor's office is making screening decisions, suggesting that junior staff might be more risk averse or more likely to obtain continuances. She asked: "Do the people in the office matter as far who on the prosecutorial staff – from junior to senior – is screening? Does it make a difference in case processing?"

Barkow also advocated studying how technology might help: "Can technology, such as video check-ins, help speed up delays so that defendants don't actually have to go to the courthouse?" President Travis followed up, suggesting a look at text messaging, night court availability, etc.: "Can you reduce barriers to make it easier for people to meet their obligations?"

Chisholm brought in a note of hope. Wisconsin is moving to a unified court system called "Measures for Justice," which will allow for case processing data to be publicly compared across counties, providing an incentive to decision-makers. He also put forward the importance of precision epidemiology, a public health approach to public safety: "You really do have the capacity to de-identify but link public health data, public education data, public safety data, community development data, and geocode to identify red flags in very specific neighborhoods. So instead of having broad-based strategies to address problems you can focus on very specific populations with a wide array of resources."

The group ended on the issues of organizational change and adoption of new practices. In Clawson's view, "Organizational change work and change around the culture is going to be absolutely essential – really seeing the power that the players have and which players have the most power." President Travis summarized the importance of organizational context: "How does reform get implemented?"

E. Case Dispositions

"We don't know about how decisions are made to use different dispositions throughout the systems except in guideline specific states where judges are bound."

Dr. Faye Taxman, Director
Center for Advancing Correctional Excellence
George Mason University

The pretrial phase ends with either the commencement of trial or, far more often, in some other non-trial disposition of the case: plea bargaining, sentencing to time served, diversion, probation, fines, referrals to social services, community service, and/or restitution. According to Dr. Faye Taxman, Director of the Center for Advancing Correctional Excellence at George Mason University, at present there are a limited number of dispositions available and most non-incarcerative dispositions rely on the probation department for their execution. This might not be the best fit, as Taxman noted that probation departments are geared to focus attention on higher risk and higher needs individuals who present threats to public safety. As such, probation might not have the capacity "to adequately handle lower risk, lower need individuals within a different framework or set of processes." The question then becomes, she told the Roundtable, "How would we put in place the capacity of organizational systems to offer a full array of dispositions?"

She challenged the Roundtable participants to think of a research agenda in terms of novel types of dispositions that might better serve some of these individuals. In her words, "overall, the justice system has not fully taken advantage of restorative justice and civil processes to address the harms from a criminal event from lower risk, lower need individuals."

Taxman identified three areas in which research could spur new thinking about optimal dispositions for certain categories of offenders:

1. Triage drug addicts, alcoholics, and the seriously mentally ill into a behavioral health pathway. There is a growing consensus, according to Taxman, that the justice system might not be the best place for this category of defendants. Accordingly, she suggests providing screening at the earliest possible stage for substance abuse, alcoholism, and serious mental illnesses to assess both behavioral health and readiness for behavioral health treatment services. In Taxman's scheme:

a. *The screening and assessment should occur at booking to expedite the identification of individuals with clear behavioral health disorders.*

b. *Treatment should be of longer duration given the severity of the addiction or mental illness (around 12 months) with other services to provide a continuum of care.*

c. *It might be necessary to use various types of controls (i.e., electronic monitoring, interlock, etc.) for those individuals where their criminal behavior may present a public safety threat (i.e., drinking and driving, property crimes, etc.).*

d. *Diversion into treatment should carry with it the potential to "erase" the arrest if the individual completes the program and remains drug/alcohol free for 12 months.*

e. *For the seriously mentally ill group, the goal should be to encourage medication compliance and treatment compliance.*

Taxman suggested research in the following areas to learn more about whether and how such diversion into treatment would work:

- *Studies on how to structure the diversion or specialized behavioral health programming*
- *Studies to identify how to measure readiness for treatment and the degree to which different incentives can be used to increase readiness*
- *Studies to identify how to assist the seriously mentally ill to comply with medication requirements*

2. Triage minor offenses, such as those with sentences under 12 months, into non-incarcerative sentences that are swift, certain, and very time delimited. Over the years, Taxman said, "We've criminalized a lot of behavior." She championed the use of mediation, conflict resolution, community service, fines, and restorative justice programming for any person arrested for an offense that includes an incarcerable sentence of less than 12 months or the potential for short periods of probation. The goal would be to find a short-term response that is proportionate to the nature of the crime and that is designed to have the individual address the harm that occurred, and to offer this alternative within 30 days of the event to create a swift response to the behavior. Taxman views this type of disposition as a useful strategy to address "broken window" type minor offenses and small property crimes.

Taxman proposed the following procedural framework:

- *The dollar value of the sentence should not exceed a certain multiple of the dollar value of the crime and the cost of the criminal justice processing (Taxman suggests three times the value).*
- *Mediation or conflict resolution should be offered instead of criminal prosecution within 30 days of personal and property crimes like simple assaults or shoplifting.*
- *Fines or community service should be used for a greater array of offenses, particularly those that have nine months or less of probation. A model to consider is the Vera Institute "day fine" approach, also used in many European countries, where the number of days of a sentence is proportionate to the crime and, if community service or day fines are given, the amount should be determined based on the level of wages that an individual is likely to receive on a daily basis.*

Taxman suggested that a series of studies be conducted to see how such a process would affect recidivism, perceptions of procedural justice, and system costs and benefits.

3. Enhance the meaning of sentences by providing individuals the option to design their own sentence. In perhaps her most out of the box suggestion, Taxman proposed that we consider the impact of having individuals convicted of crime select their punishment. "How do we introduce the client's voice in their sentence?" she asked. The lack of defendant inclusion in the process of sentence development, in Taxman's view, may result in lack of ownership of the behavior and the punishment itself. Her hypothesis: "Being involved in determining the components of punishment should increase the individual's sense of fairness and procedural justice as well as the legitimacy of the sentence."

Taxman suggested the following possibilities for such a system:

- *Establish an interchangeable framework for sentences from the perspective of society, justice system decision-makers, and those included in the justice system, to account for proportionality and parsimony. Research could help to determine what types of trade-offs with incarceration would be acceptable to different stakeholders, and how the sentence options could be enlarged.*
- *Develop a shared-sentencing framework where the individual identifies the key sentencing components that would serve to either rehabilitate, be a form of restitution, or deter from future behavior. The individual would inform the judge of their desired sentence options and the judge would be informed by this perspective. This framework could then be studied and tested for procedural justice, fairness, and impact on recidivism.*
- *Develop a series of incentives for individuals to participate in sentences that involve behavioral change as compared to incarceration, using their own health insurance (in Medicaid expansion states) to participate in a series of evidence-based programming that is better suited to change behavior, with incentives designed to address criminogenic needs as well as risk factors.*

She proposed the following research to assess such a scheme:

- *Conduct a series of studies to assess how individuals participate in the shared sentencing development process: what components are selected, how those components relate to the risk and need factors of the individual, etc.*
- *Examine how the individual's involvement in sentence design affects compliance and outcomes.*

Milgram would prioritize research on restorative justice and offender mediation. She also wondered if there are any jurisdictions that could be studied currently using a pretrial risk assessment, mental health assessment, and a substance abuse assessment. Shedd suggested that there is a "lack of trust in alternative systems. How are we going to move these systems, especially with the lack of trust across these processes?"

With respect to the mentally ill, Jennifer Perez, Director of Trial Court Services for the New Jersey Judiciary, noted that the criminal justice system is often left to intervene in the absence of other social services. "Incarceration," she said, "is being used to save people on behalf of the entire system." This brought President Travis back to the framework of values: "This exchange raises the normative question of who makes what decision, at what point in the process, exercising what authority, and to what extent do we allow the extension of state supervision over somebody who is either charged with something really minor and therefore we should be very hesitant, using parsimony, to allow state authority; or who is so ill in some way, either through addiction or mental health, that it's just somehow morally wrong—or the right thing to do is something other than—to put them in jail. We have this crosscutting value proposition."

Part III

Behavioral Economics As A Lens For Examining Pretrial Behavior

"Behavioral economics recognizes that decisions are constrained by cognitive, emotional, and motivational limits and that preferences may be context dependent, beliefs about the world may be biased, and individuals do not or cannot always choose optimal actions."

Dr. Saurabh Bhargava
Assistant Professor of Economics
Carnegie Mellon University

The Roundtable presentations and discussions on the various pretrial stages underscored the impact that the various decision points along the path have on outcomes for individual defendants, as well as their effects on the system as a whole. Little is known about the factors that underlie individual decision-making behavior or contribute to overall organizational culture.

Dr. Saurabh Bhargava is an Assistant Professor of Economics at Carnegie Mellon University who specializes in behavioral economics. His presentation provided the Roundtable with a different approach for viewing decision-making in the pretrial context.

The traditional rational model of behavior in economics assumes that people have coherent, stable, and known preferences, rationally form beliefs about the world, and choose optimal actions based on those beliefs and experiences. In contrast, behavioral economics is an approach that leverages insights from psychology and other social sciences to produce more realistic descriptions of how people behave. In the pretrial context, Bhargava focused on three areas where behavioral economics studies could assist in explaining and altering the actions of those in the system: (i) the behavior of police; (ii) pretrial release and defendant compliance; and (iii) how to aid experts in making pretrial decisions.

1. The Behavior of Police. Bhargava raised two issues with respect to police behavior – the role of incentives and the nature of police bias.

First, he posed the question: "What are the structural approaches for increasing police efficacy?" He discussed a study of police arbitrations in compensation disputes in New Jersey and noted that police performance was highly sensitive to arbitration outcomes: when police were

successful, their case clearance rate rose 12% and, when unsuccessful, their case clearance rate dropped 6%. These effects were potentially linked to changes in police effort and willingness to cooperate with courts and prosecutors and, strikingly, the effects persisted for months and months after the decisions. The takeaway: Police productivity – their effort, motivation, and satisfaction – is highly sensitive to incentives and perceived fairness. These results, according to Bhargava, "speak to the need for more work on the role of institutional incentives on productivity outcomes in policing and the need for a metric for what productivity really means in the context of police."

As a matter of research, Bhargava noted that there has been very little work into the role of incentives in police behavior. Behavioral economic studies could look into the efficacy of incentives and how best to design them. Some of the questions Bhargava suggested that would require field research in the police context include:

- *Can small, preferably non-monetary, incentives tied to outcomes be effectual, and what outcome metric should be used?*
- *Do perceptions of fairness and reciprocity heighten motivation?*
- *How can we test for behaviorally modified versions of incentives to see if they make a difference on outcomes?*

He then moved to the question of racial bias, asking: "How do we measure racial prejudice (or other decision-making mistakes) in policing?" Bhargava noted that there are "strong econometric challenges in causally capturing the effects of things like racial bias that seem to resonate and we all believe exist in some form." Though there is clear evidence for racial disparities in average outcomes, he noted, the econometric challenge is distinguishing between statistical and taste-based discrimination. One potential measure of discrimination is to look at average search success by race, but doing so, Bhargava noted, "may lead to incorrect conclusions if there are unobserved predictors of search correlated with race." He identified three such studies and their results, which were mixed:

- *Anwar and Fang (2006) leveraged police and motorist race as a means of overcoming this identification problem and did not find evidence for relative racial prejudice in drug searches in Florida.*
- *Antonovics and Knight (2007) employed a similar strategy in their analysis of police searches in Boston and did find evidence that officers treat other-race motorists more harshly.*
- *Gelman et al. (2007) looked at 125,000 pedestrian stops in New York and found that police were more likely to stop people of color relative to a baseline of prior year arrest rates.*

Bhargava suggested the need for more field research. This research may be difficult to design, he noted, but could determine what the situational contexts are that lead to prejudicial behavior or, more generally, other decision-making errors, and who is prone to making such mistakes.

2. Pretrial Release and Defendant Compliance. Bhargava posed this behavioral question as to the pretrial supervision stage: "Given the high costs of non-compliance, why do some defendants fail to comply?" What research has found in other contexts is that people may have distorted beliefs with respect to the costs and benefits of infractions. Even when people want to comply, a variety of factors may lead to non-compliance, such as small administrative hassles, forgetfulness or limited attention, impulsivity, confusion due to the complexity of information, mental health issues or substance abuse, and/or fear and anxiety. The effects of these factors, Bhargava noted, may disproportionately affect the poor and less educated.

Behavioral economics has shown that we can improve compliance through scalable, low-cost interventions that are worth testing in the pretrial context, such as:

- *The benefits of using simplified information regarding rules, requirements, and expectations*
- *Persuasive messaging*
- *Reminders by text, peers, and/or family*
- *Intention prompts that ask people to indicate what they are going to do and when*
- *Immediate small incentives or swift and certain punishments*

Higher cost methods to increase compliance could include pretrial mentorship, cognitive-behavioral therapy interventions, or monitoring technology.

3. Aiding Experts in Pretrial Decisions. Bhargava then focused on how to help experts – in particular judges – make better decisions in the pretrial system. He spoke to two issues related to judicial behavior: decision-making errors and biases and judicial use of pretrial tools.

First, he addressed decision-making errors by judges. Research suggests that even experts are subject to systematic decision-making errors in high stakes settings, Bhargava noted, especially when they are making high frequency decisions with little information, as often happens with pretrial release or the setting of bail. In such situations, experts may be susceptible to errors due to both overconfidence and reliance on simplified heuristics which can lead to systematic errors.

Field evidence on judicial sentencing and bail hearing decisions suggests racial discrimination (e.g., Abrams, Bertrand, Mullainathan 2010), potential susceptibility to sequential decision-making errors such as contrast effects (Bhargava 2008), and an inability to ignore inadmissible evidence, all can affect judges' decisions. There is a need for more research to develop persuasive field evidence on how judges and prosecutors make decisions.

Bhargava then addressed judicial behavior with respect to using pretrial decision aids, such as risk assessment tools. He noted that "simply providing information or tools – especially complicated information on risk – may lead to misinterpretation, information avoidance, confusion, or false confidence in decisions." Research should be done on how best to package this information to judges in a simple and actionable manner. Given limits on how people process information, he further suggested that there might be benefits to providing default recommendations or restricting choice sets based on decision aids. "Most research suggests," Bhargava noted, "that when experts are subjected to a lot of complicated information they disengage. They don't know what to do with it. They have difficulty translating it into actions. The way in which the tool conveys the information is hugely important in the effectiveness of its use and the willingness of the expert to use it."

Roundtable participants identified many possible behaviors that could be analyzed using behavioral economics. Radovick-Dean suggested testing the paperwork used in the pretrial process, asking: "Are forms keeping people from coming to court because they are too complicated?" Chisholm proposed analyzing juvenile offenders who have weapons charges to learn "what drives you to pick up a gun and what could change that decision?" Dr. Mona Danner, a professor of sociology and criminal justice at Old Dominion University, raised the issue of buy-in: "If you want to get people to buy into new ideas you've got to sell them well, you've got to market them well."

Part IV

Building A National Research Agenda: Recommendations From The Field

"Targeted research and analysis is needed to lay the foundation for a system of pretrial justice that upholds the presumption of innocence, addresses systemic biases, and supports the health and well-being of communities by reducing the number of people under the purview of the criminal justice system."

Jim Parsons
Vice President & Research Director
Vera Institute of Justice

In order to bring in even more voices to shape a research agenda, representatives from other organizations that are deeply involved in pretrial were invited to present their recommendations for study from their policy or practitioner perspectives. Four presented at the Roundtable and others submitted their recommendations in writing. The four were: the Pretrial Justice Institute, the Texas Public Policy Foundation, the Vera Institute for Justice, and the American Bail Coalition.

A. Presentations from Stakeholder Organizations

The Pretrial Justice Institute. The mission of the nonprofit Pretrial Justice institute is to advance safe, fair, and effective juvenile and adult pretrial justice practices. Michael Jones, PJI's Director of Implementation, began by identifying three broad categories of research that can be done: (i) research on what is currently happening in pretrial, which would provide a snapshot of the current landscape; (ii) research on why those things are happening or, as he put it, "What are the causes or correlates of the kinds of things we're observing;" and (iii) research on what we can do about those things. "What can we change to make improvements?" Jones asked. "How can we make things more effective and remedy those inefficiencies?"

Jones offered three specific ideas for research, all of which fall into the third category above – determining how to make the system more effective:

- *What release conditions – non-financial and financial, at what doses, and at what frequency – are effective in reducing pretrial risk of failure to appear and new criminal activity, and for which defendants?*

- *What is the robust empirical evidence that pretrial risk assessment instruments are not biased toward certain subgroups, and that they do not contribute to racial and ethnic disparity given that certain demographic subgroups are arrested more frequently, charged differently, convicted differently and, perhaps, "over-policed"?*
- *What is the impact of pretrial reform on pretrial release rates, failure to appear rates, and new criminal activity rates in states like Colorado, Delaware, Hawaii, and Kentucky that have made certain types of changes (e.g., rewritten laws, made smaller statutory changes, issued new court rules, implemented pretrial programs), and in states that will make such changes in the near future, like New Jersey?*

In doing this research, Jones proposed three broad research strategies or approaches:

- *Interface with the Law. Jones noted that pretrial practice requires balancing what he calls the "Three M's" – maximizing release, maximizing public safety, and maximizing court appearance. "It's important as we research remedies," Jones said, "that we balance all three simultaneously. Research that looks at one or two is not as helpful as research that looks at all three." As an example, Jones noted that while pretrial detention might maximize public safety and court appearance, it may not in some cases be legally permissible, thus failing the legally mandated goal to maximize release.*
- *A Search for Nontraditional Solutions. Jones encouraged research that might uncover entirely different processes to solve some of the problems in pretrial. Specifically, decision-makers and professionals who work in the justice system can look to remedy system problems using solutions from outside of the justice system, such as opportunities arising from the Affordable Care Act or crime prevention strategies like Blueprints for Violence Prevention.*
- *Shrinking the System. Jones proposed research that could reduce the number of individuals in the criminal justice system in order to improve the quality of justice. Whether achieved through diversion, decriminalization of certain offenses, prevention, or investment in youth and families, Jones said, research could provide ways to enable us to downsize the system. In his words, "Research may show that some of the problems that we see in our criminal justice system with ineffectiveness and inefficiencies will remedy themselves just because the system will have more time to improve its quality because it's not so overburdened with the quantity."*

The Center for Effective Justice at the Texas Public Policy Foundation. Marc Levin directs the nonprofit Texas Public Policy Foundation's Right on Crime initiative, a public policy program that promotes conservative ideas about criminal justice. He brought five research ideas to the table:

- *Create a 50-state report on the existing pretrial justice landscape. Such a report would identify which states have statutes or regulations that create barriers to non-financial forms of release and decision-making informed by risk. Digging deeper, a report could identify pretrial practices in key counties that would examine—even in states without statutory barriers to implementing non-financial forms of release and decision-making informed by risk—what local cultural or institutional barriers may be present.*
- *Identify representative jurisdictions for which data are available to produce a report on revocations from pretrial supervision, including separating out the number due to technical violations versus alleged new offenses. Such a study would explore how reforms implemented in many probation departments, such as (i) the use of swift, certain, and commensurate sanctions; (ii) avoiding the use of unnecessary conditions unrelated to the individual's offense or risk factors; (iii) use of positive incentives; and (iv) strategies to expedite case processing to reduce the period of pretrial supervision, could be used to significantly reduce pretrial supervision revocations. "You're getting such a maze of conditions," Levin said, "that you can't really enforce the ones that are important because there are so many."*

- *Study the impact of prompt appointment of counsel on pretrial detention through assembling data from jurisdictions such as King County, Washington, and Miami-Dade County, Florida, that have implemented mechanisms for expediting appointment of counsel upon arrest. "What we see in a lot of jurisdictions is that there is a hearing on the bail amount and the prosecutor is telling the judge they should raise the amount," Levin said, "and there is no one there representing the defendants. No one is there to bring out facts about the defendant that may suggest there are lower risks."*
- *Examine the use of adult civil citation in Florida and the potential it may offer for reducing jail use, including exploring what percentage of arrests this could avoid, the effectiveness of civil citation in deterring future criminal behavior, and the cost savings that are achievable.*
- *Study the impact of the decision-maker and whether they are subject to electoral influences. In jurisdictions with elected judges, magistrates could be empowered to make such decisions. More frequent delegation of pretrial decision-making from elected judges could lead to decisions that are more objective, not only in the context of the initial hearings but also in the context of revocation. For example, the pretrial supervision agency could be given greater authority to impose sanctions short of jailing an individual up until the trial date, such as imposing a weekend in jail, which might lead to fewer revocations.*

Levin offered further potential topics of study, such as studies on the role of collateral in lieu of or as a portion of a money bond as an incentive to appear in court, and studies on the impact of having a prosecutor on duty at jails to evaluate cases as police bring them in, allowing for quick release if they have no interest in prosecuting the individual. "We can all agree that there are people in jail that don't need to be in jail, particularly people who are indigent," Levin concluded. "By the same token, we need to make sure we are doing the right assessments and protecting the public."

Vera Institute of Justice. The Vera Institute is a nonprofit organization that seeks to make justice systems fairer and more effective through research and innovation. Jim Parsons, its Vice President and Research Director, raised three areas of study the Institute deems critically important, elaborating on each with specific research questions and methodologies.

- *Strengthening risk assessment tools and guarding against the unintended consequences of structured decision-making. "Risk assessment instruments can perpetuate bias because the things that predict risk are often correlated with race for systemic reasons," Parsons said. "In many places, it's easier to get arrested for the same behavior if you are a person of color." The concern then becomes, in Parsons's words, "If something predicts an outcome that we care about such as reoffending or failure to appear, but for systemic reasons disproportionally affects a community, is it legitimate to use that as a way of making decisions that will have fundamental impacts on that person's life?"*

  Study questions around the development and use of risk assessment tools could include:

  - *What racial and socioeconomic biases are latent in assessing risk based on a defendant's prior criminal history and past contacts with the criminal justice system? Do we need to reach consensus about how we define racial bias in this context?*
  - *How do we assess the extent to which risk assessment effectuates racial and ethnic bias?*
  - *What steps do we take to address that bias by using statistical techniques to pull out the impact of racial identity when designing tools?*
  - *To what extent should we accept that correcting risk assessment tools for latent bias will impact their validity? What is the appropriate balance between maximizing predictive power and safeguarding against bias?*
  - *What are the challenges related to exporting tools validated for one jurisdiction to another?*

- *When do tools need to be revalidated and what is the procedure for doing so?*
- *How do judges, prosecutors, defense attorneys, and other justice officials use the results of risk assessments and how can their impact be quantified for study?*

- *Limiting the use of pretrial supervision to the least restrictive and effective manner possible by tailoring services to needs. The goal of pretrial supervision, in Parsons' view, is to "treat people in the least restrictive way so that they will appear in court and will be less likely to commit new offenses in the pretrial period." While risk assessment tools provide some measure of these factors, Parsons encouraged Roundtable participants to think of risk more broadly. "The risk of re-arrest and the risk that a defendant will fail to appear in court are only two of a range of important factors that should be considered when determining appropriate forms of pretrial supervision," Parsons suggested. "The existence of family and job supports, a person's behavioral health needs, and the potential risk of specific types of re-offense are a few of many factors that should be considered as part of the pretrial supervision calculus." In short, Parsons stated, "How do we supplement an assessment of risk with an assessment of strength?"*

  He suggested the following further questions regarding the appropriate mix of pretrial services:

  - *What risk factors do we need to understand to assess appropriate pretrial supervision services?*
  - *What are the health or social services needs that, if addressed, will mitigate the risk of reoffending or failing to appear in court?*
  - *How can jurisdictions collect the multi-faceted data needed to make informed decisions about pretrial supervision, given constrained resources and the limitations inherent to working in courts and police stations?*
  - *What services are needed to meet different combinations of risk and need? How can these services build upon existing contacts with services and support networks in the community?*
  - *What are the potential improvements in outcomes for jurisdictions that incorporate non-traditional services such as providing behavioral health services, assistance with obtaining public benefits, workforce development opportunities, or childcare during court and other appearances?*
  - *Would a low-cost supervision option be sufficient to ensure appearance in court?*
  - *How can pretrial services be developed that specifically adapt to and meet the needs of the increasing numbers of women and girls in the criminal justice system?*

- *Documenting the specific impacts of pretrial detention as a tool for reform. Research has established the negative impact on those who are held in pretrial detention even for very short periods of time. Little is known, however, about the factors that contribute to these negative outcomes. Parsons suggested research into the mechanisms that cause people to experience worse outcomes: "Research is needed to supplement the existing knowledge base by exploring how pretrial detention affects family relationships, economic opportunities, and other sources of stability and support that may impact conviction, sentencing, and rates of re-arrest." He posed the following questions for study:*

  - *How does pretrial detention impact defendants' lives?*
  - *What are the mechanisms at play that cause pretrial detention to lead to future criminal justice involvement?*
  - *What are the potential pathways between pretrial detention and future criminal behavior?*

The American Bail Coalition. The American Bail Coalition is a non-profit industry policy development association dedicated to ensuring that state governments adopt a system of best practices that maximizes the release of criminal defendants awaiting trial and minimizes the days between arrest and release through means that protect public safety. Nicholas Wachinski, Esq., its Executive Director Emeritus, offered the following areas for study:

Wachinski offered three specific ideas for research, all of which fall into the third category above – determining how to make the system more effective:

- *Micro-Analysis of the Jail Population to Determine Who is in Jail Awaiting Trial and Why. Wachinski cautioned against an assumption that all defendants in the pretrial phase are being held because they cannot afford their money bail. He encouraged the Roundtable to look at what barriers, including monetary, non-monetary, administrative, or other legal obstacles, hold a person in jail. Some of the potential reasons he posited: Are people not posting bail because of lack of financial resources or for some other reason? Are there probation holds based on a previous offense keeping that person in jail pretrial? Is there a federal immigration hold? Does the person lack the personal or societal connections to assist them with the bail process and why? Are people being held because they owe criminal justice fines or fees for pretrial supervision or other matters? Has bail not yet been set because of administrative delays or the need to conduct risk assessment interviews? Is the person in jail as part of a legal strategy in anticipation of a plea deal or sentence to time served? What is the impact of substance abuse? Is the person subject to bail on multiple charges or in multiple cases? What is the effect of mandatory bond amounts in state statutes that create a presumption against release? "Each one of these," Wachinski said, "should be examined as a catalog of what potentially holds people in jail."*

  Wachinski called for a study that "embraces a deeper analysis of these issues, including a methodology that would take a sample of these cases where bond has been set but not posted and get involved at the file level to collect more meaningful criminal justice data as to the reasons the bail was not posted."
- *Studies Focusing on the Economic Incentives of Various Release Mechanisms. Wachinski proposed updating and expanding a 2004 study that investigated the various economic incentives provided by different forms of release. In that study, the researchers specifically focused on cases where a third-party bail agent posted the bond for an accused and, using statistical techniques, were able to estimate the probabilities of failure and re-capture under various forms of release. "This research is now over one decade old and is the only modern academic research on this topic," according to Wachinski. "The model used is sound, and could be replicated in various local jurisdictions over larger data sets to indicate the probabilities of various forms of release in terms of achieving the statutory goals of appearances and reduced time at large as a fugitive."*
- *Comparative Analyses of Effectiveness of the Forms of Release. Noting a lack of research that demonstrates the comparative success or failure of various forms of bond types and conditions of release, Wachinski encouraged researchers to replicate a study performed by Dr. Robert Morris of the University of Texas that embraced the following research questions:*

  - *Do failure to appear rates vary across release mechanisms and if so, by how much?*
  - *Does recidivism/pretrial misconduct vary across release mechanisms and if so, by how much?*
  - *What are the additional court costs associated with failure to appear rates across release types?*
  - *What are the strongest predictors of failure to appear across each release mechanism?*

- *Cost-Benefit Analysis of the Front-End of the Criminal Justice System. Wachinski recommended a study performed by an economist on the various forms of release that includes consideration of all the economic benefits and costs involved in release from custody—cost of a new crime, cost of a failure to appear, cost to the state of supervision, benefits of supervision, benefits of financial bails, benefits of court deposit bails (10%), benefits and costs of surety bonds, costs and benefits of jails, costs and benefits to the defendant, etc. Such research, Wachinski contended, "would help guide a focus on the most cost-effective way to achieve the desired results in light of all of the potential costs and benefits of making a particular decision as to the form and conditions of release."*
- *Studies on the Forms of Release that are Most Effective for Individuals with Substance Abuse and Alcohol Issues. According to Wachinski, no current academic studies focus on the issue of what form of release will be the most effective in cases where the accused has a severe substance abuse or alcohol problem. Such research would focus on the types of release that are most effective in terms of failure to appear, fugitive and recovery rates, and recidivism and pretrial misconduct rates when dealing with the specific population of those suffering from drug and alcohol addictions. Wachinski detailed an innovative program being developed by the bail industry called an "addiction bond," a diversionary program that lasts for 12 months and is especially tailored to heroin addiction. Instead of guaranteeing a defendant's appearance at trial, the bail bondsman guarantees the defendant's appearance at treatment, reporting such to the court at 30 day intervals.*

B. Submissions from the Field

In addition to the representatives from the four organizations who presented at the Roundtable, seven other entities or individuals with a stake in pretrial criminal justice research submitted recommendations for research, which are set out below:

Council of State Governments Justice Center. The Council of State Governments Justice Center is a national nonprofit organization that provides nonpartisan advice and evidence-based strategies to increase public safety to policymakers at local, state, and federal levels and in all branches of government. Hallie Fader-Towe, Senior Policy Advisor, together with research advisor Dr. Alex Holsinger, proposed the following ideas for study related to the need to respond to individuals with mental illness and/or substance abuse issues at the pretrial stage:

- *Are there any conditions under which a mental health indicator is a predictor for pretrial failure?*
  - *What definitions of "mental health" are in use by different jurisdictions?*
  - *What policies/processes are in place to establish whether an individual meets this definition?*
  - *How does this factor relate to risk of failure to appear or new criminal activity or violent activity?*
- *Are there any conditions under which a substance abuse indicator is a predictor for pretrial failure?*
  - *What definitions of "substance abuse" are in use by different jurisdictions?*
  - *What policies/processes are in place to establish whether an individual meets this definition?*
  - *How does this factor relate to risk of failure to appear or new criminal activity or violent activity?*
- *Are there different treatment and/or supervision strategies that are shown to reduce pretrial failure and increase connection to care among those with behavioral health needs?*

Justice Research and Statistics Association. The Justice Research and Statistics Association is a national nonprofit organization of state Statistical Analysis Center directors and other researchers and practitioners throughout government, academia, and the justice community who are dedicated to the use of research and analysis to make informed policy and program decisions. Dr. Jeffrey Leigh Sedgwick, its Executive Director, provided the following topics for a national research agenda:

- *Does it make sense to think in terms of a "national research agenda on pretrial justice"? "In the case of Pretrial Justice, participants include law enforcement, prosecutors, defense attorneys, and judicial officers at the federal, state, local, and tribal levels," Sedgwick wrote, "hence we might well want to reconceptualize the problem as one of supporting a robust and varied mix of research agendas, better to disseminate and institutionalize an evidence-based culture in varied settings and among varied actors."*
- *How should we define "success" in the context of risk pretrial risk assessment instruments? "At first glance, it seems quite reasonable to define success as the absence of failure to appear for the scheduled court date and/or re-arrest for further criminal violations prior to adjudication," Sedgwick wrote. But risk assessment tools can produce both false positives (an incorrect prediction that an individual will fail to appear or will be arrested for another offense prior to adjudication) and false negatives (an incorrect prediction that an individual may be safely released to the community without failing to appear or being arrested for another offense prior to adjudication). Accordingly, in Sedgwick's view, "In important ways that ought to be made explicit, risk assessment in pretrial justice is thus fundamentally an issue of the equitable distribution of cost or burden between the defendant and the community."*
- *How good are the data that we currently have to construct risk assessment scales and how can we get better data? Much research on pretrial risk assessment instruments has been based on limited samples sizes drawn from limited jurisdictions. This research isn't necessarily applicable the thousands of counties and jails in the United States. This number of geographically dispersed decision points raises the following research issues or needs, according to Sedgwick:*
  - *Data need to be collected from a very large number of sites; and*
  - *Pretrial risk assessment instruments need to be validated for that same large number of sites.*
- *What do we currently know about the service inventory available to those released or diverted from pretrial custody and the "dosage level" appropriate for each level of risk among a population of individuals under charge? "Collecting this data requires broadening the scope of data collection and puts a premium on established and sustainable data access at a convenient point of collection," Sedgwick wrote. In his view, one strategy for encouraging sustainable policy change at the local level would be to "harness the data access of state Statistical Analysis Centers and the leverage of State Administering Agencies (who distribute federal justice assistance funds)."*
- *What are the strategies by which discretionary judgment by prosecutors and judges can be made more transparent or its use be limited on a sustained basis in order to reduce disparity in treatment of those under charge? "There may be no more intractable problem in criminal and juvenile justice research than the lack of data on how prosecutors and judges exercise discretion in the disposition of cases," according to Sedgwick. "Successful implementation of pretrial risk assessment instruments will require a much greater level of understanding of how prosecutors and judges reach their decisions, and how to influence those decisions."*

National Center for Victims of Crime. The National Center for Victims of Crime advocates for stronger rights, protections, and services for victims of crime. It proposed three areas of inquiry:

- *Victim's Vulnerability. The Center identified the following research questions in this area:*
  - *To what extent are victims vulnerable to further victimization from the offender?*
  - *To what extent are victims vulnerable to offender manipulation, harassment, or intimidation designed to lead the victim to drop charges or disengage from the criminal justice system?*

    Secondary research questions under this heading could include:
  - *Are there certain crimes for which this is more or less likely?*
  - *To what extent does pretrial release decision-making take this into account?*
  - *What is the variability by victim demographic characteristics?*
  - *Does retaining the offender in custody sometimes create greater risk? If so, under what circumstances? What is the danger posed by release?*
  - *Do victims have time to relocate or take safety precautions prior to release?*
  - *How does victim cooperation with the criminal justice system differ in cases with pretrial release vs. those without, controlling for crime type and offense seriousness?*

    Potential methodologies for examining these questions might include review of arrest records, crime and incident reports, court records, and call for service history based on address, as well as victim surveys and interviews and matched case analysis.

- *Victims' Rights in the Pretrial Release Process. The Center proposed the following research questions in this area:*
  - *To what extent do victims participate in the pretrial release decision-making and supervision processes?*
  - *To what extent are victims provided notification throughout the pretrial release decision-making and supervision processes?*
  - *To what extent does victim notification and participation influence victim willingness to remain engaged with the criminal justice system?*

    Secondary research questions under this heading could include:
  - *What is the effect of non-participation and participation on victims?*
  - *Do notification and participation lead to increased victim safety?*
  - *Are there standard operating procedures in place to provide for notification?*
  - *Does notification occur, either in the presence or absence of such policies?*
  - *How do pretrial release decisions affect safety planning?*

    Potential methodologies for examining these questions might include review of program operating procedures, employee surveys, and victim surveys.

- *Effect of Victim-Offender Relationship. The Center listed the following research questions in this area:*
  - *What are the unique issues faced by victims who have children in common with their offenders?*
  - *How does victim-offender relationship affect pretrial release decisions and supervision?*

    Secondary research questions under this heading could include:
  - *How are custody decisions and practices affected by pretrial release decisions and supervision?*
  - *What are the pretrial release differences between stranger, acquaintance, and intimate partner cases?*

    Potential methodologies for examining these questions might include review of statutes and court records, as well as surveys of victims, advocates, and employees.

The National Judicial College. The National Judicial College provides education to judges at all levels of government. The Honorable Chad Schmucker, its President, emphasized that, when it comes to pretrial release decisions, judges can be risk averse. "They may view a potential mistake in a release decision as career-ending, should the defendant re-offend upon release as a result of the judge's decision not to detain." The judges the College educates therefore need, Schmucker wrote, "the most current data on the link between release, conditions imposed upon release, and the actual risk to public safety." He proposed research into judicial education around their discretion-based pretrial release decisions, including elements of implicit bias and procedural fairness – covering both how the process is perceived by the public and how judges reach decisions.

NCJA Center for Justice Planning. The NCJA Center for Justice Planning is a cooperative effort between the U.S. Department of Justice, Bureau of Justice Assistance, and the National Criminal Justice Association to support state, tribal, and local efforts to institutionalize comprehensive approaches to community-based strategic planning for justice. It offered research agenda recommendations in six areas:

- *Victim Participation in the Pretrial Process. NCJA made the following proposals for research in this area:*
  - *Process Evaluation:*
    - *Assess the degree to which victim rights are provided by pretrial programs*
    - *Determine feasibility of including victim-specific data in the risk assessment process*
    - *Assess the degree of utilization of actuarial risk assessments, such as the Ontario Domestic Assault Risk Assessment, that calculate how a man who has assaulted his female partner ranks among similar perpetrators with respect to risk and the likelihood of re-assault*
    - *Assess the use and effectiveness of Statewide Automated Victim Notification Systems in the pretrial process*
  - *Outcome Evaluation:*
    - *Measure the effect of victim participation in pretrial programs on pretrial release decisions and outcomes, subsequent criminal proceedings, and victim's well-being and perception of fairness during pretrial process and subsequent criminal proceedings.*
- *Risk Assessment Tools. NCJA made the following proposals for research in this area:*
  - *Are selective items in the current generation of risk assessment instruments (i.e. criminal history, employment, contacts with the criminal justice system) racially or socio-economically biased, and if so, what can be done to eliminate that bias without compromising predictive validity?*
  - *What is the long-term impact of pretrial risk assessment on racial disproportionality in jail and other correctional settings?*
  - *How and to what degree is the risk assessment process and the determination of risk using a structured instrument still influenced by practitioner discretion and subjective judgment?*
  - *How can individual bias in the risk assessment process be identified and addressed?*
  - *To what extent do pretrial release decisions and case management plans reflect the defendant's risk and needs identified through the risk assessment process?*

- *Data and Information Sharing. NCJA made the following proposals for research in this area:*
  - *What are the systems used (hardware and software, and who controls) for accessing necessary information for pretrial risk assessment?*
  - *What is the critical information needed to assess a jurisdiction's current pretrial activity, practice, and outcomes?*
  - *What are the biggest barriers (political and technological) to: (i) obtaining and accessing accurate and timely risk assessment data; and (ii) collecting and analyzing data to assess program impact and long term systemic change?*
  - *If data are not available or if there are gaps in certain areas of the state, could it become accessible with technical assistance provided to localities?*
  - *What governance structures and agreements are in place and needed to obtain and share criminal justice information?*
- *Incorporating Prevention Using a Public Health Model. NCJA made the following proposals for research in this area:*
  - *What lessons can be learned from applying prevention strategies that change community norms to pretrial services?*
  - *Where are the connections between prevention and pretrial reform?*
  - *What research is available to show the impact of prevention programs and future criminal justice contact and pretrial outcomes?*
- *Establishing the Knowledge Base for Sustained Reform. NCJA made the following proposals for research in this area:*
  - *What training and technical assistance and tools do states and local jurisdictions need to advance pretrial reform?*
  - *What are the costs associated with implementing pretrial reform efforts?*
  - *What are the most effective governance structures and agreements for advancing and sustaining pretrial reform efforts?*
  - *What are best practice strategies for consulting and engaging the public in pretrial reform efforts?*
- *Assessing Community Values and Expectations. NCJA made the following proposals for research in this area:*
  - *What are citizen expectations for their justice system and specifically pretrial services (e.g., parsimony, retribution, deterrence, rehabilitation)? How do citizen expectations impact pretrial services? How can the public best be engaged in designing pretrial responses?*
  - *Identify and compile public opinion surveys about components of the justice system and address those gaps.*

Professor Shima Baradaran Baughman, College of Law, University of Utah. Professor Baughman is a national expert on bail and pretrial prediction whose current scholarship examines criminal justice policy, prosecutors, drugs, search and seizure, international law and terrorism, and race and violent crime. She proposed the following recommendations focusing on pretrial release for the research agenda:

- *Research on the impact of the right to counsel on the bail decision.*
- *Research on the impact of providing neutral information to a judge by pretrial services on the bail release decision.*
- *National training of state and federal court judges on the current research and best practices in pretrial decision-making, to include training of federal judges on how to properly apply federal standards that mandate that the majority of defendants should be presumptively released.*

Texas Criminal Justice Coalition. The Texas Criminal Justice Coalition conducts policy research and analysis on issues impacting the criminal and juvenile justice systems, with an overall goal to reduce the state's over-reliance on incarceration. Leah Pinney, its Executive Director, recommended the following areas for study:

- *A thorough examination of the full system utilization costs of a pretrial release program reliant on commercial bail vs. a pretrial release program that relies on risk assessments and supervision performed by a pretrial services agency.*
- *As part of the* Jones v. City of Clanton *litigation in the federal courts in Alabama, the City of Clanton agreed to release all defendants charged with a misdemeanor offense on unsecured bond unless they had an outstanding warrant for failure to appear. This raises the following questions for study:*
  - *What is the impact of a categorical presumption of release on the risk assessment model?*
  - *Could a hybrid model that presumes release for certain categories of lower-level offenses and utilizes a universal risk assessment tool be as effective as a pure risk assessment model?*
  - *If so, which lower-level offenses would be best included for presumptive release?*

Part V

A Call For Action: A Proposed National Research Agenda

"If you change the front end of the system, you change the system."

Leah Garabedian, Esq.
Defender Counsel
National Legal Aid & Defender Association

To close the Roundtable, President Travis, together with Matt Alsdorf, Director of Criminal Justice for the Laura and John Arnold Foundation, began the work of narrowing down, categorizing, and prioritizing the dozens of recommendations for research that had originated during the gathering. "At the end of today, our hope is that we will have garnered from you in our conversation some actionable ideas in terms of a research agenda on pretrial issues broadly defined," Travis stated. His goal was to identify those projects that could draw public attention, advance thinking, and improve practice in pretrial in the near term: "In three to five years, we should be able to say: 'We have done things that have made a difference.'"

As an overarching framework to such an agenda, Travis provided four research touchstones:

1. Values and Mission. How is the criminal justice system supposed to benefit society? What is the mission of this complicated set of agencies and their exercise of discretion? How do we measure whether those overarching values have been achieved? Under this heading, participants raised issues of safety, community, legitimacy and public trust, procedural justice, racial justice, liberty and the social contract, the equitable distribution of risk, proportionality of punishment, parsimony, the presumption of innocence, and equal protection.

2. Data. How can we better describe the operations of the system? What data do we need for analytical, predictive, and instrumental purposes? Who has the data and how can it be mined? For descriptive purposes, participants noted the need for a uniform set of definitions, a need to map the landscape of data systems in the country, the need to ensure data quality, and the costs of building data infrastructure. For analytical purposes, participants discussed the need for cost/benefit analyses and studies that consider and compare variations in data over time, between jurisdictions, and amongst decision-makers.

3. Effectiveness. What works? How do we measure the effectiveness of the various systems and decision-makers that make up the pretrial stages? What research can we conduct to achieve system goals like reducing pretrial detention, removing racial bias, improving decision-making at the pretrial release stage, and addressing public health issues like substance abuse and serious mental illness that impact the criminal justice system?

4. Methods and Implementation. Who can perform such research? How do we advance and implement evidence-based change borne out by research to achieve better outcomes? How do we provide outreach and education to policymakers and decision-makers? Participants mentioned the possibility of building research consortiums or research centers, working to enact legislation, leveraging the resources of state coalitions, and engaging professional associations and the public. As research methods, demonstration projects, randomized control experiments, and legal research were suggested.

Questions for Research. Ultimately, the suggestions raised by these overarching touchstones must be boiled down into a research agenda. What follows are topics for study, categorized by pretrial phases or overarching system goals. A more detailed summary of the research questions raised by Roundtable participants is at **Appendix B**.

The Pretrial Landscape

Studies that Provide an Overview of Existing Practices and Outcomes

---

Law Enforcement

Studies on Individual and Organizational Behavior and its Impact on Outcomes

Studies on Policing and Racial Bias

Studies on Arrest and Alternatives to Initial Police-Citizen Interactions

---

Charging and Prosecutorial Discretion

Studies on Prosecutorial Discretion in Charging, Diversion, and Bail Decisions

Studies on the Impact Prosecutors Have on Case Processing

Studies on Prosecutorial Discretion and Racial Bias

Role of Defense Counsel

Studies on the Availability of Defense Counsel

Studies on the Impact of Defense Counsel on Outcomes at Various Pretrial Stages

---

Risk Assessment Tools

Studies on the Validity and Validation of Risk Assessment Tools

Studies on the Development of Risk Assessment Tools for Defendants Charged with Domestic Violence and DUI

Studies on the Adoption and Use of Risk Assessment Tools by Decision-makers

Studies on Risk Assessment Tools and the Potential for Embedded Racial Bias

Pretrial Release and Supervision

Comparative Analyses of Effectiveness of Various Forms of Release

Studies on the Impact of Bail on Release, FTA and Public Safety

Studies on Efficacy of Types of Supervision on Failure to Appear and Public Safety

Studies on Incentives to Ensure Pretrial Supervision Compliance

Cost-Benefit Analyses of Pretrial Release Forms vs. Pretrial Detention

---

Pretrial Detention

Micro-Analysis of the Jail Population to Determine Who is in Jail Pretrial and Why

Studies on the Reasons Why Pretrial Detention Leads to Negative Outcomes

---

Case Processing

Studies that Provide the Following Information on Case Processing:

- *Basic descriptive research that develops data-based typologies of case processing policies, practices, and outcomes in different levels of courts and different socio-political environments*
- *Comparative analysis that contrasts processes in jurisdictions with optimal and less optimal practices*
- *Assessments of the effectiveness of innovations designed to increase the fairness and timeliness of case processing and the legitimacy and proportionality of outcomes*

Studies that Assess Experiments with Changes in Procedural and Substantive Criminal Law and the Introduction of New Case Processing Practices

---

Judicial Discretion

Studies to Assess How Judges Exercise their Discretion

Studies on Judicial Education to Improve Decision-Making

Studies on Judicial Discretion and Racial Bias

Disposition

Studies to Evaluate a Full Range of Disposition Options and to Build the Infrastructure Necessary to Support Them, e.g.:

- *Behavioral Health Pathways*
- *Triaging Minor Offenses*
- *Restorative Justice*
- *Offender Mediation*
- *Individually Designed Sentences*

Victims' Rights / Community Impact

Studies Assessing the Level of Victim Participation in the Pretrial Process and its Impact on Outcomes

Studies Evaluating the Impact of Pretrial Decisions on Victims

---

Prevention and Public Health

Studies to Evaluate a Public Health Model of Crime Prevention, Considering the Needs of the Seriously Mentally Ill and Individuals with Substance Abuse and Alcohol Issues

---

Dissemination and Adoption of Research-Based Practices

Studies on the Dissemination of Innovation and the Adoption of Evidence-Based Practices

Studies on Implementation of Evidence-Based Best Practices

APPENDIX A

Participants' Biographies

Rachel Barkow is the Segal Family Professor of Regulatory Law and Policy and the Faculty Director of the Center on the Administration of Criminal Law at NYU. In June 2013, the Senate confirmed her as a Member of the United States Sentencing Commission. Since 2010, she has also been a member of the Manhattan District Attorney's Office Conviction Integrity Policy Advisory Panel. Professor Barkow teaches courses in criminal law, administrative law, and constitutional law. In 2013, she was the recipient of the NYU Distinguished Teaching Award. The Law School awarded her its Podell Distinguished Teaching Award in 2007. Her scholarship focuses on applying the lessons and theory of administrative and constitutional law to the administration of criminal justice. She has written more than 20 articles and is recognized as one of the country's leading experts on criminal law and policy. Barkow has testified before the Senate Judiciary Committee; the House of Representatives Subcommittee on Commerce, Trade, and Consumer Protection; and the U.S. Sentencing Commission. She has also presented her work to the National Association of Sentencing Commissions Conference, the Federal Judicial Center's National Sentencing Policy Institute, and the Judicial Conference of the Courts of Appeals for the First and Seventh Circuits. After graduating from Northwestern University (B.A. '93), Barkow attended Harvard Law School ('96), where she won the Sears Prize. She served as a law clerk to Judge Laurence H. Silberman on the D.C. Circuit and Justice Antonin Scalia on the U.S. Supreme Court. Barkow was an associate at Kellogg, Huber, Hansen, Todd & Evans in Washington, D.C.

Saurabh Bhargava is an Assistant Professor of Economics at Carnegie Mellon University. His research resides at the intersection of Economics and Psychology (Behavioral Economics) with a particular focus on questions with relevance to public policy. Recent projects have examined whether consumers are able to make sensible health insurance choices, why eligible individuals fail to claim social benefits such as the EITC, the psychological causes of long-term unemployment, the role of insurance incentives and their complexity on behavior, how perceptual biases influence judicial sentencing (and speed dating!), and the factors that determine happiness. This research has been published in journals such as the American Economic Review, the American Economic Journal, the Review of Economics and Statistics, and Psychological Science, and has been covered by media outlets including the New York Times, NPR, Bloomberg, New York Magazine, and CNBC. Prior to joining CMU, Dr. Bhargava taught at the Booth School of Business at the University of Chicago and was a consultant at McKinsey & Co.

Barbara Broderick was selected to be the Chief Probation Officer of the Maricopa County Adult Probation Department in December 2000. From June 2005 to August 2006, she served as Interim Chief Juvenile Probation Officer for Maricopa County. Prior to that, Broderick was the State Director for Adult Probation for the Arizona Supreme Court. In that position, she provided technical assistance to local jurisdictions and substance abuse treatment providers. She is knowledgeable in the areas of risk assessment, probation performance measures, drug courts, parole guidelines, substance abuse treatment with criminal defendants, sex offender supervision, enforcement of financial obligations, and the theory and practice of community justice. Prior to joining the Arizona judicial system, Broderick was the New York State Director of Probation and Correctional Alternatives. She has been involved with the development and expansion of drug courts and substance abuse treatment, the design and implementation of an operational review process for the oversight of fifteen probation departments, and the development of probation performance measures in her current home state. Broderick serves as chair of the Arizona Parents' Commission on Drug Education and Prevention and on the Maricopa County Community Justice Advisory Board. She is the past President of the American Probation and Parole Association and is a member of the American Corrections Association, the National Association of Drug Court Professionals, and the National Association of Probation Executives. Broderick earned her B.A. in History at Niagara University and her M.A. at the School of Criminal Justice at the State University of New York at Albany.

John T. Chisholm is the District Attorney of Milwaukee County. His office handles criminal cases for the State of Wisconsin in the Milwaukee County Circuit Court. As District Attorney, Chisholm organizes his office to work closely with neighborhoods through his nationally recognized Community Prosecution program. He designed a Child Protection Advocacy Unit to better serve child victims, formed a Public Integrity Unit to focus on public corruption matters and a Witness Protection Unit to thwart attempts to intimidate victims and witnesses of crime. He helped start the drug treatment court and participated in Milwaukee County's selection as a seed site for the National Institute of Corrections' Evidence Based Decision Making framework. Chisholm is an Army Veteran and worked with the Veterans' Administration and collaborative partners to establish resources for veterans who encounter the criminal justice system in Milwaukee County, resulting in the opening of the Veterans Treatment Initiative and Treatment Court. He is past chair of the Milwaukee County Community Justice Council and currently chairs the Washington D.C. based Association of Prosecuting Attorneys.

John T. Chisholm sits on numerous boards including the Milwaukee Homicide Review Commission, Safe & Sound, and the Milwaukee High Intensity Drug Trafficking Area board. He is a graduate of Marquette University and the University of Wisconsin Law School.

Elyse Clawson is a founder and Principal for Justice System Partners and brings over 30 years of experience in both executive level roles in correctional agencies and as a nationally recognized consultant. She specializes in criminal and juvenile justice system reform at the state and local level, and is known for her innovative approaches to complex problems. Previously, Clawson was Executive Director for the Crime and Justice Institute for 13 years. She led the team that developed the Integrated Model for Evidence Based Practices for the National Institute of Corrections, which is now widely used across the country. Prior to CJI, Clawson was Executive Director of Multnomah County Department of Community Justice, where she assisted elected officials and partners in the development of countywide criminal and juvenile justice policy. In this role, she was able to substantially reduce juvenile detention and jail bed usage, and racial and ethnic disparities through pretrial supervision practices and an administrative sanctions system for probation. Clawson implemented evidence based programming in both the adult and juvenile divisions of the department. As Assistant Director for the Oregon Department of Corrections, she developed several pieces of legislation to reform community corrections, and implemented a risk assessment system in community corrections, administrative sanctions, and evidence based reentry programs. Clawson has been a consultant to elected officials, state and local leaders on policy and practice reform. She has led planning at the system and organizational level, provided leadership coaching, organizational change, and implementation assistance. She has overseen several large-scale reform efforts, both as a consultant and as an agency leader, and has a comprehensive understanding of the complexities to consider in developing new models and frameworks for doing business.

Mona Danner is Professor of Sociology and Criminal Justice at Old Dominion University in Norfolk, Virginia. Social inequalities, crime control policies, pretrial justice, and globalization comprise her primary research and teaching interests. With Dr. Marie VanNostrand of Luminosity, she recently completed *Risk-Based Pretrial Release Recommendation and Supervision Guidelines: Exploring the Effect on Officer Recommendations, Judicial Decision-Making, and Pretrial Outcome*. Dr. Danner has presented at conferences throughout the U.S., in Europe, Latin America, Australia, and at the NGO Forum held in conjunction with the 1995 United Nations Conference on Women in Beijing, China. She regularly conducts workshops on issues for women in academia and on the process of negotiating academic contracts. A reviewer for numerous scholarly journals, she has served as associate editor or on the editorial board of four journals, and as a reviewer for NIJ and NSF grants and for departmental and graduate programs, in addition to having held a number of administrative positions including Associate Dean at ODU. Dr. Danner has published op-eds, been featured in television and radio interviews, and been quoted by the popular print media.

Leah Garabedian serves as Defender Counsel for the National Legal Aid & Defender Association. Through policy advocacy, strategic alliances, and training and technical assistance, she works to promote the critical importance of public defense and to support public defenders in their pursuit of justice for all. NLADA has recently been named the training and technical assistance (TTA) provider for the Smart Defense Initiative, part of the Bureau of Justice Assistance's "Smart Suite." As the TTA lead for Smart Defense, Garabedian will work with five defender sites across the country, collaborating with diverse and impressive teams, to build and implement evidence based, data driven solutions to improve the quality of public defense representation. She brings a diverse range of experience, having practiced criminal law for six years, first with the Missouri State Public Defender and then in private practice on trial and appellate cases in both federal and state court. As Senior Associate with the Pew Charitable Trusts, Garabedian worked on public policy and legislative reform, providing technical assistance under the Bureau of Justice Assistance's Justice Reinvestment Initiative. Garabedian has a B.A. in Philosophy from Colgate University and a J.D. from Washington & Lee University School of Law.

Michael Jones is the Director of Implementation for the Pretrial Justice Institute (PJI), where he has worked since 2010. At PJI, he directs the Bureau of Justice Assistance's Smart Pretrial Demonstration Initiative, oversees training and technical assistance for states, localities, and various stakeholder organizations, and assists states and local jurisdictions in understanding and implementing more legal and empirically-based pretrial policies and practices by designing strategic, system-change initiatives, delivering technical assistance, performing empirical research, and publishing resource materials. Dr. Jones also works as a technical resource provider for the National Institute of Corrections, and previously served as the Criminal Justice Planning Manager for Jefferson County, Colorado, for nine years. He received his Ph.D. in Clinical Psychology from the University of Missouri-Columbia.

Marc A. Levin, Esq., is the director of the Center for Effective Justice at the Texas Public Policy Foundation and Policy Director of its Right on Crime initiative. In 2010, Levin developed the concept for the Right on Crime initiative, which has become the national clearinghouse for conservative criminal justice reforms. Levin has testified on sentencing reform and solitary confinement at separate hearings before the U.S. Senate Judiciary Committee, and has testified before legislatures in states such as Texas, Nevada, Kansas, Wisconsin, and California. In 2007, he was honored in a resolution unanimously passed by the Texas House of Representatives that stated, "Mr. Levin's intellect is unparalleled and his research is impeccable." Levin served as a law clerk to Judge Will Garwood on the U.S. Court of Appeals for the Fifth Circuit and Staff Attorney at the Texas Supreme Court.

James P. Lynch is professor and chair of the Department of Criminology and Criminal Justice at the University of Maryland and director of the Maryland Data Analysis Center. Dr. Lynch joined the department after serving as the director of the Bureau of Justice Statistics in the United States Department of Justice. Previously, he was a distinguished professor in the Department of Criminal Justice at John Jay College, City University of New York. He was a professor in the Department of Justice, Law and Society at American University from 1986 to 2005 and chair of that department from 2003 to 2005. Dr. Lynch's research focuses on victim surveys, victimization risk, the role of coercion in social control, and crime statistics. He has published four books and numerous articles, many of them dealing with crime statistics. He was vice president-elect of the American Society of Criminology and currently is president-elect of that association. He served on the Committee on Law and Justice Statistics of the American Statistical Association. From 2008 to 2010 he was co-editor of the Journal of Quantitative Criminology. Dr. Lynch received his B.A. degree from Wesleyan University and his M.A. and Ph.D. in sociology from the University of Chicago.

Barry Mahoney is a Denver-based researcher and consultant whose work focuses principally on court and justice system operations. From 1993 to 2014 he was with The Justice Management Institute (JMI), serving twice as JMI's President (1993-2002 and 2008-2009). Since retiring from active work with JMI in 2014, he has been doing research on bail, sentencing, and post-conviction supervision issues, and occasionally taking teaching and consulting assignments. While with JMI, Dr. Mahoney developed and led national scope and local jurisdiction projects in areas that include court delay reduction, pretrial services, drug court planning and implementation, rural courts, assistance for self-represented litigants, use of fines and other intermediate sanctions, and strengthening justice system operations to help prevent the conviction of innocent persons. Before helping to found JMI in 1993, he was with the National Center for State Courts and the Institute for Court Management for nineteen years. In earlier years, Dr. Mahoney had extensive litigation experience handling criminal and constitutional law cases as an Assistant Attorney General in New York State. He has been an Associate Director of the National Center for State Courts; Director (twice) of the London Office of the Vera Institute of Justice; and Director of Research at the Institute for Court Management. He is the author of numerous publications on justice system operations and has led many educational programs in the U.S. and abroad. He is a graduate of New York City public schools, Dartmouth College, and Harvard Law School, and holds a Ph.D. in Political Science from Columbia University.

Anne Milgram is the Vice President of Criminal Justice at the Laura and John Arnold Foundation. Prior to joining the Arnold Foundation, Milgram served as New Jersey's Attorney General, where she headed the 9,000-person Department of Law and Public Safety. As New Jersey's chief law enforcement officer, she oversaw hundreds of prosecutors and approximately 30,000 law enforcement officers. Milgram implemented a statewide program to improve public safety through prevention of crime, law enforcement reform, and re-entry initiatives. She also served as a member of the United States' Attorney General's Executive Working Group on Criminal Justice and as a co-chair of the National Association of Attorneys General Criminal Law Committee. Prior to becoming Attorney General, Milgram served as First Assistant Attorney General and, before that, was Counsel to a United States Senator. She also previously served as a federal prosecutor in the Criminal Section of the United States Department of Justice's Civil Rights Division, prosecuting complex international sex trafficking, forced labor, domestic servitude, and hate crimes cases. In 2004, Milgram became the lead federal prosecutor in the country for human trafficking crimes. Milgram was also awarded the United States Department of Justice Special Commendation for Outstanding Service and the United States Department of Justice Director's Award. She began her prosecution career as an Assistant District Attorney in the Manhattan District Attorney's office. She graduated summa cum laude from Rutgers and holds a masters of philosophy degree in social and political theory from the University of Cambridge in England. She received her law degree from New York University School of Law and clerked for United States District Court Judge Anne E. Thompson in Trenton, New Jersey from 1996 to 1997. In addition to her work with the Laura and John Arnold Foundation, Milgram serves as a Senior Fellow at the NYU Law School Center on the Administration of Criminal Law and teaches a seminar course on Human Trafficking at the Law School. She is also a member of the Covenant House International Board of Directors.

Jim Parsons serves as vice president and research director of Vera Institute of Justice. He is responsible for shaping Vera's research agenda and working closely with practitioners, government officials, and partner institutions to implement research findings. Parsons joined Vera in March 2003. He previously served as both the director of the Substance Use and Mental Health Program and research director of the International Program. His work has included studies measuring the overlap of mental illness and incarceration in New York City and Washington, D.C.; the provision of jail-to-community reentry services in New York City and Los Angeles; an evaluation of the implementation and impacts of drug law reforms in New York City; and an ongoing study of the challenges that people with serious mental health disorders face accessing effective legal defense representation. Parsons also directed Justice and Health Connect, a federally funded initiative to improve information sharing as a tool for coordination between justice and health systems. His international work includes a number of projects to develop and implement empirical rule of law indicators for the UK Department for International Development and United Nations Department for Peacekeeping Operations, and the American Bar Association. This work has included data collection in Chile, Haiti, India, Liberia, Nigeria and South Sudan. For the past ten years, he has consulted

on justice reform projects in China. Prior to joining Vera, Parsons worked at the Center for Research on Drugs and Health Behavior and the Institute for Criminal Policy Research in London, where he conducted community studies of HIV prevalence among injecting drug users and evaluated needle exchange programs and prison reentry services. He holds an MSc in social research methods from the University of Surrey.

Jennifer M. Perez was appointed Director of Trial Court Services for the New Jersey Judiciary in May 2015, and in this role she manages central office operations related to the Civil, Family, Criminal, Probation and Automated Trial Court Services divisions. She also provides support and assistance to judges, managers, and staff throughout the trial courts. In addition to policy and operational issues, Perez works in close collaboration with members of the Information Technology Office (ITO) related to the development of a web-based application for electronic filing, electronic case management, and electronic records retention. Perez is a member of the Advisory Committee on Information Technology, as well as other committees within the Judiciary. She was also a member of the Supreme Court's Special Committee on Electronic Filing, and a former member of the Advisory Committee on Public Access. Perez is a graduate of St. Joseph's University in Philadelphia, where she obtained her undergraduate degree in International Relations and Economics, and of Rutgers Law School in Camden, where she obtained her J.D. degree. Perez began her career with the Judiciary as a law clerk to the Honorable Joseph M. Nardi, Jr., in the family division of the Camden Vicinage. After a brief period practicing matrimonial law and civil litigation, she returned to the Judiciary and has held management/court administration positions in the family and civil divisions. Prior to becoming the Director of Trial Court Services, Perez was the Judiciary's Chief of the Automated Trial Court Services Unit from 2013 to 2015, where she oversaw the development and implementation of eCourts for the Criminal and Tax Courts. She was also the Clerk of Superior Court from 2008 to 2013, responsible for foreclosure case processing, statewide judgment lien processing, electronic access to court records in the Judiciary's case management databases, and Superior Court records management. Perez worked in the Camden Vicinage for over 10 years, first in the Family Division and then as a Civil Division Manager.

Carol V. Petrie is currently a consultant working in the field of criminal justice research. Since 2010 she has worked with Development Services Group (DSG Inc.) on a project for the Office of Justice Programs and the National Institute of Justice. Prior to her retirement in 2009, she served as staff director of the Committee on Law and Justice at the National Research Council, a position she held for twelve years. During her tenure, she oversaw the development of over 20 National Research Council reports. Prior to her work there, she was the director of planning and management at the National Institute of Justice, responsible for policy development and administration. In 1994, she served as the acting director of the National Institute of Justice. Throughout a 30-year career, she worked in the area of criminal justice research, statistics, and public policy, serving as a project officer and in administration at the National Institute of Justice, the Bureau of Justice Statistics, and The District of Columbia Department of Corrections. She has conducted research on violence, and managed numerous research projects on the development of criminal behavior, policy on illegal drugs, domestic violence, child abuse and neglect, transnational crime, and improving the operations of the criminal justice system. Early in her career she worked as a High School English teacher in Camden, New Jersey, and Minot, North Dakota. She graduated from Kent State University. While attending Kent State, she co-founded their collegiate branch of the NAACP. Petrie's other interests include choral singing, travel, volunteer work. And baseball.

Janice Radovick-Dean, currently the Director of the Fifth Judicial District of Pennsylvania's Pretrial Services Department, began her career with the Allegheny County Probation Department in 1989. During that time Dean has worked in the DUI Unit, the Electronic Monitoring Unit, and the County's Drug Court Program. In 2001, Dean aided in the creation of the Allegheny County Ignition Interlock Program, which is one of the only County operated Programs in the state. In 2007, she was transferred to the newly created Pretrial Services Department. Dean has been instrumental in the creation of policies and procedures and to the overall changes made in the department and the Court. She holds degrees in Administration of Justice and Criminology from the University of Pittsburgh. Dean serves as Immediate Past President of the Pennsylvania Pretrial Services State Association, and serves as the Affiliate Director for the National Association of Pretrial Services.

Carla Shedd is Assistant Professor of Sociology and African American Studies at Columbia University. Dr. Shedd received her Ph.D. in Sociology from Northwestern University. Her research and teaching interests focus on: crime and criminal justice; race and ethnicity; law; inequality; and urban sociology. Dr. Shedd's first book, Unequal City: Race, Schools, and Perceptions of Injustice (October 2015, Russell Sage), focuses on Chicago public school students, and is a timely examination of race, place, education, and the expansion of the American carceral state. Dr. Shedd's current research focuses on New York City's juvenile justice system, investigating how young people's linked institutional experiences influence their placement on and movement along the carceral continuum. Dr. Shedd has been published in the American Sociological Review and Sociological Methods & Research, and she has received fellowships from the Russell Sage Foundation and the Ford Foundation.

Faye S. Taxman, Ph.D., is a University Professor in the Criminology, Law and Society Department and Director of the Center for Advancing Correctional Excellence at George Mason University. She is recognized for her work in the development of systems-of-care models that link the criminal justice system with other service delivery systems, as well as her work in reengineering probation and parole supervision services and in organizational change models. Her work covers the correctional system from jails and prisons to community corrections, and adult and juvenile offenders. She has received grants from the National Institute on Drug Abuse, National Institute of Justice, National Institute of Corrections, Office of National Drug Control Policy and Bureau of Justice Assistance. She has active "laboratories" with the Maryland Department of Public Safety and Correctional Services. She developed the RNR Simulation Tool. Dr. Taxman has published more than 155 articles, including "Tools of the Trade: A Guide to Incorporating Science into Practice," and "Implementing Evidence-Based Community Corrections and Addiction Treatment" (Springer, 2012 with Steven Belenko). She is co-editor of the journal Health & Justice. The American Society of Criminology's Division of Sentencing and Corrections has recognized her as Distinguished Scholar twice, and she is the recipient of the Rita Warren and Ted Palmer Differential Intervention Treatment award. She has a Ph.D. from Rutgers University's School of Criminal Justice.

John Scott Thomson was sworn in as chief of the Camden County Police Department on May 1, 2013. Prior to that, he served as chief of the former Camden Police Department for five years. Chief Thomson has been in law enforcement since 1992. He holds an M.A. in education from Seton Hall University and a B.A. in sociology from Rutgers University. Chief Thomson ascended through the ranks of the Camden Police Department, serving in various operational and investigative positions and commands and receiving several commendations such as the Narcotic Detective of the Year in 1999 from the New Jersey County Narcotic Commanders Association. He served on the New Jersey Supreme Court Special Committee on Discovery in Criminal and Quasi-Criminal Matters. In 2011, Chief Thomson received the Gary P. Hayes Award from the Police Executive Research Forum. He sits on the board of advisors for New York University School of Law Center on the Administration of Criminal Law. Chief Thomson serves as an Executive Fellow for the Police Foundation and sits on the board of directors for the Police Executive Research Forum in Washington, D.C.

Jeremy Travis is president of John Jay College of Criminal Justice at the City University of New York. Prior to his appointment, he served as a Senior Fellow in the Urban Institute's Justice Policy Center, where he launched a national research program focused on prisoner reentry into society. From 1994-2000, Travis directed the National Institute of Justice, the research arm of the U.S. Department of Justice. Prior to his service in Washington, he was Deputy Commissioner for Legal Matters for the New York City Police Department (1990-1994), a Special Advisor to New York City Mayor Edward I. Koch (1986-89), and Special Counsel to the Police Commissioner of the NYPD (1984-86). Before joining city government, Travis spent a year as a law clerk to then-U.S. Court of Appeals Judge Ruth Bader Ginsburg. He began his career in criminal justice working as a legal services assistant for the Legal Aid Society, New York's indigent defense agency. He has taught courses on criminal justice, public policy, history, and law at Yale College, the New York University Wagner Graduate School of Public Service, New York Law School, and George Washington University. He has a J.D. from the New York University School of Law, an M.P.A. from the New York University Wagner Graduate School of Public Service, and a B.A. in American Studies from Yale College. He is the author of *But They All Come Back: Facing the Challenges of Prisoner Reentry* (Urban

Institute Press, 2005), co-editor (with Christy Visher) of *Prisoner Reentry and Crime in America* (Cambridge University Press, 2005), and co-editor (with Michelle Waul) of *Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities* (Urban Institute Press, 2003). He has published numerous book chapters, articles, and monographs on constitutional law, criminal law, and criminal justice policy.

Marie VanNostrand is an experienced practitioner, skilled researcher, and nationally recognized expert in the pretrial phase of the criminal justice system. She has presented at national and statewide conferences, participated in a congressional briefing, and presented at the U.S. Attorney General's symposium on pretrial justice. Dr. VanNostrand's path to career fulfillment began with a strong desire to make a difference. Her goal was to reshape the pretrial justice system by developing both risk measurement and risk management strategies to ensure equal justice for all. In pursuit of this goal, she has led the largest studies ever conducted on pretrial risk assessment, alternatives to detention, and the impact of the pretrial release and detention decision. Over the course of her career, Dr. VanNostrand also amassed an impressive list of academic credentials. She's earned a Master's Degree in Public Administration, a second Master's degree in Urban Studies and a Doctorate in Public Policy with a specialty in research methods and statistics. Most impressively, she accomplished all this while working full time in the field. Before cofounding Luminosity, Marie gained 15 years of experience serving as a probation and parole officer, a pretrial services agency manager, and a criminal justice analyst. Her unique combination of practical experience and educational achievements serve her well in her role as Luminosity's justice project manager. Her extensive subject matter expertise drives the company forward on its continuing quest for a more equitable pretrial justice system.

Nicholas Wachinski is a lifelong resident of the Commonwealth of Pennsylvania. He began his practice as an attorney in 2006 with licensure in both the State of New Jersey and Commonwealth of Pennsylvania, and has tried cases in Pennsylvania, New Jersey, and Federal Court. In addition to his service to the American Bail Coalition, Wachinski currently serves as Chief Executive Officer of Lexington National Insurance Corporation in Maryland and serves as instructor for the Pennsylvania Supreme Court, Minor Judiciary Education Board, being originally appointed in 2010. In his capacity as an instructor, he has the privilege of teaching District Judges of Pennsylvania the rules/issues relating to bail, bail forfeitures, bail revocations, and bench warrants. Mr. Wachinski was appointed an advisor to the Pennsylvania General Assembly Joint State Government Commission in 2011 as part of an initiative to restructure the First Judicial District of Pennsylvania (Philadelphia). Specifically, he advises on issues relating to the establishment/revision of bail guidelines and the establishment of a system of best practices in bail matters for the Commonwealth of Pennsylvania. Wachinski frequently is called to provide advice/counsel to members of the Pennsylvania House of Representatives, members of the Pennsylvania Senate, Judges and members of the Pennsylvania Supreme Court Rules Committee on the issues of criminal procedure, bail, , and court reform.

Judge Roger K. Warren is the President Emeritus of the National Center for State Courts (NCSC), serving as President of the NCSC from 1996 to 2004. He currently serves as a principal consultant to the NCSC and its partnership with Pew Charitable Trusts' Public Safety Performance Project. From 2005 to 2012, Judge Warren served as Scholar-in-Residence with the Judicial Council of California, where he coordinated the Judicial Council's implementation of evidence-based practices to reduce recidivism and probation performance incentive funding programs. He is the author of over a dozen works on evidence-based sentencing and has conducted evidence-based practice training programs for judges and other criminal justice practitioners in over 30 states. Previously, Judge Warren served for twenty years as a trial judge in Sacramento, California, where he established Sacramento's pretrial release program, and was the Founder and First Chair of the Sacramento Criminal Justice Cabinet. He received the California Jurist of the Year award in 1995, and Sacramento Judge of the Year awards in the years 1987, 1993, and 1994. He also represented the California judicial branch on the California Constitution Revision Commission. Prior to his appointment to the bench, Judge Warren served as Executive Director of Northern California Legal Services. He graduated from Williams College and, following a Fulbright Fellowship to Iran, received a Master's Degree in Political Science and J.D. degree from the University of Chicago, where he served on the Editorial Board of the University of Chicago Law Review.

Robert E. Worden is the director of the John F. Finn Institute for Public Safety, Inc., and associate professor of criminal justice at the University at Albany, State University of New York. He holds a Ph.D. in political science from the University of North Carolina at Chapel Hill. Dr. Worden's interests revolve around questions about the accountability and responsiveness of criminal justice institutions to the public. Thus his work includes both basic research – concerned with explaining the behavior of criminal justice actors in terms of political, organizational, and social influences – and applied research – concerned with the implementation and outcomes (read: social benefits) of criminal justice policies and programs; most of it focused on police behavior and police programs and reforms. His scholarship has appeared in Justice Quarterly, Criminology, Law & Society Review, and other academic journals, and his research has been funded by the National Institute of Justice, the Bureau of Justice Assistance, the New York State Division of Criminal Justice Services, and other sponsors. Dr. Worden served on the National Research Council's Committee to Review Research on Police Policies and Practices, whose report, *Fairness and Effectiveness in Policing: The Evidence*, was published by the National Academies Press in 2004.

APPENDIX B

A Summary Of Research Questions Raised By Roundtable Participants

The Pretrial Landscape

Studies that Provide an Overview of Existing Practices and Outcomes

- *What is the existing statutory landscape of pretrial criminal justice in the United States?*
- *What is causing the following trends in pretrial?*
  - *increase in the pretrial population*
  - *decrease in the use of release on recognizance (ROR)*
  - *increase in the use of secured bond*
  - *increase in the arrest to pretrial detention ratio*
  - *increase in simple assault and drug possession while crime overall is decreasing*

Law Enforcement

Studies on Individual and Organizational Behavior and its Impact on Outcomes

- *How do individual officers exercise their discretion and how is variation in that exercise patterned by officers' backgrounds and characteristics?*
- *What can we learn about the nature and impact of formal and informal characteristics of police organizations on police efficacy and behavior, including their policies, procedures, incentives and disincentives, workload, supervision, training, or peer group norms, as well as bureaucratization, decentralization of authority, job specialization, geographic deployment, and management accountability mechanisms?*
- *What is the impact of forms of external oversight on police behavior, including that by local elected officials, citizen oversight mechanisms like civilian review boards, and other structures like police auditors?*
- *How do department strategies or policies affect arrest priorities, arrest rates, and the demographics of arrestees?*

Studies on Policing and Racial Bias

- *What is the racial make-up of police departments as compared to the communities they serve?*
- *What impact does the racial make-up of a department have on outcomes like arrest?*

  How does the race of officers and how that intersects with the race of the citizens they police change citizens' assessment of police-citizen interactions?
- *What situational contexts lead to prejudicial behavior and who is prone to such bias?*

Studies on Arrest and Alternatives to Initial Police-Citizen Interactions

- *How do police exercise their authority to arrest? What forces shape their behavioral patterns?*
- *What are the determinants of officers' choices to exercise forms of authority that are associated with arrest, such as the use and misuse of physical force; decisions to frisk, search, or ask for consent to search; and decisions to stop citizens?*
- *What forces shape officers' choices among non-arrest alternatives, such as warning, advising, or referral to other social services?*
- *By what metric can we measure crime prevention?*

Charging and Prosecutorial Discretion

Studies on Prosecutorial Discretion in Charging, Diversion, and Bail Decisions

- *What factors influence a prosecutor's decision to bring felony charges in a case?*
  - *Are particular charging guidelines used?*
  - *Is the charging decision based on the ultimate dispositional sentence available?*
  - *Is the charge made as leverage to be used in future plea negotiations?*
  - *Does the officer's presentation of the case impact the charge?*
  - *Does the victim's response affect prosecutorial decision-making?*
  - *What is the role of police in charging independent of prosecutors?*
- *How is prosecutorial decision-making affecting the misdemeanor docket?*
  - *When and why do prosecutors dismiss misdemeanors?*
  - *What information do prosecutors have about the impact of case continuances when making decisions about misdemeanor case management? Do they perform any kind of cost-benefit thinking about the criminogenic impact of pretrial detention?*
- *How do prosecutors make decisions about diversion?*
  - *Who do prosecutors think are eligible to participate in diversion? What level risk of offender can and should be diverted?*
  - *Are there racial biases involved in how decisions to divert are being made?*
  - *Are people being required to plead guilty as a condition of diversion? How does that type of model compare to one that does not require a guilty plea?*
  - *What kind of reward or incentive should be given to someone who participates in a diversion program? Reductions in sentence? Outright dismissal? How is success measured?*
  - *What is the impact of statutory or policy bars to participation in diversion programs?*

- *What influences prosecutors to make bail requests?*
  - *Is it based on charge severity, criminal history, and/or office policy or practice?*
  - *Can risk tools assist prosecutors in making bail requests?*
  - *What kind of system impact might be felt if prosecutors began to waive bail in certain cases?*

Studies on the Impact Prosecutors Have on Case Processing

- *How do office procedures and systems impact case processing times and how can these be improved?*
- *What is the impact of junior vs. senior prosecutorial staff on case processing, including requests for continuances?*

Studies on Prosecutorial Discretion and Racial Bias

- *What is the impact of implicit or explicit bias in prosecutorial decisions on charging, bail, and case processing?*

Role of Defense Counsel

Studies on the Availability of Defense Counsel

- *How many people are facing a liberty decision in the United States without appointed counsel?*

Studies on the Impact of Defense Counsel on Outcomes at Various Pretrial Stages

- *Do outcomes change if defendants are provided counsel at first appearance and how?*
- *What is the impact of prompt appointment of counsel on pretrial detention decisions?*
- *What is the impact of right to counsel on bail decisions?*

Risk Assessment Tools

Studies on the Validity and Validation of Risk Assessment Tools

- *What are the challenges related to exporting tools validated for one jurisdiction to another?*
- *When do tools need to be revalidated and what is the procedure for doing so?*

Studies on the Development of Risk Assessment Tools for Defendants Charged with Domestic Violence and DUI

- *Can tools be developed to assess risk for defendants charged with domestic violence or driving under the influence? What factors predict and measure risk of failure to appear (FTA) and re-offense in these contexts?*

Studies on the Adoption and Use of Risk Assessment Tools by Decision-makers

- *How do judges, prosecutors, defense attorneys, and other justice officials use the results of risk assessments and how can their actions and impact be quantified for study?*
- *How, and to what degree is the risk assessment process and the determination of risk using a structured instrument still influenced by practitioner discretion and subjective judgment?*

Studies on Risk Assessment Tools and the Potential for Embedded Racial Bias

- *Are selective items in the current generation of risk assessment instruments (i.e., criminal history, employment, contacts with the criminal justice system) racially or socio-economically biased, and if so, what can be done to eliminate that bias without compromising predictive validity?*
- *What is the long-term impact of pre-trial risk assessment on racial disproportionality in jail and other correctional settings?*
- *How can individual bias in the risk assessment process be identified and addressed?*

Pretrial Release and Supervision

Comparative Analyses of Effectiveness of Various Forms of Release

- *Do failure to appear (FTA) rates vary across release mechanisms and if so, by how much?*
- *Does recidivism/pretrial misconduct vary across release mechanisms and if so, by how much?*
- *What are the strongest predictors of FTA across each release mechanism?*
- *What is the impact of a categorical presumption of release on the risk-assessment model? If so, which lower-level offenses would be best included for presumptive release?*
- *What legislative restrictions on pretrial release exist and what is their impact?*

Studies on the Impact of Bail on FTA and Public Safety

- *Do secured bonds serve as a deterrent to FTA or pretrial criminal activity?*

Studies on Efficacy of Types of Supervision on Failure to Appear and Public Safety

- *What release conditions are effective in reducing pretrial risk of FTA and new criminal activity, and for which defendants?*
- *What risk factors do we need to understand to assess appropriate pretrial supervision services?*
- *To what extent do pre-trial release decisions and case management plans reflect the defendant's risk and needs identified through the risk assessment process?*
- *What are the potential improvements in outcomes for jurisdictions that incorporate non-traditional services such as providing behavioral health treatment, assistance with obtaining public benefits, workforce development opportunities, or childcare during court and other appearances?*
- *How can pretrial services be developed that specifically adapt to and meet the needs of the increasing numbers of women and girls in the criminal justice system?*

Studies on Incentives to Ensure Pretrial Supervision Compliance

- *Given the high costs of non-compliance, why do some defendants fail to comply with pretrial conditions?*
- *How can compliance with pretrial conditions be maximized?*
- *How can messaging and reminders best be designed to ensure court appearance?*

Cost-Benefit Analyses of Pretrial Release Forms vs. Pretrial Detention

- *What are the comparative costs and benefits of pretrial release vs. detention, considering all economic factors?*
- *What are the comparative costs of pretrial release programs that rely on commercial bail vs. those that rely on risk assessments and supervision performed by a pretrial services agency?*

Pretrial Detention

Micro-Analysis of the Jail Population to Determine Who is in Jail Pretrial and Why

- *For what other reasons besides inability to pay bail are people in jail, including holds, nonpayment of criminal justice fines and fees, administrative delays, legal strategy, or lack of social supports?*
- *What is the effect of mandatory bond amounts in state statutes that create a presumption against release?*

Studies on the Reasons Why Pretrial Detention Leads to Negative Outcomes

- *What are the mechanisms at play that cause pretrial detention to lead to future criminal justice involvement?*

Case Processing

Studies that Provide the Following Information on Case Processing:

- *Basic descriptive research that develops data-based typologies of case processing policies, practices, and outcomes in different levels of courts and different socio-political environments*
- *Comparative analyses that contrast processes in jurisdictions with optimal and less optimal practices*
- *Assessments of the effectiveness of innovations designed to increase the fairness and timeliness of case processing and the legitimacy and proportionality of outcomes*
- *Studies to develop uniform definitions of case processing and pretrial terms to assist in data collection and analysis across agencies and jurisdictions*
- *Evaluation of the duration of the process in terms of both length in time and number of scheduled court dates*
- *An overview of the options available to relevant decision-makers at key stages of the process*

- *An overview of the options available to relevant decision-makers at key stages of the process*
- *Analysis of type and impact of restrictions and economic obligations is the defendant under at various pretrial stages*
- *Review of the landscape of pretrial case processing in lesser visibility courts*
- *The impact of pretrial reform on pretrial release rates, FTA rates, and new criminal activity rates in states that have made such changes (KY, DE, CO, HI), and in states that will make such changes in the near future (NJ)*

Studies that Assess Experiments with Changes in Procedural and Substantive Criminal Law and the Introduction of New Case Processing Practices

- *De-criminalization of specific minor offenses*
- *Elimination of mandatory minimum sentences*
- *Elimination of reliance on surety bail*
- *Increased use of risk assessment in pretrial decision-making*
- *Use of alternatives to jail for non-criminal violation of release conditions*
- *Rapid access to relevant behavioral health background information about individuals*
- *Active implementation of case processing time standards*
- *Renewal and re-design of day fine experiments*
- *Caps on maximum amounts of economic obligations that can be imposed on a defendant*
- *Procedures that can enable offenders facing unpayable economic obligations imposed by the justice system to reduce the burden and start afresh*
- *Alternative ways of providing legal advice/assistance to defendants, especially in minor cases*
- *Electronic recording of all proceedings in courts that handle minor offenses*

Judicial Discretion

Studies to Assess How Judges Exercise their Discretion

- *What factors influence judicial decision-making in pretrial?*
- *How can judicial decision-making be made more transparent?*
- *How do electoral influences impact judicial decision-making?*

Studies on Judicial Education to Improve Decision-Making

- *How can judges best be educated on the use of risk assessment tools?*
- *How can judges be trained on current research and best practices in pretrial decision-making?*

Studies on Judicial Discretion and Racial Bias

- *What is the impact of implicit or explicit bias in judicial decisions on bail, pretrial release, and case processing?*

Disposition

Studies to Evaluate a Full Range of Disposition Options and to Build the Infrastructure Necessary to Support Them, e.g.:

- *Behavioral Health Pathways*
- *Triaging Minor Offenses*
- *Restorative Justice*
- *Offender Mediation*
- *Individually Designed Sentences*

Victims' Rights / Community Impact

Studies Assessing the Level of Victim Participation in the Pretrial Process and its Impact on Outcomes

- *To what extent are victim rights provided by pretrial programs?*
- *To what extent is it feasible to include victim-specific data in the risk assessment process?*
- *What is the effect of victim participation in pretrial programs on pretrial release decisions, outcomes, and subsequent criminal proceedings?*
- *What is the effect of victim participation in pretrial programs on victims' well-being and perception of fairness during the pretrial process and subsequent criminal proceedings?*

Studies Evaluating the Impact of Pretrial Decisions on Victims

- *To what extent do victims participate in the pretrial release decision-making and supervision processes?*
- *To what extent are victims provided notification throughout the pretrial release decision-making and supervision processes?*
- *To what extent does victim notification and participation influence victim willingness to remain engaged with the criminal justice system?*
- *To what extent are victims vulnerable to further victimization from the offender during the pretrial process, and how does this impact victim participation?*

Studies that Assess Community Values and Expectations

- *How do citizens view their encounters with police?*
- *What are citizen expectations for their justice system, specifically pretrial services, and how do these expectations impact pretrial procedures? Identify and compile public opinion surveys about components of the justice system and address gaps.*
- *How best can the public be engaged in designing pretrial responses?*

Prevention and Public Health

Studies to Evaluate a Public Health Model of Crime Prevention, Considering the Needs of the Seriously Mentally Ill and Individuals with Substance Abuse and Alcohol Issues

- *How are jurisdictions currently assessing mental health and substance abuse? Are any jurisdictions using assessments for mental health, substance abuse, and risk?*
- *What definitions of "mental health" and "substance abuse" are in use by different jurisdictions?*
- *How do mental health and substance abuse factors relate to risk of failure to appear and new criminal activity pending trial?*
- *What forms of release are most effective for individuals with mental health, substance abuse, and/or alcohol issues?*
- *Can a public health model focused on treatment and prevention be used to reduce crime? What research is available to show the impact of prevention programs on future criminal justice contact and pretrial outcomes?*

Dissemination and Adoption of Research-Based Practices

Studies on the Dissemination of Innovation and the Adoption of Evidence-Based Practices

- *What are the most effective governance structures and agreements for advancing and sustaining pretrial reform efforts?*
- *What are best practice strategies for consulting and engaging the public in pretrial reform efforts?*
- *How do you overcome barriers to change, such as a lack of trust across actors and agencies?*

Studies on Implementation of Evidence-Based Best Practices:

- *What training and technical assistance and tools do states and local jurisdictions need to advance pretrial reform?*
- *What are the costs associated with implementing pretrial reform efforts?*

ENDNOTES

1. Howard N. Snyder, Ph.D., Arrest in the United States, 1980-2009 (Bureau of Justice Statistics, Sept. 2011), available at http://www.bjs.gov/content/pub/pdf/aus8009.pdf.

2. Bureau of Justice Statistics, Correctional Populations of the United States, available at http://www.bjs.gov/index.cfm?ty=pbse&sid=5.

3. See Snyder, supra n.1.

4. See Correctional Populations of the United States, supra n.2.

5. Source: Correctional Populations of the United States Reports, supra n.2.

6. Source: Comparing arrest data from Snyder, supra n.1 and BJS Correctional Population reports, supra n.2.

7. Thomas H. Cohen, Ph.D. & Brian A. Reaves, Ph.D., Bureau of Justice Statistics Special Report: Pretrial Release of Felony Defendants in State Courts (Nov. 2007) at 2 & fig. 2, available at http://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

8. Eric Helland & Alexander Tabarrok, "The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping," 47 J. Law & Econ. 93 (Apr. 2004), available at http://mason.gmu.edu/~atabarro/PublicvsPrivate.pdf.

9. Dr. Robert G. Morris, Associate Professor of Criminology, University of Texas at Dallas, Pretrial Release Mechanisms in Dallas County, Texas: Differences in Failure to Appear, Recidivism/Pretrial Misconduct, and Association Costs of FTA (January 2013), available at http://www.utdallas.edu/epps/ccjs/dl/Dallas%20Pretrial%20Release%20Report%20-FINAL%20Jan%202013c.pdf.

JOHN JAY COLLEGE OF CRIMINAL JUSTICE

PRI PRISONER REENTRY INSTITUTE

CUNY The City University of New York

COMPILED LINKS

Machine Bias: https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing

Chain Gang 2.0 (costs of supervision): http://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283

New Jersey Bail Reform Costs:

http://www.app.com/story/news/investigations/watchdog/government/2016/06/16/cost-county-government-going-up/85974660/?platform=hootsuite

http://www.nj.com/politics/index.ssf/2016/07/christie_directs_ag_to_study_bail_reform.html?platform=hootsuite

http://www.pressofatlanticcity.com/news/crime/courts/how-much-will-bail-reform-cost-n-j-taxpayers/article_485f04c4-4abc-11e6-b384-eff1718c3d56.html?platform=hootsuite

http://www.nj.com/morris/index.ssf/2015/09/judge_bail_reform_to_require_extraordinary_amount.html

Criminal Sentencing Commission

July 22, 2016

I myself will be surety for him; from my hand you shall require him. If I do not bring him back to you and set him before you, let me bear the blame forever.

Genesis 43:9

Bail in the United States

- Eighth amendment
- Prohibits excessive bail
- (This amendment does not speak of the right to bail, but it implies that if bail is not to be excessive then it should be available.)

Bail in Ohio

- 6th Amendment
- The Constitution of the State of Ohio Sec.
- All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great.

- Black Law Dictionary: SURETY- A person who is primarily liable for the payment of another's debt or the performance of another's obligation.
- Criminal Rule 46:
- Types of Bail:
- Justification of Sureties
- Conditions of Bail
- Factors

TYPES OF BAIL

- PERSONAL RECOGNIZANCE
- DEPOSIT OF 10%
- SURETY
- REAL ESTATE or SECURITIES
- CASH

OHIO COMMERCIAL SURETY

- OHIO DEPARTMENT OF INSURANCE REGULATION
- WHAT IT TAKES TO BECOME A COMPANY
- BUILD UP FUNDS
- LICENSING REQUIREMENTS FOR THE AGENTS

Breakdown of Bond posted in the Franklin County Municipal Court

January 01, 2015 through December 31,2015

Appearance bonds posted- 8,217

BFOI notices sent when Defendant failed to appear- 862 (10.60%)

Surety Bonds posted- 9,531

BFOI notices sent to Bonding Companies- 309 (2.95%)

RESEARCH REPORT

PRETRIAL RELEASE MECHANISMS IN DALLAS COUNTY, TEXAS:

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

Prepared by:

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

The University of Texas at Dallas
800 West Campbell Rd, GR 31
Richardson, Texas 75080-3021

(972) 883-6728
morris@utdallas.edu

January 2013

* **This study was completed on behalf of the Dallas County (Texas) Criminal Justice Advisory Board (CJAB).**

DISCLAIMER
No attempt by the research investigator, Professor Robert Morris, or the University of Texas at Dallas, will be made to explain the reasons behind the findings presented within this report. Nor will recommendations be made as to how the county should, or should not, respond to these findings. The information presented is driven solely by the data provided by Dallas County and caution should be used in any attempt to generalize these findings to other counties. The computer programming written to extract the data for analysis, as well as those used to established model estimates, will be made publically available upon request to ensure research transparency and objectivity. Any audit of this programming by a qualified professional/s is welcomed. Contact Robert G. Morris, Ph.D. with questions: morris@utdallas.edu

EXECUTIVE SUMMARY

Relative to other elements of the criminal justice system, pretrial release and the mechanisms by which it operates, has received little attention from scholars and empirical research is lacking. To date, no study has been carried out that has focused on pretrial release mechanisms at the county level and their isolated effects on failure to appear (FTA) and recidivism/pretrial misconduct. Further, it remains unclear whether the costs associated with one particular form of release outweigh the costs of another. While a handful of studies have explored failure to appear and recidivism across release types, they have been limited by data problems or problematic research designs.

The purpose of this study was to address a number of very important issues that underlie pretrial release from jail, specific to varying mechanisms of release including: attorney bonds, cash bonds, commercial bonds, and pretrial services bonds.[1] Archival data was culled from official records collected by the Dallas County criminal justice system as well as from the Texas Department of Public Safety (DPS). The analyses presented here were based on all defendants booked into the Dallas County jail during 2008 for a crime/s in which the defendant was not previously arrested/jailed, and who were released via one of the above noted release mechanisms (n = 22,019). Specifically, this study addresses the following questions: (1) Do failure to appear (FTA) rates vary across release mechanisms and if so, by how much? (2) Does recidivism/pretrial misconduct vary across release mechanisms and if so, by how much? (3) What are the additional court costs (observed and estimated) associated with FTA rates across release types? and (4) What are the strongest predictors of FTA across each release mechanism?

Methods and Findings. Regarding FTA and recidivism/pretrial misconduct, this study approximated an experimental research design to provide for an objective "apples-to-apples" empirical analysis (propensity score matching). This analysis suggested that net of other effects (e.g., criminal history, age, indigence, etc.—see technical appendix), defendants released via commercial bonds were least likely to fail to appear in court compared to any other specific mechanism. This finding was consistent when assessed for all charge categories combined and when the data were stratified by felony and misdemeanor offenses, respectively. For felony defendants (among the matched pairs), those *not* released on commercial bond were between 39 and 56 percent more likely to fail to appear in court, with the largest difference being between cash and commercial, followed by pretrial and then attorney bonds. For misdemeanors, differences were similar, ranging between 26 and 32 percent with pretrial bonds being the most different from commercial, followed by attorney bonds, then cash bonds. Overall, analyses based on the data explored here suggest that commercial bonds were the most successful in terms of defendant appearance rates, followed by attorney bonds, cash bonds, and pretrial services releases.

Findings for the remaining bond type comparisons were mixed. For felonies and misdemeanors, limited/inconsistent support was found favoring FTA rates for pretrial services over cash bonds; other differences were not statistically significant.

---

[1] Personal recognizance was not analyzed here due to its very limited use in release for new crimes (less than 1%).

[2] Estimate adjusted for inflation from 1997 dollars. Base estimate taken from Block and Twist (1997), who

Regarding recidivism (or pretrial misconduct), analyses were carried out for new crimes occurring within 9 and 12 months of release for the book-in of record. It is important to note that such crimes may or may not have occurred during the pretrial phase for the book-in of record as this data was not readily available. The findings for recidivism were mixed and more commonly null (i.e., no difference was found between release types). Note: Extreme caution should be used in interpreting the recidivism/pretrial misconduct analysis due to the situational factors associated with recidivism that are completely external to the associated release mechanism.

As to the costs associated with FTA across each release type, model estimates suggest that commercial bond releases were the most cost-effective in Dallas County, based on the group of defendants captured by the study. This finding was corroborated by the observed data, which suggested that for the 22,000+ defendants captured by this study, assuming a public cost of $1,775 per FTA[2], the use of commercial bonds saved over $7.6 million (or ~$350k per 1,000 defendants) among felony defendants and over $3.5 million (or $160k per 1,000 defendants) among misdemeanor defendants, as compared to attorney bonds, cash bonds, and pretrial services bonds. For misdemeanors, the largest differences in costs were found between commercial bonds and pretrial services bonds. For felonies, the largest differences in costs were found between commercial bonds and cash bonds.

[2] Estimate adjusted for inflation from 1997 dollars. Base estimate taken from Block and Twist (1997), who conduced a complete cost-benefit analysis of failure to appear in Los Angeles, CA.

TABLE OF CONTENTS

Executive Summary…..……. 2

Study Highlights……..……. 5

Study Findings……. 6

Descriptive Statistics..……. 6

Comparative Analysis and Results……. 9

Failure to Appear……. 10

Recidivism……. 13

Cost-benefit Analysis for Failure to Appear……. 17

Predictors of Failure to Appear……. 20

Study Limitations……. 22

Technical Appendix….……..23

References……..…..…..….. 30

Acknowledgements….…….. 31

About the Author..….…….…….…….…….…….…….…….…….…… 32

STUDY HIGHLIGHTS

- The study explored failure to appear (FTA) and recidivism (at 9 and 12 months) based on longitudinal data for 22,019 defendants released from the county jail during 2008 for the first new offense occurring during that year.

- The analyses isolated the effect of particular bond types by statistically controlling for many correlates (i.e., predictors of) of FTA and recidivism/pretrial misconduct and approximating an experimental research design (see appendix for a complete listing and definitions).

- When comparing similarly situated defendants' probability of FTA for all case types, defendants released via a commercial bond (i.e., a bail bond company) were significantly and substantively less likely to fail to appear in court compared to attorney bonds, cash bonds, and pretrial services bonds, respectively. This finding held when analyzing all defendants simultaneously and when assessing felony and misdemeanor defendants separately.

- Regarding recidivism/pretrial misconduct (at 9 and 12 months) among misdemeanor defendants, no statistically/practically significant differences were found between any combination of the release mechanisms.

- Regarding recidivism/pretrial misconduct (9 and 12 months) for felony defendants, the findings supported cash and attorney bonds, however, there may be qualitative differences in how the recidivism relationship operates for these particular release mechanisms, as they are the most expensive form of financial bail.

- Differences for 12 month recidivism/pretrial misconduct were found between commercial bonds and pretrial services bonds for the model including running data for all charge categories combined, favoring pretrial services, however, the differences were nullified when assessing felonies and misdemeanors separately.

- Release on their own recognizance (OR) was rarely used for an initial release (less than 1% of defendants). For this reason, OR was excluded from the analysis.

- A basic cost-benefit analysis suggested that commercial bonds are the most cost effective release type in Dallas County, in terms of the court costs associated with FTA. Based on the observed data for the 22,000+ defendants captured by this study (all initial releases for a new crime in 2008), assuming a public cost (i.e., justice administration) of $1,775 per FTA[3], the use of commercial bonds saved over $7.6 million (or ~$350k per 1,000 defendants) among felony defendants and over $3.5 million (or $160k per 1,000 defendants) among misdemeanor defendants, as compared to attorney bonds, cash bonds, and pretrial services bonds. For misdemeanors, the largest differences in costs were found between commercial bonds and pretrial services bonds. For felonies, the largest differences in costs were found between commercial bonds and cash bonds.

- The strongest predictor variables of FTA across release mechanisms were also explored. Such variables were limited to those made available by Dallas County. The factors predicting FTA varied considerably across release mechanisms and are outlined within.

---

[3] Estimate adjusted for inflation from 1997 dollars. Base estimated taken from Block and Twist (1997), who conduced a complete cost-benefit analysis of failure to appear in Los Angeles, CA.

STUDY FINDINGS

Descriptive Statistics for Study Defendants

Release Mechanisms Studied (All Charge Types)

Release Mechanism	Freq.	%
Attorney Bond	684	3.1
Cash Bond	4,219	19.2
Commercial Bond	14,705	66.8
Pretrial Bond	2,411	10.9
Total	22,019	100.0

Release Mechanisms Studied (Felony Defendants)

Release Mechanism	Freq.	%
Attorney Bond	326	5.1
Cash Bond	339	5.3
Commercial Bond	5,048	78.9
Pretrial Bond	682	10.7
Total	6,395	100.0

Release Mechanisms Studied (Misdemeanor Defendants)

Release Mechanism	Freq.	%
Attorney Bond	342	2.5
Cash Bond	3,529	25.2
Commercial Bond	8,548	61.0
Pretrial Bond	1,589	11.3
Total	14,008	100.0

Descriptive Statistics for **Failure to Appear (FTA)** in Court

All Charge Types

	# of Defendants	% FTA
Attorney Bond	684	34.1
Cash Bond	4,219	29.2
Commercial Bond	14,705	23.0
Pretrial Services Bond	2,411	37.0

TOTAL 22,019 Overall FTA Rate = 26.1%

Felonies

	# of Defendants	% FTA
Attorney Bond	326	28.2
Cash Bond	339	30.7
Commercial Bond	5,048	16.6
Pretrial Services Bond	682	26.1

TOTAL 6,395 Overall FTA Rate = 19.0%

Misdemeanors

	# of Defendants	% FTA
Attorney Bond	342	37.4
Cash Bond	3,529	30.2
Commercial Bond	8,548	26.7
Pretrial Services Bond	1,589	39.6

TOTAL 14,008 Overall FTA Rate = 29.3%

Descriptive Statistics for **Recidivism/Pretrial Misconduct** (9 months / 12 Months)

All Charge Types

	# of Defendants	% Recidivating (9 Months/12 Months)
Attorney Bond	684	19.0 / 22.4
Cash Bond	4,219	11.7 / 13.8
Commercial Bond	14,705	23.5 / 27.3
Pretrial Services Bond	2,411	24.4 / 28.5

TOTAL 22,019 Overall Recidivism/Pretrial Misconduct Rate = 21.2% / 24.7%

Felonies

	# of Defendants	% Recidivating (9 Months/12 Months)
Attorney Bond	326	17.5 / 20.3
Cash Bond	339	9.7 / 12.1
Commercial Bond	5,048	26.2 / 29.7
Pretrial Services Bond	682	25.2 / 28.9

TOTAL 6,395 Overall Recidivism/Pretrial Misconduct Rate = 24.7% / 28.2%

Misdemeanors

	# of Defendants	% Recidivating (9 Months/12 Months)
Attorney Bond	342	20.2 / 24.0
Cash Bond	3,529	11.5 / 13.7
Commercial Bond	8,548	22.1 / 26.0
Pretrial Services Bond	1,589	24.6 / 29.1

TOTAL 14,008 Overall Recidivism/Pretrial Misconduct Rate = 19.7% / 23.2%

ANALYTICAL FINDINGS

PROPENSITY SCORE MATCHING ANALYSIS: FAILURE TO APPEAR

The below findings represent an "apples-to-apples" approach to exploring differences in FTA rates among similarly situated defendants, across the release mechanisms. These estimates have been conditioned (i.e., statistically adjusted on other influence factors) based on the defendant/crime characteristics outlined in the technical appendix, by means of a counterfactual statistical modeling strategy known as propensity score matching (PSM).

PSM was used to assess the effect sizes of different combinations of release mechanisms on 1) whether a defendant fails to appear (FTA) in court and on 2) whether the defendant recidivated within a specified time period post-release (9 or 12 months). This counterfactual model approximates an experimental design by allowing for comparisons to be made between defendants that had an equivalent probability of receiving some treatment (here the treatment being a release mechanism) over an alternative treatment. Similar analytical designs where the focus has been on multiple treatment effects are not uncommon in the social sciences (see Lechner, 1999; 2001)

***NOTE: Prior to presenting the results, readers unfamiliar with PSM are encouraged to read the information provided in the technical appendix to get a basic idea of what the technique does and how to interpret the findings presented in the below tables.

The below table presents the statistically significant findings on FTA stemming from the propensity score matching analysis and using commercial bonds as a reference category (comparison) group. This approach was taken because significant differences were found only for comparisons that included similarly situated (matched) defendants released on a commercial bond defendants.

In short, the findings clearly demonstrate that when comparing similarly situated defendants against one another (apples-to-apples), <u>commercial bonds were much less likely to fail to appear in court after release for the first time for a new offense</u>. The differences are fairly consistent when analyzing all defendants and also when assessing felony and misdemeanor cases separately. Differences in FTA rates between defendants released via other release types (e.g., attorney bonds vs. pretrial bonds) were not statistically or substantively different from one another (i.e., FTA rates were equivalent for those comparison groups).

For felony defendants (among the matched pairs), those ***<u>not</u>*** released on commercial bond were between 39 and 56 percent more likely to fail to appear in court, with the largest difference between cash and commercial, followed by pretrial and then attorney bonds. For misdemeanors, difference were similar, ranging between 26 and 32 percent, with pretrial bonds being the most different from commercial, followed by attorney bonds, then cash bonds.

Multi-treatment Propensity Score Matching Results on Failure to Appear: Attorney, Cash, and Pretrial Bonds as compared to Commercial Bonds.

Treated vs. Matched Controls released on Commercial Bond	Mean FTA Rate (Treated)	Mean FTA Rate (Controls)	FTA Rate Difference	% Difference in FTA vs. Commercial
All Defendants				
Attorney	0.34	0.27	0.07	**21% higher**
Cash	0.29	0.20	0.09	**31% higher**
Pretrial	0.37	0.23	0.14	**39% higher**
Felony				
Attorney	0.28	0.17	0.11	**39% higher**
Cash	0.32	0.14	0.18	**56% higher**
Pretrial	0.26	0.15	0.11	**42% higher**
Misdemeanor				
Attorney	0.38	0.27	0.11	**29% higher**
Cash	0.31	0.23	0.08	**26% higher**
Pretrial	0.40	0.27	0.13	**32% higher**

Note: All findings are compared to Commercial Bonds (the reference category). Only statistically significant comparisons shown where equivalent findings were demonstrated between alternated reference categories ($p < .05$).

Failure to Appear Analysis – Propensity Score Matching Results

How are the below tables interpreted?

The below tables represent all differences between release types (unlike the above table which illustrates the same findings, but for statistically significant findings only). The PSM findings are presented to illustrate the differences in FTA rates between those treated and their matched controls for all releases, felonies, misdemeanors, and state jail felonies, respectively. On the diagonal of these tables are the unadjusted FTA rates for each release type. These statistics are presented for reference only. The off-diagonal statistics are the mean (average) difference in FTA rates (i.e., the treatment effect) between those released via a particular treatment (i.e., release mechanism)--which is identified by the left-hand column--compared to a particular alternative, identified by the top row of the table. Note that the percent range displayed (if statistically significant) reflects the estimated difference for matching based on an inverted treatment outcome (e.g., commercial vs. attorney compared to attorney vs. commercial)(Non-significant findings are indicated as such in the table).

As an example, looking at the top category, "Attorney Bond" on the far left column of the first table below, we can see that the unadjusted FTA rate for this release type is 34 percent. Following this row to the right, we see that there is no statistically significant difference in FTA rates between comparable (i.e., similarly situated) defendants released by an attorney bond compared to cash bonds. However, the conditioned difference in FTA rate for attorney bonds is 7-13% higher than for Commercial bonds. Further, we find no significant difference between attorney bond FTA rates and pretrial services bonds.

ALL DEFENDANTS - Average Treatment Effects: Failure to Appear (Unconditioned rates on the diagonal)

	Attorney Bonds	Cash Bonds	Commercial Bonds	Pretrial Services
Attorney Bond	***.34***	No Significant Difference	.07-.13 higher	No Significant Difference
Cash Bond		***.29***	.09-.10 higher	No Significant Difference
Commercial Bond			***.23***	.14-.15 lower
Pretrial Services				***.37***

Note: Unadjusted failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

FELONY DEFENDANTS - Average Treatment Effects: Failure to Appear (Unconditioned rates on the diagonal)

	Attorney Bonds	Cash Bonds	Commercial Bonds	Pretrial Services
Attorney Bond	***.29***	No Significant Difference	.11-.12 higher	No Significant Difference
Cash Bond		***.30***	.15-.18 higher	Partial support favoring Pretrial
Commercial Bond			***.17***	.10-.11 lower
Pretrial Services				***.26***

Note: Unadjusted failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

MISDEMEANOR DEFENDANTS - Average Treatment Effects: Failure to Appear (Unconditioned rates on the diagonal)

	Attorney Bonds	Cash Bonds	Commercial Bonds	Pretrial Services
Attorney Bond	***.37***	No Significant Difference	.10-.11 higher	No Significant Difference
Cash Bond		***.30***	.08 higher	Partial support favoring Pretrial
Commercial Bond			***.27***	.12-.13 lower
Pretrial Services				***.40***

Note: Unadjusted failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

Recidivism/Pretrial Misconduct Analysis – Propensity Score Matching Results

12 Months

Note: Unadjusted Failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

ALL DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in12 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.22***	No Significant Difference	No Significant Difference	No Significant Difference
Cash Bond		***.14***	.02-.03 lower	No Significant Difference
Commercial Bond			***.27***	.14-.15 lower
Pretrial Services				***.29***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

FELONY DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 12 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.21***	No Significant Difference	.09-.13 lower	Partial support favoring Attorney
Cash Bond		***.12***	.06-.07 lower	.16-.19 lower
Commercial Bond			***.30***	No Significant Difference
Pretrial Services				***.29***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

(Continued from previous page)

MISDEMEANOR DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 12 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.24***	Partial support favoring Cash	Partial support favoring Commercial	No Significant Difference
Cash Bond		***.14***	.01-.02 lower	No Significant Difference
Commercial Bond			***.26***	No Significant Difference
Pretrial Services				***.29***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

Recidivism/Pretrial Misconduct Analysis – Propensity Score Matching Results

9 Months

ALL DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 9 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.19***	No Significant Difference	No Significant Difference	No Significant Difference
Cash Bond		***.12***	.03 lower	No Significant Difference
Commercial Bond			***.24***	No Significant Difference
Pretrial Services				***.24***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

FELONY DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 9 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.19***	No Significant Difference	.08-.12 lower	Partial support favoring Attorney
Cash Bond		***.12***	.05-.08 lower	.16-.19 lower
Commercial Bond			***.24***	No Significant Difference
Pretrial Services				***.24***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

(Continued from previous page)

MISDEMEANOR DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 9months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.20***	No Significant Difference	No Significant Difference	No Significant Difference
Cash Bond		***.12***	Weak support favoring cash	No Significant Difference
Commercial Bond			***.22***	No Significant Difference
Pretrial Services				***.25***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

COSTS OF FAILURE TO APPEAR

The below matrices represent a basic cost-benefit analysis based on the treatment effect of each release mechanism for treated versus matched controls. Since no exact figures were available on the cost of a single FTA, it was conservatively assumed that the public cost for an FTA is $1,775 per FTA (see Block and Twist (1997)).

For this example, the below figures represent the costs associated with the processing of FTAs per 1,000 defendants. These numbers do not reflect the subsequent social costs that may stem from FTA. These differences (i.e., between release types) are based on the mean (average) treatment effect size differences presented in the propensity score matching analysis outlined above.

INTERPRETATION OF TABLES: The on-diagonal numbers are the costs for dollars spent on FTA processing for a particular release type based on the FTA rates from the matched pairs of defendants resulting from the PSM analysis. The off-diagonals represent the *differences* in cost between release types (row versus column). Note that positive (+) numbers reflect extra costs and negative (-) numbers represent savings. For example, in the first row of the table immediately below, we expect that for every 1,000 defendants released by way of an attorney bond an extra 7 to 13% of defendants will FTA, compared to similar defendants released via a commercial bond. The mid-point (half the distance between the range) of that estimate being 10% or (10 = [6/2] + 7). This equates to an additional cost of $60,350 for FTA processing *($603,500 x .10 = $60,350)* for those 1,000 defendants released via an attorney bond who were equally likely to have been released on a commercial bond. An alternative interpretation would be that if these same individuals were released via a commercial bond, the savings in FTA processing costs would have been -$60,350. Because there was no difference in the effect of release type on FTA between attorney bonds and cash bonds, the cost difference was assumed to be $0.

COSTS of Failure to appear for 1,000 similar defendants released from jail.

All Charge Types

	Attorney	Cash	Commercial	Pretrial
Attorney	***$603,500***	$0	$60,350	$0
Cash	$0	***$514,750***	$48,901	$0
Commercial	-$60,350	-$48,901	***$408,250***	-$59,196
Pretrial	$0	$0	$59,196	***$656,750***

Felonies

	Attorney	Cash	Commercial	Pretrial
Attorney	***$514,750***	$0	$59,196	$0
Cash	$0	***$532,500***	$87,863	$0
Commercial	-$59,196	-$87,863	***$301,750***	-$31,684
Pretrial	$0	$0	$31,684	***$461,500***

Misdemeanors

	Attorney	Cash	Commercial	Pretrial
Attorney	***$656,750***	$0	$68,959	$0
Cash	$0	***$532,500***	$42,600	$0
Commercial	-$68,959	-$42,600	***$479,250***	-$59,906
Pretrial	$0	$0	$59,906	***$710,000***

(Continued from above)

From this analysis, which was based on model estimated differences, commercial bonds represent the most cost-effective mechanism in terms of preventing FTA, as compared to other release types. These differences hold for similar defendants charged with either a misdemeanor or a felony charge. No differences in cost are predicted between attorney bonds and cash bonds, attorney bonds and pretrial services bonds, or cash bonds and pretrial services bonds.

Cost Estimates Based on Actual FTA Records

Other costs, based on the actual (historical) numbers may also be of interest. The below tables reflect the costs of FTA (assuming $1,775 per FTA) across each release mechanism observed for the inmates represented in the study (i.e., those entering jail for a new offense in 2008). Commercial bonds are used as a reference category (i.e., as compared to) for percent differences due to it being the most common release mechanism. NOTE: These numbers reflect only NEW CRIMES for 2008 and NOT ALL releases from jail or FTAs occurring during 2008.

All Charge Types

	# of Defendants	% FTA	Cost per 1000 Defendants	Rate Difference	$ Difference
Attorney Bonds	684	34.1	$605,275	+11	$197,025
Cash Bonds	4,219	29.2	$518,300	+6	$110,050
Commercial Bonds	14,705	23.0	$408,250	Ref. Category	Ref. Category
Pretrial Services	2,411	37.0	$656,750	+14	$248,500

Felonies

	# of Defendants	% FTA	Cost per 1000 Defendants	Rate Difference	$ Difference
Attorney Bonds	236	28.2	$500,550	+12	$205,900
Cash Bonds	339	30.7	$544,925	+14	$250,275
Commercial Bonds	5,048	16.6	$294,650	Ref. Category	Ref. Category
Pretrial Services	682	26.1	$463,275	+10	$168,625

Misdemeanors

	# of Defendants	% FTA	Cost per 1000 Defendants	Rate Difference	$ Difference
Attorney Bonds	342	37.4	$663,850	+11	$189,925
Cash Bonds	3,529	30.2	$536,050	+4	$62,125
Commercial Bonds	8,548	26.7	$473,925	Ref. Category	Ref. Category
Pretrial Services	1,589	39.6	$702,900	+13	$228,975

Example Calculation:
(Felony) Attorney Bonds vs. Commercial
a) Cost per 1000 Defendants =[$1,775 x 1,000] x 0.282 = $500,550
b) $ Difference = $500,550 - $294,650 = $205,900

Estimating the "strongest" predictors of FTA and Recidivism/Pretrial Misconduct among Absconders across release types.

This analysis was based on a logistic regression modeling approach assessing two outcomes (FTA and FTA plus recidivism/miconduct at 12 months). These estimates are conditioned on the type of offense charged with the 2008 book-in. Variables with (+) next to them are positive findings, (-) are negative. Here, the meaning of positive is that for an increase in the variable, there is an increased chance (odds) of failure to appear. Negative refers to a reduction in the chance of failure to appear.

Attorney Bonds:

Failure to Appear:

Celerity (+)
Felony (-)
Indigence (+)
Time Criminally Active (-)
Days in Jail (+)

Recidivism/Pretrial Misconduct *among Absconders:*

Felony (-)
Celerity (-)
Jail history (-)

Cash Bonds:

Failure to Appear:

Felony (-)
Age (-)
Indigence (+)
Celerity (+)
Days in Jail (+)
Jail History (+)
FTA History (+)
US Born (-)

Recidivism/Pretrial Misconduct *among Absconders:*

Age (-)
Celerity (-)
Jail history (-)
US Born (-)
Criminal History (+)

Commercial Bonds:

Felony (-)
Male (+)
Indigence (+)
Celerity (+)
Days in Jail (+)
Mental Illness (+)
Jail History (+)
Hispanic vs. all other (+)
Year of First Arrest (+)
Criminal History (+)
FTA History (+)

Recidivism/Pretrial Misconduct *among Absconders:*

Age (-)
Celerity (-)
Hispanic vs. White (-)
Criminal History (+)

Pretrial Services Bonds:

Felony (-)
Male (+)
Indigence (+)
Jail History (+)
Married (-)
Hispanic vs. all other (+)

Recidivism/Pretrial Misconduct *among Absconders:*

Felony (+)
Mental Illness (+)
US Born (-)
Criminal History (+)

(+) Positive association with FTA (i.e., increased odds of occurrence)
(-) Negative association with FTA (i.e., reduced odds of occurrence)

STUDY LIMITATIONS

- The findings presented herein are limited to one county (Dallas County, Texas) and are not necessarily generalizable to counties other than those of similar demographic make-ups and those with similar pretrial release practices/proportions. Readers should use caution in any attempt to make inferences about other counties based on these findings.

- Release on recognizance is an important mechanism of release but was rarely used by Dallas County for new crimes (less than 1% defendants). For this reason, own recognizance releases are not analyzed.

- Pretrial services bonds may involve a diversionary program for some defendants. The data provided no indication of whether this was the case, thus no information is provided in terms of FTA for any particular diversion program.

- While the statistics presented here from the propensity score matching analysis are relatively robust, there are indicators of release type and FTA that were not collected by, or made available from, Dallas County. These include employment status, residential status, as well as pre-release and risk assessment measures. However, the Dallas County data are unique in the fact that they do include many measures that other data sources do not include, such as drug offense history, mental illness, and indigence.

- Analyses were not carried out specific to any particular criminal offense (e.g., DWI). The findings may change when exploring particular offenses.

- The measure of recidivism/pretrial misconduct does not exclusively account for rearrests for a new crime during the pretrial phase for the book-in of interest. Crimes that occurred after the pretrial phase, but within the window of opportunity (here 9 or 12 months) are also counted as recidivism. Additional data will be required to develop a recidivism measure that is exclusively representative of pretrial misconduct.

- The indicator of FTA for pretrial services releases was limited to bonds that were held “insufficient” rather than an official indicator of non-appearance in court. This was due to limits on the data collection procedures currently in practice by the County. It is possible that some bonds held insufficient do not reflect a failure to appear, however, in discussion with Dallas County Pretrial Services, it was determined that this possibility was minimal.

TECHNICAL APPENDIX

What is propensity score matching (PSM)?

PSM is a well-known statistical matching procedure that approximates an experimental design by matching cases, (i.e., defendants), based on a near equivalent probability of having been released from jail by way of one mechanism versus a possible alternative. (For this study, within a maximum difference of 0.1% (caliper = .001) probability, which is considered very conservative). Here, the varying release types can be considered treatments, just like in an experiment. Since there are multiple treatments under study (i.e., the four release types), comparisons are made from one release-type to another, for every possible combination of treatments, respectively. The goal is to end up with an estimate of the "treatment effect." This is the difference in average probability for defendants failing to appear, or recidivating, between two specific release mechanisms. Again, these comparisons are based on statistically matched (i.e., similarly situated) defendants equally likely to have received the treatment.

Restated, a series of predictor variables (outlined in the technical appendix) are used to estimate a defendant's probability of receiving one treatment over another particular treatment. This estimate is the conditioned probability of receiving the treatment–also known as the propensity score. Upon establishing the quality and robustness of the propensity score, mean (average) levels of a final outcome (e.g., failure to appear in court) can be compared between the treated (i.e., those receiving the treatment) and the matched controls (i.e., those who did not receive the treatment, but who had an equal probability of having received it). *In the end, comparisons are made not between all defendants released by way of a particular method, but only between statistically matched pairs.*

How robust are these findings and how was this determined?

The quality of the matching procedure was assessed in multiple ways, using contemporary statistical methods. These include 1) an assessment of balance on covariates between matched and unmatched samples, 2) a sensitivity analysis to determine how strong an unmeasured covariate (i.e., something not available in the data such as employment history) would need to be to change the results (Rosenbaum Bounds), and 3) a complementary weighted regression analysis that involved both matched and unmatched defendants (Inverse Probability of Treatment Weighting, IPTW).

These procedures resulted in a strong level of confidence that these PSM analysis findings are robust to the influence of unmeasured covariates and that the matching procedure was very good at finding suitable matches to those actually treated. The specific details on these diagnostics are available via the Center for Crime and Justice Studies webpage (www.utdallas.edu/epps/ccjs) and/or can be requested via email (morris@udallas.edu).

ANALYSIS OVERVIEW

There are four major types of release (bonds) used in Dallas County that are explored here. Such bonds include: (1) cash bonds, (2) attorney bonds, (3) commercial bonds, and (4) pretrial

services bonds. Note that release on recognizance and “other” release types (e.g., release to TDCJ for incarceration) are not assessed. The PSM approach will assess the effect of each bond compared to an alternative bond, respectively, across all combinations of bond types. This is illustrated in Figure 1 below.

```
Figure 1: Counterfactual Comparison Groups

   (1) Attorney              vs.         (2) Cash
   (1) Attorney              vs.         (3) Commercial
   (1) Attorney              vs.         (4) Pretrial

   (2) Cash                  vs.         (3) Commercial
   (2) Cash                  vs.         (4) Pretrial

   (3) Commercial            vs.         (4) Pretrial
```

As noted, PSM matches individuals who received a treatment, here a type of bond, to others who did not receive the treatment, but who had a statistically identical probability of having received such. In other words, these are similarly situated defendants (e.g., similar offense, criminal history, demographics, etc.) This approach allows for the isolation of a particular bond effect as compared to every alternative. For example, this approach allows us to determine whether cash bonds do better at reducing the probability of FTA compared to an attorney bond, net of other predictive variables on FTA.

Measurement/Definition of Variables

This section outlines and defines all data variables used in this study. The section is broken down by outcome variables, treatment variables (i.e., bond types) and control variables.

Statistical Model Output will be made available via Professor Morris’s webpage, and/or can be requested via email (morris@utdallas.edu)

Outcome Variables

Failure to Appear (FTA) is defined differently depending on the type of bond. For attorney, cash, and commercial bonds, FTA is defined by whether the Court passes a judgment *NISI* against the defendant. A *NISI* is a judicial declaration that a bond is forfeited unless s/he can provide a suitable reason why there was no court appearance. While it is not uncommon for a judgment *NISI* to be overturned, this is an indication of FTA in Court and was easily identified in the `bond_forfeiture` data file provided by Dallas County.

FTA for personal recognizance and pretrial services rarely results in a judgment *NISI* being entered by the Court. Unfortunately, there was not a specific data indicator provided by Dallas County indicative of FTA for these two bond types. In order to gather this information, data on FTA were extracted from court comments through a character extraction algorithm constructed by Dr. Morris, and approved by Mr. Ron Stretcher (the Director of Criminal Justice for Dallas Co.). The comment information was provided in the `dc_bonds` data file. For personal recognizance and pretrial services bonds, FTA was indicated by the issuance of a bond forfeiture, however, most personal bonds are not formally identified as being forfeited. Rather a bond is

held "insufficient" when a defendant out on a personal bond does not appear in court. The specific terms used in the character extraction algorithm are available upon request (email morris@utdallas.edu).

Recidivism/Pretrial Misconduct is defined by a new arrest occurring after the offense of record for the study (i.e., an individual's first arrest occurring in 2008). The recidivism measures here specifically exclude re-arrest for failure to appear (absconding) only; only "new" crimes are counted as part of the measure. This issue is important because we should expect higher return to jail rates for absconders since either the system or a surety actively attempts to capture absconders. It is important to note that the measure of recidivism/Pretrial Misconduct here does not exclusively reflect pretrial misconduct as such data (i.e., court hearing dates) were not readily available. Recidivism researchers agree that differing lengths of time be used to assess any effect on recidivism, generally at no more than 36 months. However, since these release mechanisms should impact recidivism sooner rather than later (if ever), recidivism was assessed at 9 and 12 months, respectively, to help account for new crimes during the pretrial phase. The reason for this approach is that the context of a release mechanism stays with a defendant only to the disposition of a criminal case. After that point, the relationship is terminated.

Data for the recidivism/Pretrial Misconduct measure stem from supplementary data provided by the Texas Department of Public Safety (DPS), as well as those from Dallas County. DPS arrest data were required as Dallas County does not have in its possession arrest data for arrests occurring in other jurisdictions and are not tied to a Dallas County arrest. Using both of these data sources for the same set of defendants, recidivism represents any "new crime" arrest occurring in Dallas County or elsewhere, provided it is on file with DPS, which took place after the first 2008 book in and occurred prior to January 1st, 2012.

Control Measures

In addition to FTA, a series of variables serve as control variables for the present study. The variables outlined below are limited to what was available within the data provided by Dallas County. Definitions are provided as needed.

SOCIODEMOGRAPHIC VARIABLES

Age	(in years) at Time of Arrest
Age^2	Age squared (i.e., age as a non-linear effect)
Gender	(Female=1, Male=0)
Race	(Black, White, Hispanic) – Those indicated as "other" on race were less than 3% of all defendants.
Marital Status	(Married=1, otherwise=0)
Mental Illness History	(1=yes, 0=no)

Medical Problems (1=yes, 0=no)

Indigence (1=yes, 0=no)

Born in the United States (1=US born; 0=foreign born)

CRIMINAL HISTORY VARIABLES

Number of Prior Arrests – refers to the number of arrests that a defendant has on file with either Dallas County or Texas Department of Public Safety (DPS). Reporting error exists between the arrests reported to DPS from Dallas County. In order to minimize such error, the number of prior arrests was based on the total number of unique arrests occurring prior to the book-in of record stemming from Dallas Co., DPS, or both (whichever was highest).

Type of Offense for Book-in of Record – refers to the offense/s for which a defendant was charged underlying the primary 2008 book-in (i.e., the book-in of record). This was codified in part by UCR Index Crime definitions. Each of these 16 crime types was indicated by a binary variable to allow for multiple charge types to be included in the analysis simultaneously. For example, someone arrested for burglary may also have a charge of aggravated assault for the same arrest (or book-in). The offense categories include: drug related crimes, family violence, homicide (not present in data), robbery, aggravated assault, burglary, larceny, auto theft, fraud, obstruction of justice, weapons related offenses, and driving while intoxicated (DWI or DUI).

Offense of Record Category (OOR; misdemeanor vs. felony) – The category of offense was used at times to produce results stratified between misdemeanors and felonies.

Failure to Appear History (1=at least one previous FTA; 0=no previous FTAs)

Year of First Arrest on File – This variable serves as a proxy for the amount of time that an individual has been criminally active, as far as it is indicated in official police records.

Days in Jail for the OOR – The number of days spent in jail for the offense of record.

Celerity – Celerity refers to the amount of time between the date of the offense and the date of arrest (in days). This variable was log-transformed prior to analyses to correct for skewness.

Dallas County Jail History – An indicator of whether a defendant had been booked into the County jail at any time prior to the book-in of record

Treatment Variables

There are four main categories of bonds (release mechanisms) explored here. These include attorney bonds, cash bonds, commercial bonds, and pretrial services bonds.

The 2012 Texas Association of Counties (TAC) Bail Bond Handbook (p. 9) provides a detailed explanation of the bond process in Texas, which may vary between counties and defines a bail bond as:

> *A "bail bond" is a written undertaking entered into by the defendant and the defendant's sureties for the appearance of the principal therein before a court or magistrate to answer a criminal accusation; provided, however, that the defendant on execution of the bail bond may deposit with the custodian of funds of the court in which the prosecution is pending current money of the United States in the amount of the bond in lieu of having sureties signing the same. Any cash funds deposited under this article shall be receipted for by the officer receiving the funds and, on order of the court, be refunded, after the defendant complies with the conditions of the defendant's bond, to:*
>
> *(1) any person in the name of whom a receipt was issued, in the amount reflected on the face of the receipt, including the defendant if a receipt was issued to the defendant; or*
>
> *(2) the defendant, if no other person is able to produce a receipt for the funds.*

<u>Attorney Bond</u>
In Texas Bail Bond Board Counties, a state licensed attorney may post bonds as a surety for official clients in a criminal case, without the need to be licensed as a bail bond agent. The Sheriff of a County may inquire as to the security of the attorney in his/her ability to write a bond in accordance with TEXAS Code of Crim. Proc. Ch 17.

<u>Cash Bond</u>
'A "cash bond" occurs when the criminal defendant executes the bond himself as principal and posts the entire amount of the bond in cash with the "custodian of funds of the court" in lieu of having sureties sign the bond.' A cash bond is "unsecured" and if the defendant fails to appear for trial, s/he is liable for the full bond amount.

<u>Commercial Bond</u>
A commercial bond is one type of surety bond wherein the bond is made by a corporate surety (an insurance company), via a bonding company. In Texas, only a specially licensed insurance company can write such bonds. This form of bond occurs when a jailed defendant contacts a bail bond company and applies for bail. If approved, the defendant is released to the bonding company for a fee (generally 10-20% of the bail amount set by the court).

Personal Bonds

Personal Recognizance (not analyzed here), or release on recognizance, is one form of personal bond wherein the court releases an individual from jail without sureties or other security (i.e., financial penalty), but with the promise of the defendant that s/he will reappear for trial.

Pretrial Services bonds involve the release of a defendant under an unpaid, or $20 fee, bond held accountable to the Pretrial Services Division. These bonds are intended for low-risk defendants who are unable to secure release solely to the fact that they cannot access funding needed for a financial bond. A pretrial services bond is technically a type of personal recognizance bond.

In Dallas County, pretrial services eligibility is determined by reviewing a list of inmates booked in the jail the previous business day (or over the weekend), who have yet to be released, and who reside in Dallas and the surrounding counties. Among these inmates, the current offense is checked for eligibility (see below list of exclusions), along with the set bond amount (Dallas County Pretrial Services, 2012). If an inmate is eligible, his/her criminal background is checked via TCIC and NCIC. If still eligible and incarcerated, the inmate is interviewed by Pretrial Services that day. The inmate is then required to provide reference information, which must be confirmed by two personal references. The inmate also has to agree to abide by the program rules. The references are given the information of the amount of the pretrial fee (20 dollars or 3% of the bond, whichever is greater). Information is entered into the computer that the pretrial bond has been approved and once the fee is paid, the inmate is released. If the fee is not paid, a determination is made whether or not the fee should be waived in order to keep the jail population down. The financial status (i.e., indigence) of an inmate is not considered in Dallas Co. pretrial services releases. Inmates released via pretrial services tend to be those who cannot access funding to secure a financial bond.*

Specific eligibility requirements for pretrial services in Dallas Co. were determined via a Court Order in 1999 (Dallas County Court Order No. 99-1951), and were revised in 2007. Serious and violent offenses preclude an inmate's eligibility for pretrial services release as are inmates with a history of felony/assaultive offenses. In some cases, exceptions can be made with approval from a supervisor and/or the District Attorney's office. Pretrial services tend to include individuals charged with minor non-violent (e.g., thefts and fraud) and/or lesser drug possession offenses.

Formal risk assessment tools are not used by Dallas County Pretrial Services in making release decisions.

During the period of observation for this study, Dallas County's Pretrial unit was staffed by four pretrial services officers who operate during normal business hours only. Therefore, potential defendants are screened the next business day after book-in to the jail. The monitoring of defendants other than the required regular check-ins took place solely by telephone.

The offenses that are excluded by Pretrial Services are outlined in the following page:

*Above paragraph paraphrased from in-person and email correspondence with Dallas County Pretrial Services (December, 2012).

Offenses Excluded by Pretrial Services Releases

1. Aggravated kidnapping
2. Aggravated Manufacture, Delivery or possessions of Controlled Substances
3. Aggravated Promotion of Prostitution
4. Aggravated Sexual Assault
5. Aggravated Robbery
6. Capital Murder
7. Criminal Solicitation
8. Aggravated Assault
9. Enticing a child
10. Prohibited Sexual Conduct
11. Indecency with a child
12. Injury to a child, elderly or disabled individual
13. Murder
14. Sexual assault
15. Parole violation
16. Sale, distribution or display of harmful materials to a minor
17. Sale or purchase of a child
18. Sexual performance by a child
19. Criminal solicitation of a minor
20. Any charge involving a firearm
21. Any charge involving assault with bodily injury
22. Stalking
23. Family violence
24. Violation of protective order or Magistrate’s order; and
25. Harassment (includes telephone harassment)

References

Block, M. K. & Twist, S. J. (May, 1997). *Report Card on Crime-Runaway Losses: Estimating the Costs of Failure to Appear in the Los Angeles County Criminal Justice System*. American Legislative Exchange Council.

Dallas County Pretrial Services (personal communication, December 10, 2012).

Lechner, M. (1999a). Earnings and Employment Effects of Continuous Off-the-job Training in East Germany after Unification. *Journal of Business and Economic Statistics, 17,* 74-90.

Lechner, M (2001) Identification and Estimation of Causal Effects of Multiple Treatments under the Conditional Independence Assumption. In: Lechner M, Pfeiffer P (eds.) Econometric Evaluation of Labour Market Policies. Heidelberg and New York, Physica.

Texas Association of Counties. (2012). Bail Bond Handbook: Basic Information for County Officers, 2012 Update. Available at https://www.county.org/member-services/legal-resources/publications/Documents/Bail-Bond-Handbook.pdf

Acknowledgements

The author of this study would like to thank Dallas County, Texas and its agents in providing cooperation in the data-gathering phase of this project. Special thanks to Dr. Elba Garcia (Dallas County Commissioner, District 4), Ron Stretcher (Director of Criminal Justice), Jill Reese (fmr. Jail Population Manager), Mark Crooks (Dallas Co. IT Department), and Leah Gamble for their time, support, and guidance. Mr. Crooks was particularly instrumental to the data collection component and deserves special recognition for his mastery of the County's data infrastructure, which was sufficiently complex. Thanks are also deserved by the Dallas County District Attorney, Craig Watkins, and his staff, particularly Mr. Gordon Hikel, for their support and cooperation in establishing an MOU between the County and the University so that this study could be made possible. Recognition is also deserved by the Texas Department of Public Safety, for expediting the delivery of statewide arrest records for Dallas County jail inmates. Ms. Amanda Russell, the graduate research assistant on the project, is also deserving of thanks for all of her time and effort with this project. Finally, thanks to the University of Texas at Dallas's School of Economic, Political and Policy Sciences (EPPS) and (former) Dean James Marquart for providing financial and graduate student support for the completion of this project.

ABOUT THE AUTHOR

Robert G. Morris, Ph.D. is Associate Professor of Criminology as well as the Director of the Center for Crime and Justice Studies at the University of Texas at Dallas. Dr. Morris specializes in quantitative analytics, criminological theory, and contemporary issues in criminal justice, having published dozens of peer reviewed scholarly studies in top-ranked scientific journals such as *Justice Quarterly*, *Crime and Delinquency*, *Intelligence*, and *Journal of Quantitative Criminology*. He teaches doctoral level statistics/analysis courses at UT Dallas as well as undergraduate courses surrounding criminal justice and criminology. He is the recent recipient of numerous research and teaching awards including the prestigious UT System Regents' Outstanding Teaching Award (2011) and the Academy of Criminal Justice Sciences Outstanding Research Paper Award (2012). Dr. Morris received his Ph.D. in Criminal Justice from Sam Houston State University in 2007.

Michigan Law
University of Michigan Law School

Law and Economics Research Paper Series

Paper No. 13-014 September 2013

Evidence-Based Sentencing and the Scientific Rationalization of Discrimination

Sonja B. Starr

Forthcoming in Stanford L. Rev. 66 (2014)

The Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract=2318940

For more information about the program in Law and Economics visit:
http://www.law.umich.edu/centersandprograms/lawandeconomics/Pages/default.aspx

Evidence-Based Sentencing and the Scientific Rationalization of Discrimination

Sonja B. Starr*

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

ABSTRACT

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

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

INTRODUCTION 1

I. Actuarial Risk Prediction and the Movement Toward Evidence-Based Sentencing 5

II. The Disparate Treatment Concern 12

A. Gender Classifications and the Problem with Statistical Discrimination 13

B. Wealth-Related Classifications in the Criminal Justice System 17

C. The Social Harm of Demographic and Socioeconomic Sentencing Discrimination 22

III. Assessing the Evidence for Evidence-Based Sentencing 25

A. Precision, Group Averages, and Individual Predictions 26

B. Do the Instruments Outperform Clinical Prediction and Other Alternatives? 32

C. Do the Risk Prediction Instruments Address the Right Question? 36

IV. Will Risk Prediction Instruments Really Change Sentencing Practice? 41

A. Does EBS Merely Provide Information? 41

B. Does EBS Merely Replace One Form of Risk Prediction With Another? 43

CONCLUSION 47

INTRODUCTION

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

[18] *Id.*

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

[31] Casey et al., *supra*, at 23-26.
[32] *E.g.*, Margareth Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAPMAN J. CRIM. JUST. 43 (2009).
[33] Gerald Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OH. ST. J. CRIM. L. 219, 220 (2003) (also observing that the Code's classroom use makes it "the document through which most American lawyers come to understand criminal law").
[34] Draft MPC § 6B.09 (2).
[35] *Id.* at § 6B.09 (2).
[36] *See id.* at 133.
[37] Draft MPC, § 6B.09(2), cmt. (a). *See also, e.g.*, Wolff, *supra*, at 1406 (emphasizing superiority of actuarial prediction).
[38] *E.g.*, Nat'l Ctr. for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing* 2-3 (2011); Price, *supra* (citing EBS as a way to "move from anger-based sentencing" toward reduced incarceration); Wolff, *supra*, at 1390; PEW Ctr. on the States, *supra*, at 1; Michael Marcus, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 751 (2009).
[39] *E.g.*, Bonta, *supra*, at 524.
[40] *E.g.*, Etienne, *supra*.

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

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

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

---

[41] *Id.*

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

[43] HARCOURT, *supra* note 12.

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

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

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

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

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

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

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

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

---

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

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

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

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

[53] *E.g.*, Oleson, *supra*, at 1397-98 (concluding simply that EBS "raises excruciatingly difficult questions" and that "judges and jurists must determine" how to answer them).

[54] *Barefoot v. Estelle*, 463 U.S. 880 (1983); *see also Jurek v. Texas*, 428 U.S. 262 (1976) (holding that "prediction of future criminal conduct is an essential element in many" criminal justice-related decisions).

[55] Bernard Harcourt, *Risk as a Proxy for Race*, CRIM. & PUBLIC POL'Y (forthcoming), draft available at http://www.law.uchicago.edu/files/file/535-323-bh-race.pdf.

[56] *Id.*

[57] Kelly Hannah-Moffat, *Actuarial Sentencing: An 'Unsettled' Proposition*, at 17, available at http://www.albany.edu/scj/documents/Hannah-Moffatt_RiskAssessment.pdf.

The existing constitutional analyses, meanwhile, have focused on gender (and the hypothetical use of race), and have been limited in their doctrinal analysis.[58] The most extensive such analysis, by J.C. Oleson, concludes that the instruments survive even strict scrutiny.[59] Similarly, Monahan, while opposing use of demographic variables in sentencing on punishment-theory grounds, defends the constitutionality of their use in civil commitment, arguing that only race and gender raise constitutional issues at all, and that gender survives intermediate scrutiny because the gender differences are real and the state interests are substantial.[60]

In my view, the existing literature has seriously understated both the breadth and the gravity of the constitutional concern. There is a strong case that most or all of the risk prediction instruments now in use are unconstitutional, and current literature has not made that case or even seriously examined it. I seek to fill that gap, comprehensively analyzing the relevant case law and empirical research. I show both that the use of gender cannot be defended on the statistical bases that other authors have offered and that the problem goes well beyond gender—the socioeconomic variables, at least, should also receive heightened constitutional scrutiny. And if such scrutiny is applied, the empirical evidence is not currently strong enough to sustain the instruments, and it likely never will be.

In the criminological literature on the instruments, there is considerable debate over issues of reliability, validity, and precision. Current EBS scholarship often notes these concerns but ultimately advocates the instruments' use anyway.[61] The MPC Commentary is a striking example. It states that "error rates when projecting that a particular person will engage in serious criminality in the future are notoriously high" and that "most projections of future violence are wrong in significant numbers of cases," and yet concludes:

> Although the problem of false positives is an enormous concern—almost paralyzing in its human costs—it cannot rule out, on moral or policy grounds, all use of projections of high risk in the sentencing process. If prediction technology shown to be reasonably accurate is not employed, and crime-preventive terms of confinement are not imposed, the justice system knowingly permits victimizations in the community that could have been avoided.[62]

In my view, for all their apparent agonizing, the MPC drafters and other EBS advocates are missing the legal import of the methodological concerns: If the instruments don't work well, their use in sentencing is almost surely unconstitutional, and terribly unwise as well. As I show in Part II, the Supreme Court has warned against disparate treatment based on generalizations about (at least) gender and poverty, *even if* the generalizations have statistical support. If the statistical support is shoddy, there is simply no defending them.

It is curious that the EBS literature has not taken the constitutional concern more seriously. EBS scholars have occasionally asserted that actuarial prediction is obviously

---

[58] *E.g.*, Christopher Slobogin, *Risk Assessment and Risk Management in Juvenile Justice*, 27-WTR CRIM. JUST. 10, 13-14 (2013); Pari McGarraugh, Note, *Up or Out: Why "Sufficiently Reliable" Statistical Risk Assessment is Appropriate at Sentencing and Inappropriate at* Parole, 97 Minn. L. Rev. 1079, 1102 (2013).

[59] Oleson, *supra*, at 1388-92; *see also* Slobogin, *supra*, at 13-14 (briefly stating that gender discrimination probably survives intermediate scrutiny).

[60] Monahan, *supra*, at 429-432.

[61] *E.g.*, Slobogin, *supra*, at 16-17; McGarraugh, *supra*, at 1105-07; *see also* Hannah-Moffat, *supra* (raising various concerns but reaching an ambivalent conclusion: "Arguably, we should pause to reflect on the complexities of risk-needs assessments and concordant calls for and against evidence-based risk jurisprudence.").

[62] MPC Draft §6B.09, cmt. (e).

constitutional because the Supreme Court has approved, against a due process challenge, admission of even-less-reliable expert *clinical* predictions of risk in sentencing proceedings.[63] This assertion is wrong. The equal protection issue is not presented in those cases, and in general is not presented by individualized clinical assessments of risk *per se*; it is presented by punishment of group membership, which is explicit in the actuarial instruments. And even assuming actuarial predictions are more accurate than clinical ones, a question to which I return in Part III, the fact that evidence is reliable enough to be admissible does not mean that it establishes a strong enough relationship to an important government interest to withstand heightened scrutiny.[64] In the next Part, I show that such scrutiny applies.

II. The Disparate Treatment Concern

The most distinctive feature of EBS is that it formally incorporates discrimination based on socioeconomic status and demographic categories into sentencing. In this Part, I set forth the basic constitutional and policy objections to this practice. I begin with the constitutionality of gender-based sentencing in Section A (setting aside race because the current instruments do not include it).[65] Although it is uncontroversial that gender classifications are subject to heightened scrutiny, I examine the gender case law in some detail because it illuminates a core feature of the Supreme Court's equal protection jurisprudence that will make it very hard for EBS to *survive* heightened scrutiny: otherwise-unconstitutional discrimination cannot be justified by statistical generalizations about groups, even if the generalizations have empirical support. In Section B, I show that that the constitutional concern goes beyond gender: a form of heightened scrutiny (and a similar prohibition on group generalizations) also applies to socioeconomic discrimination in the criminal justice context. And in Section C, I articulate reasons policymakers should take the disparity concern seriously even if courts were to sustain EBS against constitutional challenges. This Part does not *complete* either the constitutional or the normative analysis; rather, it establishes the seriousness of the disparity concern and the resulting need at least for a very strong empirical justification for EBS. In Part III, I address whether such a justification exists.

Note that I frame my constitutional argument within existing doctrine, and thus do not argue for heightened scrutiny of certain other variables in the model—for instance, age and marital status are routine government classifications that are subject to rational basis review. There is, however, a plausible broader argument for strict scrutiny of group-based sentencing discrimination more generally, grounded in the "fundamental rights" branch of equal protection jurisprudence rather than the "suspect classifications" branch. Incarceration, after all, profoundly interferes with virtually every right the Supreme Court has deemed fundamental, and EBS makes these rights interferences turn on identity rather than criminal conduct. Although I would be happy to see the Supreme Court adopt such an approach, it is presently foreclosed to lower courts by language the Court used in a case called *Chapman v. United States*, and I do not focus

---

[63] *E.g.*, Slobogin, *supra*, at 15; Steven J. Morse, *Mental Disorders and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 944 (2011); *see* Barefoot v. Estelle, 463 U.S. 880 (1983).

[64] In *Barefoot*, the Court made clear that the defects in evidence would have to be extreme before their admission would be barred by the Due Process Clause on the grounds of sheer unreliability. 463 U.S. at 898-99.

[65] The instruments do include socioeconomic variables that are highly correlated with race, a point I return to in § C, but they would be hard to challenge constitutionally on that basis. The Supreme Court has consistently held that absent a racially disparate purpose, policies that are facially neutral as to race cannot be challenged merely on the grounds of a racially disparate impact. *E.g.*, Washington v. Davis, 426 U.S. 229 (1976).

on it.[66] Certain variables used in some models might also merit new recognition as quasi-suspect—particularly variables relating to an offender's family background or family members' criminal history, which are closely analogous to illegitimacy, a quasi-suspect classification—but again, I do not rely on this possibility.[67] The policy critique in Section C thus applies more broadly, to more variables, than the constitutional arguments in Sections A and B do.

A. Gender Classifications and the Problem with Statistical Discrimination

Virtually every risk prediction instrument in use incorporates gender. Because the coefficient on gender is the same for all defendants, every single male defendant will, due to gender alone, be assigned a higher risk score than an otherwise-identical woman. Gender classifications are subject to heightened constitutional scrutiny, requiring an "exceedingly

---

[66] *Chapman v. United States*, 500 U.S. 453, 464-65 (1991). In *Chapman*, the defendant challenged the U.S. Sentencing Guidelines' method of calculating LSD weight, which included the carrier medium; the claim was that this method created unfair distinctions between people who carried the same amount of actual LSD. The Court rejected the notion that fundamental rights analysis should apply to sentencing distinctions within the statutory sentencing range, reasoning that once convicted, the offender no longer has a fundamental right to any sentence below the statutory maximum. Note that this holding does not preclude a challenge to a sentencing decision based on the nature of the classification; it speaks only to the "fundamental rights" branch. As I show below, both gender and poverty-based discrimination have triggered successful challenges to sentences within the statutory range.

Although *Chapman*'s holding is not entirely surprising (the Court in general is quite reluctant to apply constitutional scrutiny to sentences, *see* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 Cal. L. Rev. 47, 49 (2011), and presumably worried that doing so in that case would require the extension of strict scrutiny to virtually every sentencing distinction), its reasoning, in my view, fails to take seriously the tremendous stakes of sentencing choices within statutory ranges. Those ranges are often very broad (say, zero to 20 years), and it is hard to imagine any government decision that would have a more drastic impact on a defendant's exercise of fundamental liberties than the choice between, say, 5 and 20 years' incarceration. Moreover, the Court's characterization of the right at issue was unduly narrow; the question is not whether the defendant had a right to a sentence below the statutory maximum. Rather, underlying, clearly established fundamental rights are being taken away (including the defendant's most basic physical liberty, which is directly and deliberately retracted by the incarceration decision, plus iadditional rights as procreation, communication, and voting). *Cf.* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (critiquing the Court's past, overly narrow characterization of the right to sexual intimacy as a "right to homosexual sodomy").

The *outcome* in *Chapman* is perfectly defensible, but it could have been reached with a different rationale. The drug-weighting rule was a classification of *criminal conduct*, not persons, and thus (absent evidence of some discriminatory motive) raised no equal protection concern at all; all persons are prospectively subject to the same weighting rules, and have an equal chance to conduct their activities to avoid the rule. Applying fundamental rights analysis to EBS thus would not imply that routine sentencing distinctions between crimes are also subject to strict scrutiny. One could likewise defend sentencing distinctions based on criminal history as also being conduct-based and universally applicable—all persons who commit crimes are subjecting themselves to potential higher sentences for subsequent crimes. But when the state systematically gives different sentences to different groups of people for the same crime, with the same past criminal conduct, the Constitution *should* demand a compelling justification.

[67] Such variables are outside the defendant's control, unchangeable, generally unrelated to legitimate state policy, and often—especially in the case of familial incarceration or time in foster care—the basis for considerable social stigma and disadvantage. *See* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions for People With Criminal Records*, 7 J. L. Society 18, 51 (2005) (reviewing case law and identifying factors that often trigger heightened scruting); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999) (reviewing literature on effects of parental incarceration); United States v. Sprei, 145 F.3d 528, 535 (2d Cir. 1998) (describing stigma and reduced marital prospects as an "inevitable result" of a parent's incarceration); Daniel Pollack et. al., *Foster Care as a Mitigating Circumstance in Criminal Proceedings*, 22 TEMP. POL. & CIV. RTS. L. REV. 43, 59 (2012) (quoting Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE CHILD. 75, 85 (2004)).

persuasive justification"—that is, the state must prove "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[68] Given this well-established doctrine, one might have thought that gender's inclusion in the instruments would have occasioned considerable concern and debate. And yet most scholarship ignores this concern, or else briefly asserts that the state's interests are important.[69] The draft Model Penal Code recommends excluding race, and the Commentary notes that sentencing based on race would be unconstitutional.[70] And yet the MPC drafters recommend including gender, and offer no commentary defending this on constitutional grounds, as though its constitutionality is self-evident.[71]

In the rare cases in which the issue has been presented, modern courts have consistently held (outside the EBS context) that it is unconstitutional to base sentences on gender.[72] There is, to be sure, considerable statistical research suggesting that judges (and prosecutors) *do* on average treat women defendants more leniently than men.[73] But it is virtually unheard of for modern judges to *say* that they are taking gender into account,[74] and demonstrating gender bias would usually be challenging. Before the past few decades, explicit consideration of gender as well as race was common, but few today defend that practice.[75] The U.S. Sentencing Guidelines, for example, expressly forbid the consideration of both race and sex.[76] Outside the literature on EBS, scholars have likewise mostly treated the gender gap as "unwarranted" sentencing disparity.[77]

Given this widespread consensus against sentencing based on gender, there is a certain surreal quality to the EBS literature's mostly untroubled embrace of it. The justification offered (if any) is that women in fact pose substantially lower recidivism risk than men do.[78] Some scholars add that to fail to account for this fact is unfair to women, essentially punishing them for men's recidivism risk.[79] More generally (referring to "gender, ethnicity, age, and disability"),

---

[68] *United States v. Virginia*, 518 U.S. 515 (1996).

[69] *E.g.*, Slobogin, *supra*, at 14. McGarraugh, *supra* at 1102, states that gender should be removed from the instruments to preserve their constitutionality, but does not develop the legal reasoning for this point.

[70] Draft MPC, *supra*, Sec 6B.09 cmt. (i).

[71] *Id.*

[72] Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 137 (2010); *United States v. Maples*, 501 F.2d 985, 989 (4th Cir. 1974); *Williams v. Currie*, 103 F. Supp. 2d 858, 868 (M.D.N.C. 2000).

[73] *E.g.*, Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases* (under review) (2013) (finding large gender gaps at multiple procedural stages that are unexplained by observable variables, and also reviewing other studies).

[74] Hessick, *supra*, at 128.

[75] *Id.* at 129-36.

[76] U.S.S.G. Sec 5H1.10.

[77] *E.g.*, Oren Gazal-Ayal, A Global Perspective on Sentencing Reforms, 76 LAW & CONTEMP. PROBS. I, iii-iv (2013); Mona Lynch, Expanding the Empirical Picture of Sentencing: An Invitation, 23 FED. SENT. R. 313 (2011). Some scholars criticize increasing female incarceration rates, but do not generally argue that women should receive lower sentences based on gender per se. Rather, they argue that the system should take more account of certain mitigating factors that are more often present in female defendants' cases. E.g., Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER RACE & JUST. 277, 291-93 (2002); Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and their Children*, 11 STAN. L. & POL'Y REV. 133 (1999).

[78] *E.g.*, Monahan, *supra*, at 431.

[79] *See* Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER, RACE, & JUSTICE 73, 82 (2010).

Judge Michael Marcus states: "We are not treating like offenders alike if we insist on ignoring factors that make them quite unalike in risk."[80]

But this argument, which embraces a concept of "actuarial fairness,"[81] stands on unsound constitutional footing. The Supreme Court has consistently rejected defenses of gender classifications that are grounded in statistical generalizations about groups—even those with empirical support. In *Craig v. Boren*, for instance, the Court considered a challenge to a law subjecting men to a higher drinking age for certain alcoholic beverages than women. The state had defended the law with statistical evidence, including a study showing that young men were arrested for drunk driving at more than ten times the rate of young women (2% versus 0.18%). The Court noted observed that "prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this." That is, what is prohibited is not *just* "outdated misconceptions" and merely "hypothesized" gender differences.[82] What is prohibited is inferring an individual tendency from group statistics. Note that the government's argument in *Craig* could easily have been framed in "actuarial fairness" terms: arguably it would have been unfair to bar young women from drinking based on a drunk driving risk that came almost entirely from males. But the Court's approach to equal protection means that individuals are neither entitled to a favorable statistical generalization based on gender, nor subject to unfavorable ones.

Examples of this principle abound. For instance, the Court has repeatedly held that government cannot base benefits policies on the assumption that wives are financially dependent on their husbands—even though, when the cases were decided in the 1970s, that presumption was usually correct.[83] The Court explained that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do" support their families.[84] Likewise, the Court has struck down gender-based peremptory challenges in jury selection, holding that the state cannot make assumptions about jurors based on gender, "even when some statistical support can be conjured up."[85] And in *United States v. Virginia*, the Court ordered the Virginia Military Institute to admit women, rejecting its arguments about "typically male or typically female 'tendencies.'" The Court observed: "The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. … It may be assumed, for purposes of this decision, that *most* women would not choose VMI's adversative method." But, the Court emphasized, the point is not what *most* women would choose. "[W]e have cautioned reviewing courts to take a hard look at generalizations or 'tendencies' of the kind pressed by Virginia… [T]he State's great goal [of educating soldiers] is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the State's premier 'citizen soldier' corps."[86]

---

[80] Marcus, *supra*, at 769.

[81] This is a concept that has traditionally (although subject to some limitations) dominated insurance law—the idea is that it is fair for insurers to tailor rates to the risks posed by particular groups, and unfair to expect groups to cross-subsidize one another's risks. *See, e.g.*, Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1597-1600 (2011).

[82] *See* Monahan, *supra*, at 432-433 (defending gender-based risk prediction for civil commitment).

[83] Frontiero v. Richardson, 411 U.S 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

[84] Wiesenfeld, 420 U.S. at 645.

[85] J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140 n.11 (1994).

[86] In *City of Los Angeles v. Manhart*, 432 U.S. 702 (1978), the Court similarly struck down, on Title VII grounds, a requirement that female employees pay higher pension plan premiums because of their higher actuarial life expectancy. The Court stated:

In short, the Supreme Court has squarely rejected "statistical discrimination"—use of group tendencies as a proxy for individual characteristics—as a permissible justification for otherwise constitutionally forbidden discrimination. Economists often defend statistical discrimination as efficient, arguing that if a decision-maker lacks detailed information about an individual, relying on group-based averages (or even mere stereotypes, if the stereotypes have a grain of truth to them) will produce better decisions in the aggregate. But the Supreme Court has held that this defense of gender and race discrimination offends a core value embodied by the equal protection clause: that people have a right to be treated as individuals.

Individualism, indeed, is at the very heart of the Supreme Court's equal protection case law.[87] Many scholars have criticized this characteristic, arguing that it renders the Court's jurisprudence overly formalistic and too inattentive to substantive inequalities. On this view, the primary purpose of the Equal Protection Clause is to dismantle group-based subordination, not to ensure that government will treat individuals in ways that are blind to group identity; the latter approach may actually undermine the former if it prevents government from recognizing and acting to rectify societally entrenched inequalities.[88] I am sympathetic to this view myself, in fact, but I frame this Article within the approach that dominates current doctrine. In any event, an antisubordinationist approach to equal protection law would hardly be friendlier to EBS, an approach that amplifies inequality in the criminal justice system's impact by inflicting additional criminal punishment on the poor and, via disparate impact, on people of color. In Section D, I explore further EBS's social and distributive impacts, and explain why (even though men, in general, are not a subordinated class) its inclusion of gender can be expected to exacerbate this social impact on disadvantaged groups.

Thus, although gender discrimination is not wholly constitutionally forbidden, EBS proponents are going to face tough sledding if their defense of it depends on statistical generalizations about men and women. And it does—EBS is *all about* generalizing based on statistical averages, and its advocates defend it on the basis that the averages are right. At least in the gender context, that probably will not convince courts. The statistical relationship would at the very least have to be so strong that courts could deem the resulting *individual* predictions noticeably more sound than those the Supreme Court has rejected in the past, and could accordingly hold that an "exceedingly persuasive justification" for the classification was present. But this requirement sets a high bar—in *United States v. Virginia*, for instance, the Court's only example of sex differences that the government *could* (within constraints) consider was the irreducible *physical* differences between men and women.[89]

Beyond gender, the Court's emphasis on individualism and rejection of statistical discrimination should inform our thinking about the constitutionality of other variables as well.

> This case … involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men….It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives…... [Title VII] precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. … Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

Id. at 707-08; *see* Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 620 (1990) (O'Connor, J., dissenting) (citing this passage to inform the interpretation of the Equal Protection Clause).

[87] *See* Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 553 (2002).

[88] *See id.* at 554-59; Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9-10 (2004) (reviewing antisubordinationist scholarship).

[89] 518 U.S. at 533.

To be sure, it is not *always* forbidden for the government to rely on statistical generalizations; it would be hard to imagine government functioning if it did not, since it would have to tailor every action it takes to every individual. Government sometimes has to draw clear lines that may overgeneralize—for instance, the state sets a maximum blood-alcohol content for driving, rather than requiring each individual's fitness to drive to be individually assessed. Frederick Schauer has made this point forcefully, offering a fairly broad defense of reliance on statistically supported generalizations.[90] But as Schauer emphasizes, this practice properly has limits—certain kinds of generalizations (including those based on gender) are particularly socially harmful, or expressively invidious, even if they have statistical support.[91] The practice of applying more demanding equal protection scrutiny to some government classifications than to others is grounded in similar reasoning.

Note that the problem with EBS could be framed either as excess generalization (failure to treat people as individuals whose risk varies for reasons particular to them) or as *insufficient* generalization (failure to treat all those with the same criminal conduct the same way). Schauer, for instance, defended the then-mandatory U.S. Sentencing Guidelines, and particularly their bar on demographic and socioeconomic considerations, along the latter lines: "Ignoring real differences in sentencing -- sentencing socially beneficial heart surgeons to the same period of imprisonment for murder as socially parasitic career criminals -- may well serve the larger purpose of explaining that at a moment of enormous significance … we are all in this together."[92] In my view, the problem with EBS cannot be simply described in terms of generality versus particularity; the problem is not that the instruments generalize, but that they employ particular kinds of generalizations that are insidious, in a context that has huge consequences for individuals and communities.

B. Wealth-Related Classifications in the Criminal Justice System

The constitutional problem with EBS goes beyond gender. In this Section, I show that current doctrine also supports application of heightened scrutiny to variables related to socioeconomic status, such as employment status, education, or income. The Supreme Court's case law in *other* contexts has consistently held that similar wealth-related classifications are not constitutionally suspect,[93] and perhaps this is why EBS scholars have completely ignored the potential constitutional concerns with these variables. But this case law is not dispositive in the sentencing context. Many criminal defendants have challenged policies and practices that effectively discriminate against the indigent, including discrimination in punishment. These defendants have often succeeded, and the Supreme Court and lower courts have applied to their claims a special form of heightened constitutional scrutiny, citing intertwined equal protection and due process considerations.

The treatment of indigent criminal defendants has for more than a half-century been a central focus of the Supreme Court's criminal procedure jurisprudence. Indeed, the Court has often used very strong language concerning the importance of eradicating wealth-related

---

[90] FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES (2003).
[91] *Id.* at 38-41.
[92] *Id.* at 261-62. Although I am uncomfortable with group-based sentencing distinctions, I do not favor mandatory sentencing, because offenses are often defined too broadly to capture real differences in criminal conduct and culpability. Also, mandatory sentencing laws generally do not eliminate individualization of punishment, but shift the power to individualize toward prosecutors (a possibility Schauer acknowledges, *id.* at 256).
[93] *E.g.*, Maher v. Roe, 432 U.S. 464, 471 (1977).

disparities in criminal justice; in *Griffin v. Illinois*, for instance, it called this objective "the central aim of our entire judicial system."[94] *Griffin* struck down the requirement that defendants pay court costs before receiving a trial transcript, which they need to prepare an appeal. The Court held that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," and that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[95]

Numerous other cases also stand for the principle that both equal protection and due process concerns require that indigent criminal defendants not be subject to special burdens. Principally, these cases have focused on access to the criminal process: "the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[96] Notably, these cases have applied heightened scrutiny even when the wealth-based classification did not deprive the defendant of something to which he otherwise would have had a substantive right—the cases relating to appeal procedures, for instance, reiterated the then-established principle that a State need not provide an appeal as of right at all. Rather, *Griffin* and its progeny involved a special "equality principle" motivated by "the evil [of] discrimination against the indigent."[97] For this reason, a challenge to EBS need not establish that the defendant has some free-standing constitutional entitlement to a lower sentence than he received.

For our purposes, the most on-point Supreme Court case is *Bearden v. Georgia*, in which the district court had revoked the probation of an indigent defendant who had been unable to pay his court-ordered restitution.[98] The Court unanimously reversed, holding that incarcerating a defendant merely because he was unable to pay amounted to unconstitutional wealth-based discrimination.[99] Importantly, the Court in *Bearden* squarely rejected the state's argument that poverty was a recidivism risk factor that justified additional incapacitation:

> [T]he State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future. …[T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.[100]

The Court's resistance to "lumping [the defendant] together with other poor persons" is very similar to its reasoning concerning statistical discrimination in the gender cases. The Court

---

[94] 351 U.S. 12, 16 (1956).

[95] *Id.* at 19. *Accord* Mayer v. City of Chicago, 404 U.S. 189 (1971).

[96] Ake v. Oklahoma, 470 U.S. 68, 76 (1985); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (citing the goal of achieving a justice system in which, regardless of finances, "every defendant stands equal before the law").

[97] Lewis v. Casey, 518 U.S. 343, 369-72 & nn. 2-3 (1996) (Thomas, J., concurring) (reviewing case law); *see* Douglas v. California, 372 U.S. 353, 355-57 (1963); *United States v. MacCollom*, 426 U.S. 317, 331 (1976) (Brennan, J., dissenting) (referring to the "*Griffin* equality principle").

[98] 461 U.S. 660 (1983).

[99] *Id. Bearden* built on *Williams v. Illinois*, 399 U.S. 235 (1970), in which the Court had similarly reversed a revocation of probation for failure to pay restitution. In *Williams*, the resulting incarceration sentence exceeded the statutory maximum for the crime, and the Court stated in dictum that absent that problem, no constitutional concern would have been raised. *Id.* at 243 In *Bearden*, however, the incarceration sentence did *not* exceed the statutory maximum, and the Court nonetheless held it unconstitutional, apparently rejecting the *Williams* dictum.

[100] 461 U.S. at 671.

observed that the state had cited "several empirical studies suggesting a correlation between poverty and crime," but it was not persuaded by this appeal to a statistical generalization.[101]

Bearden does not establish that financial background is *always* irrelevant to sentencing. Although the Court decisively rejected the use of poverty to predict crime risk, it took more seriously a different defense of the provocation revocation. The Court emphasized one reason it may be permissible to consider ability to pay (and related factors such as employment history) when choosing between incarceration and restitution sentences:

> The State, of course, has a fundamental interest in appropriately punishing persons--rich and poor--who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus…the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.[102]

That is, the State may consider financial factors as necessary to ensure the poor do not *avoid* punishment—as they would if sentenced only to pay a fine or restitution that they then cannot pay. But with EBS, poverty is not being considered to *enable equal punishment* of rich and poor, but to trigger extra, unequal punishment.[103] The Court further held that even when probation revocation is necessary to ensure that the poor do not avoid punishment, it is only permitted after an inquiry to determine if there are viable alternatives, such as "a reduced fine or alternate public service…Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay."[104]

This requirement that less restrictive alternatives be considered is a hallmark of strict scrutiny. However, the Court resisted expressly categorizing its analysis within any particular tier of scrutiny. Indeed, reviewing the case law on indigent criminal defendants, the Court expressed ambivalence as to whether the key constitutional provision was really the Equal Protection Clause at all, as opposed to the Due Process Clause. As the Court explained, these constitutional concerns are intertwined in these cases, and in any event,

> "[w]hether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose ....'"[105]

This language suggests an unconventional, perhaps somewhat flexible balancing test: a stronger legislative purpose and connection to that purpose might be required depending on the individual

---

[101] *Id.* at 671 n.11.

[102] *Id.* at 669-70.

[103] *See also* Williams v. Illinois, 388 U.S. at 244 (stating that ability to pay can be considered to avoid "inverse discrimination"); United States v. Altamirano, 11 F.3d 52, 53 (5th Cir. 1993) (discussing the circumstances in which courts can consider indigency). A defendant, indeed, is constitutionally entitled to a judicial inquiry into her ability to pay a fine. *See, e.g.*, Powers v. Hamilton County Public Defender Comm'n, 501 F.3d 592, 608 (6th Cir. 2007).

[104] 461 U.S. at 671-72. Similarly, Justice White wrote that because "poverty does not insulate those who break the law from punishment," the poor may be imprisoned if they cannot pay fines, but only "if the sentencing court makes a good-faith effort to impose a jail sentence that in terms of the state's sentencing objectives will be roughly equivalent to the fine and restitution that the defendant failed to pay." That is, the magnitude of the punishment must be the same, even if the means is not. Bearden, 461 U.S. at 675 (White, J., concurring in the judgment).

[105] 461 U.S. at 666-67; *see Evitts v. Lucey*, 469 U.S. 387 (1985) (discussing the interrelationship between due process and equal protection concerns in these cases).

interest at stake and the extent to which it is effected. But in requiring a "careful inquiry" into each factor, including the existence of alternatives, it is clear that the Court means to require *some* form of heightened scrutiny, considerably more assertive than mere rational basis review.

Although *Bearden* involved revocation of probation, lower courts have treated it as a constraint on initial sentencing decisions. For instance, the Ninth Circuit has cited *Bearden* to reverse a district court's decision to treat inability to pay restitution as an aggravating sentencing factor, explaining that "the court improperly injected socioeconomic status into the sentencing calculus" and that "the authority forbidding such an approach is abundant and unambiguous."[106] Conversely, citing the same disparity concern, the Ninth Circuit has also reversed (as "unreasonable" under *United States v. Gall*) a decision to *reduce* a defendant's sentence due to ability to pay restitution, holding: "Rewarding defendants who are able to make restitution in large lump sums…perpetuates class and wealth distinctions that have no place in criminal sentencing."[107] Even before *Bearden*, several circuits had already held that equal protection entitles an indigent defendant who was unable to make bail to credit against the eventual sentence for time served, to avoid impermissible wealth-based distinctions in sentencing.[108]

The Supreme Court and lower courts have recognized a divergence between the Supreme Court's treatment of indigent criminal defendants and its normally deferential review of wealth-based classifications: "legislation which has a disparate impact on the indigent defendant should be subject to a more searching scrutiny than requiring a mere rational relationship."[109] The Supreme Court itself has repeatedly noted this divergence. In *United States v. Kerr*, a district court reasoned that special scrutiny is justified by a combination of the serious stakes and the nature of the class: "At stake here is not mere economic or social welfare regulations but deprivation of a man's liberty. The courts 'will squint hard at any legislation that deprives an individual of his liberty—his right to remain free.' Moreover, the indigent, though not a suspect class, have suffered unfair persecution."[110]

Outside the context of inability to pay fines and restitution, there is relatively little case law focusing on use of wealth classifications to determine substantive sentencing outcomes. This dearth should not be taken to suggest judicial approval—the issue likely rarely arises because the practice is rare. The criminal justice system has been rife with procedural obstacles to equal treatment of the indigent, and there are no doubt many subtle or *de facto* ways in which

---

[106] United States v. Burgum, 633 F.3d 810, 816 (9th Cir. 2011); *accord* United States v. Parks, 89 F.3d 570, 572 (1996) ("[The defendant] may be receiving an additional eight months on this sentence due to poverty. Such a result is surely anathema to the Constitution."); *see also* United States v. Ellis, 907 F.2d 12, 13 (1st Cir. 1990) (stating that "the government cannot keep a person in prison solely because of indigency"); *but see* State v. Todd, 147 Idaho 321, 323 (2009) (upholding inability to pay as an aggravating factor).

[107] United States v. Bragg, 582 F.3d 965, 970 (9th Cir. 2009).

[108] *See, e.g.*, King v. Wyrick, 516 F.3d 321, 323 (8th Cir. 1975); *Ham v. North Carolina*, 471 F.2d 406, 407, 408 (4th Cir.1973); *Johnson v. Prast*, 548 F.2d 699, 703 (7th Cir.1977); *but see* Vasquez v. Cooper, 862 F.2d 250 (10th Cir. 1988) (finding no constitutional violation because the court considered inability to pay when setting bail).

[109] *U.S. v. Luster*, 889 F.2d 1523 (6th Cir. 1989); *see also* Maher v. Roe, 432 U.S. 464, 471 n.6 (1977); Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 461 n.*(1988) (rejecting heightened scrutiny in a non-criminal case because "the criminal-sentencing decision at issue in *Bearden* is not analogous to the user fee … before us"); Dickerson v. Latessa, 872 F.2d 1116, 1119-1120 (1st Cir. 1989) (observing that classifications implicating appeal rights receive heightened scrutiny only if they are wealth-based); United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986) (Kennedy, J.) (same); *United States v. Kerr*, 686 F. Supp. 1174 (W.D. Pa. 1988).

[110] Kerr, 686 F. Supp. at 1178 (quoting Williams v. Illinois, 399 U.S. at 263 (Harlan, J., concurring) and citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)).

poverty might influence the sentence. But the practice of actually treating poverty as an aggravating factor in sentencing has not been prevalent (before EBS) and has been considered illegitimate. For instance, the formerly mandatory U.S. Sentencing Guidelines forbid consideration of socioeconomic status.[111] It is true that, now that the guidelines are merely advisory, federal courts do occasionally refer to education or employment when discussing the offender's circumstances (as do state courts—in contrast to gender, which is essentially never cited).[112] Such cases might well also be constitutionally problematic, unless such factors are used in service of the "equal punishment" principle discussed above; I do not focus here on the factors that can be considered in individualized judicial assessments of offenders. But at least such cases do not necessarily reflect a generalization that unemployed or uneducated people are categorically more dangerous, in the mechanical way that the EBS instruments do. Instead, the court can assess what each factor means in the context of a particular case—considering, for instance, whether the offender is making an effort to find employment or otherwise pursue rehabilitation, rather than simply blindly adding a given number of points based on current employment status or past educational attainment.

The federal Guidelines do include an enhancement for offenders with a "criminal livelihood,"[113] and defendants have occasionally challenged that enhancement as disparately affecting the poor, because the same criminal revenue would constitute a larger share of a low-income person's livelihood. Soon after the guideline's adoption, a least one district court held (citing *Bearden*) that, to avoid this potential constitutional concern, it should be interpreted to focus on the absolute amount of criminal income, rather than the share of total income, and the Sentencing Commission amended the guideline to come closer to this view.[114] After the amendment, the Sixth Circuit upheld the new guideline against a similar challenge, holding that although *Bearden* required heightened scrutiny of sentencing burdens on the poor, the amended guideline appropriately targeted "professional criminals" who have "chosen crime as a livelihood" and that any disproportionate effect on the poor did not reflect disparate treatment, but rather was "an incidental effect of the statute's objective."[115]

This rationale, however, cannot be applied to EBS, in which poverty indicators are themselves treated as recidivism risk factors—exactly the statistical generalization that the Supreme Court squarely condemned in *Bearden.* As the district court put it in *Kerr*, even though *Bearden* recognized "a correlation between poverty and crime,…a person cannot be punished solely for his poverty. As a matter of constitutional belief, the presumption that the indigent will act criminally 'is too precarious for a rule of law.'"[116]

It is difficult to see how the socioeconomic variables in EBS can avoid *Bearden*-like heightened scrutiny. Unemployment and education, the most common such variables, cannot

---

[111] U.S.S.G. 5H1.10; *see also* Joan Petersilia & Susan Turner, *Guideline-Based Justice: Prediction and Racial Minorities*, 9 CRIME & JUST. 151, 153-154, 160 (1987) (describing sentencing reformers' objective of eliminating role of "status" factors like employment).

[112] *E.g.*, United States v. Trimble, 2013 WL 1235510 (11th Cir. 2013).

[113] U.S.S.G. 4B1.3.

[114] United States v. Rivera, 694 F.Supp. 1105 (S.D.N.Y.1988); *see* United States v. Luster, 889 F.2d 1523 (6th Cir. 1989) (describing the amendment). The amended guideline's quantitative inquiry concerns only the amount of criminal income; there is also a qualitative inquiry into whether crime was the defendant's "primary occupation."

[115] Luster, 889 F.2d at 1530.

[116] 686 F. Supp. at 1179. Cf. *Edwards v. California*, 314 U.S. 160, 177 (striking down a vagrancy law and holding that it could not be "seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence'. Poverty and immorality are not synonymous.").

meaningfully be distinguished from the ability to pay, nor can composite variables like "financial status." All are proxies for poverty, and the case law in the *Bearden-Griffin* line makes interchangeable references to "wealth," "poverty," "class," and so forth without fine distinctions. For instance, the Court has always treated "ability to pay" as being equivalent to poverty, even though the two are not identical—ability to pay also depends on what one's other expenses are, whether one can borrow money from someone, and so forth. *Bearden* directly addresses, and limits, the circumstances under which courts can consider "employment history and financial resources," specifically rejecting the consideration of such factors as recidivism predictors.[117] Indeed, the argument the Court was rejecting in that passage turned fundamentally on employment status; the empirical studies that Georgia had cited in *Bearden* to support its recidivism-risk argument were mainly studies of the relationship between unemployment and recidivism, and the state emphasized that the defendant's recent job loss made him a higher recidivism risk.[118] Meanwhile, the point of including education in the recidivism instrument is that it is a proxy for the defendant's future prospects for employment and legitimate earnings; it would be hard to defend the use of this factor using logic that clearly distinguished it from past, present, or future poverty. Neighborhood characteristics could potentially also be considered socioeconomic variables, since they are also very closely related to poverty, although this example is more disputable because these variables operate at a geographic level and do not draw distinctions among persons within the neighborhood.[119]

While there are limits to the courts' efforts to protect indigent defendants, those limits have been found in cases testing what affirmative assistance the state must provide in order to level the criminal justice playing field. EBS, in contrast is a deliberate effort to *unlevel* that field. As with gender, its defenders will be fighting an uphill battle to overcome heightened scrutiny, because if, as *Bearden* holds, one cannot impute individual risk based on the average risk posed by poor defendants, the rationale for EBS disappears.

C. The Social Harm of Demographic and Socioeconomic Sentencing Discrimination

EBS's use of demographic, socioeconomic, and family-related characteristics is also highly troubling on public policy grounds. As noted above, EBS advocates frequently emphasize its potential to help reduce incarceration rates.[120] But what they do not typically emphasize is that the mass incarceration problem in the United States is drastically disparate in its distribution. This unequal distribution is a core driver of its adverse social consequences, because it leaves certain neighborhoods and subpopulations decimated. Black men, for instance, are 52 times as likely to be incarcerated as white women are.[121] Young black men are especially at risk: one in nine black men under 35 are currently behind bars,[122] and one in three will be at some point in

---

[117] 461 U.S. at 671.

[118] Brief of the Respondent, *Bearden v. Georgia*, 1982 U.S. Sup. Ct. Briefs LEXIS 438, at 32-35.

[119] Given fairly high levels of residential segregation, *see generally* U.S. Census Bureau, Racial and Ethnic Residential Segregation in the United States: 1980-2000, available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf, neighborhood might also be a racial proxy, but challengers would likely have trouble proving a racially discriminatory purpose.

[120] *See supra* note 38 and accompanying text.

[121] *See* HEATHER C. WEST, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES, 21 tbl.18 (2010).

[122] PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008), *available at* http://www.pewstates.org/research/reports/one-in-100-85899374411.

their lives.[123] And the concentration of incarceration's effects is even more dramatic when one takes into account socioeconomic and neighborhood-level predictors. High school dropouts, for example, are 47 times as likely to be incarcerated as college graduates are, and young black male dropouts are incarcerated at a rate of approximately 22% at any given time.[124] An ample literature documents these disparities and their effects on communities.[125]

The EBS instruments produce higher risk estimates, other things equal, for the same subgroups that are already disproportionately incarcerated, and so it is reasonable to predict that EBS will exacerbate these disparities. Although we do not know whether EBS will reduce incarceration on balance, the most intuitive expectation is that it will increase incarceration for some people (those deemed high-risk) and reduce it for others (those deemed low-risk). If so, it will further concentrate mass incarceration's impact demographically.

This is likely to include concentrating its racial impact. I have ignored race in my constitutional analysis, because the instruments do not include it. But the socioeconomic, family, and neighborhood variables that they do include are highly correlated with race, as is criminal history, so they are likely to have a racially disparate impact.[126] Although the courts have not recognized equal protection claims grounded in disparate impact, policymakers should care about the consequences of their policies, and not just about the facial distinctions that they draw. Ample literature documents mass incarceration's severe consequences for African-American communities in particular. If EBS exacerbates this problem, it would be particularly hard to defend it as a progressive strategy for responding to the mass incarceration crisis.

The demographic concentration problem is one reason to worry about the gender and age variables, in addition to socioeconomic status. In other contexts, discrimination based on young age is often treated as not particularly morally troublesome. Young age is not a significant social disadvantage, nor is it even really a discrete group trait; everyone has it and then loses it. Likewise, many advocates no doubt worry less about gender discrimination that adversely affects men because men, taken as a whole, have dominant political and economic power. But the likely impact of EBS is not centered on "men taken as a whole," nor on young people generally. Rather, it will principally affect a subgroup of young men—those involved in the criminal justice system, mostly poor men of color—who are highly disadvantaged. The age and gender criteria exacerbate the extent to which incarceration's impact targets a particular slice of disadvantaged communities, effectively resulting in a substantial part of a generation of men being absent from communities and exacerbating the socially distortive effects of mass incarceration. A broad literature explores the effects of high, demographically concentrated incarceration rates on everything from marriage rates to overall community cohesion.[127]

---

[123] THOMAS BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (2003).

[124] Center for Labor Market Studies, *The Consequences of Dropping Out of School* (2009), available at http://hdl.handle.net/2047/d20000596; *see also* Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, DAEDALUS (Summer 2010) (discussing neighborhood effects).

[125] *E.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2011); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Patillo et al. eds., 2004).

[126] *See* Harcourt, *supra* note 55 (arguing that "prior criminal history has become a proxy for race").

[127] Todd R. Clear, *supra*, at 97; William A. Darity, Jr. & Samuel L. Myers, Jr., *Family Structure and the Marginalization of Black Men: Policy Implications*, *in* THE DECLINE IN MARRIAGE OF AFRICAN AMERICANS 263,

Another serious disadvantage is the expressive message sent by state endorsement of sentencing based on group traits. Consider specifically the traits associated with socioeconomic disadvantage. Though many Americans no doubt already suspect that the criminal justice system is biased against the poor, EBS ends any doubt on the matter. It involves the state telling judges explicitly that poor people should get longer sentences because they are poor—and, conversely, that socioeconomic privilege should translate into leniency. That is a message that, I suspect, many state actors would find embarrassing to defend in public. Doing so would require pointing to a justification that hardly improves matters: that the poor are dangerous. Generalizing about groups based on crime risk is a practice with a pernicious social history.[128] Dressing up that generalization in scientific language may have succeeded in forestalling public criticism, but mostly because few Americans understand these instruments or even are aware of them. If the instruments were better understood (and as EBS expands, perhaps they will be), they would send a clear message to disadvantaged groups: the system really is rigged. Further, if that message undermines the criminal justice system's legitimacy in disadvantaged communities, it could undermine EBS's crime prevention aims.[129]

Some EBS advocates propose that it should be used only to *mitigate* sentences, and such proposals have, at first glance, a seductive appeal—reducing incarceration rates is an important objective.[130] But there is no persuasive reason to believe access to risk predictions would tend to reduce sentences rather than increasing them (or doing both in different cases). Some advocates blame a retributivist approach to sentencing for the rise in incarceration, and suggest that EBS would help to make sentencing more moderate by encouraging a practical focus on crime prevention instead.[131] This line of argument is curious, however, because much of the political "tough on crime" movement over the past several decades has in fact been accompanied by public safety language, responding to the public's (oft-exaggerated) perceptions of crime risk.[132]

One could attempt to force unidirectional use of risk assessments, but it may be difficult. If judges are given the risk assessments before they choose the sentence, even if they are told to only use them for mitigation, it is difficult to expect them to completely ignore high-risk assessments.[133] And even if the risk score is not provided until an initial sentence is chosen, judges who know that subsequent mitigation will be available if it turns out that the defendant is

---

286 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995); Bruce Western et al., *Incarceration and the Bonds Between Parents in Fragile Families*, *in* IMPRISONING AMERICA, *supra*, at 21-45; Elizabeth I. Johnson & Jane Waldfogel, *Children of Incarcerated Parents*, in IMPRISONING AMERICA, *supra*, at 98; James P. Lynch & William J. Sabol, *Effects of Incarceration on Informal Social Control in Communities*, *in* IMPRISONING AMERICA, *supra*, at 135-164.

[128] For a recent, prominent reflection on the way such generalizations about black men have affected African-American communities, *see* Barack Obama, Remarks by the President on Trayvon Martin (July 19, 2013), available at http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin.

[129] *See* William Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1825-30 (1998) (discussing the effects of community perceptions of unfairness on law compliance).

[130] *E.g.*, Etienne, *supra*; J. Richard Couzens, Evidence-Based Practices: Reducing Recidivism to Increase Public Safety: A Cooperative Effort by Courts and Probation 10 (June 27, 2011), available at http://www.courts.ca.gov/documents/EVIDENCE-BASED-PRACTICES-Summary-6-27-11.pdf; Kleiman, *supra*, at 301 (explaining that Virginia's EBS program diverts 25% of nonviolent prison-bound offenders to probation).

[131] Marcus, *supra*, at 751.

[132] Rachel Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278-81 (2005).

[133] Analogously, limiting instructions to juries—instructions to consider evidence for one purpose but not another—are "notoriously ineffective" and "may be counterproductive because they call jurors' attention to the evidence that is supposed to be ignored." Prescott & Starr, *supra*, at 323 (citing studies).

low risk might err on the side of higher preliminary sentences. Likewise, the risk scores could affect the parties' strategies; in particular, prosecutors might push for longer sentences for higher-risk offenders. Even if the scores are withheld at first from the parties, given that the instruments are quite simple, one would expect the parties to calculate the scores themselves and plan accordingly, and not to wait for the official report.

But let us hypothesize that it could be guaranteed that risk scores would only reduce sentences. Would such an approach be justified? I am loath to resist strategies for reducing unnecessary incarceration. But the key question here is not whether low-risk defendants should be diverted from incarceration—it is whether those low-risk diversion candidates should be identified based on constitutionally problematic demographic and socioeconomic characteristics (instead of past or present criminal conduct or other personal, behavioral assessments).

I conclude that such an approach raises the same problems as does EBS generally. As a constitutional matter, policies that benefit only the lowest-risk offenders may actually be more objectionable because they are less flexible and narrowly tailored—more like quotas than "plus factors." Those with sufficiently unfavorable demographic and socioeconomic characteristics will never qualify as "low risk," no matter how favorable their other characteristics. Consider the Missouri instrument described in Part I. A 20-year-old high school dropout with no job loses six points for those characteristics alone, and can never score higher than 1 on the scale ("average" risk), even if he has no criminal history and no other risk factors and has committed a relatively minor offense. Other instruments that consider gender and a wider variety of socioeconomic and family traits could be even more strongly driven by those factors.[134]

Special exceptions for the privileged cut against the foundational principle that the justice system should treat everyone equally. Moreover, one likely driver of the growth of incarceration is that the relatively privileged majority of the population has been spared its brunt.[135] Those who are primarily incarcerated—poor young men of color—are not politically well represented, and most other citizens have little reason to worry about the growth of incarceration. Progressives should hesitate before endorsing policies that give them another reason not to worry, even if those policies will have the immediate effect of somewhat restraining that growth.

Merely raising the potential policy concerns associated with discrimination and disparity does not necessarily end the argument, just as the constitutional inquiry is not ended by establishing that EBS merits heightened constitutional scrutiny. One must consider how strongly EBS advances competing state interests. In the next Part, then, I turn to the question whether the studies support EBS advocates' optimism.

III. Assessing the Evidence for Evidence-Based Sentencing

Protecting society from crime while avoiding excessive incarceration is no doubt an important interest, even a "compelling" one. But the Constitution and good policy also require

---

[134] The mitigation-only approach also would not deprive defendants of standing to challenge EBS; a defendant who would have received diversion to probation had the risk instrument not considered his gender, for instance, is harmed by that consideration. The Supreme Court has often considered equal protection challenges in which the plaintiff claims she was denied a government benefit (such as university admission) on the basis of some improper consideration. *E.g.*, Fisher, __ S.Ct. at __.

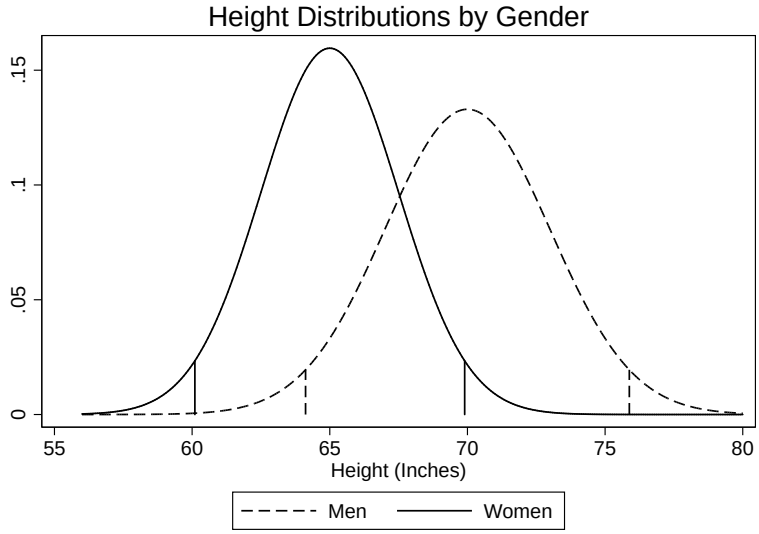
[135] James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1001 (2010); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008).

assessing the strength of the relationship between EBS and that interest. When heightened scrutiny applies, it is the state's burden to provide convincing evidence establishing that relationship. In this Part, I show that the current empirical evidence does not suffice.

A. Precision, Group Averages, and Individual Predictions

The instruments' first serious limitation is that they do not provide anything even approaching a precise prediction of an individual's recidivism probability. At best, what they predict with reasonable precision is the *average* recidivism rate for all offenders who share with the defendant whichever characteristics are included as variables in the model. If the model is well specified and based on a sample that is representative of the population to which the results are extrapolated, then it might perform this task well. But that does not necessarily make it particularly useful for individual predictions. Individual vary much more than groups do, and even a relatively precisely estimated model will often not do well at predicting individual outcomes in particular cases.[136] Social scientists sometimes refer to the broader ranges attached to individual predictions as "prediction intervals" (or sometimes as "forecast" uncertainty or "confidence intervals for a forecast") to distinguish them from the "confidence intervals" that are estimated for the group mean or for the effect of a given variable.

To illustrate this point, let's start with an example that involves predicting a continuous outcome rather than a binary future event. To simplify, we will consider only one explanatory variable (sex) and one normally distributed outcome variable (height), which are quite strongly related. The height distributions of the U.S. male and female populations look approximately like Figure 1 below, which is based on average heights of 70 inches for males (standard deviation 3 inches) and 65 inches for females (standard deviation 2.5 inches).



But suppose one did not know the true population distributions, and one had to estimate them by taking a random sample. If one takes a large enough sample, it is easy to obtain quite precise estimates of the average male height and the average female height (as well as the average additional height associated with being male, which is just the difference between the

[136] *See* David J. Cooke & Christine Michie, *Limits of Diagnostic Precision and Predictive Utility in the Individual Case*, 34 LAW & HUM. BEHAV. 259, 259 (2010) ("It is a statistical truism that the mean of a distribution tells us about everyone, yet no one.").

group means). This point is illustrated in Table 1. I created simulated data for a "true population" of men and women that has the height distributions shown in Figure 1. Then I drew from that population random samples with sample sizes 20, 200, and 400, regressed height on gender within each sample, and recorded the predicted mean heights for men and women and the confidence intervals for those means.

Table 1. Precision of Predicted Means versus Individual Forecasts: An Illustration

Sample Size	Male Height in Inches			Female Height in Inches		
	Mean (& Forecast)	95% Conf. Int. for the Mean	95% Pred. Int. for Indiv. Forecast	Mean (& Forecast)	95% Conf. Int. for the Mean	95% Pred. Int. for Indiv. Forecast
20	69.8	[68.2, 71.4]	[64.4, 75.1]	64.8	[63.2, 66.4]	[59.4, 70.1]
200	69.8	[69.3, 70.4]	[64.3, 75.4]	64.6	[64.0, 65.1]	[59.0, 70.1]
400	70.0	[69.6, 70.4]	[64.6, 75.4]	64.9	[64.5, 65.3]	[59.5, 70.3]
Samples are drawn from a simulated "true population" with population means and standard deviations of 70.0 (3.0) for men and 65.0 (2.5) for women.						

Notice that even the smallest sample quite closely approximates the true population means of 70 and 65 inches, while the largest sample comes even closer. Exactly how close each sample comes involves chance (different random samples of the same sizes would have different means), but in general chance plays a smaller role the larger the sample is; as the sample grows the estimates should converge on the true population values. This expectation is captured in the estimation of confidence intervals for the mean, which get narrower as the sample gets larger. Confidence intervals are a way of accounting for chance in sampling. For the 400-person sample, one can express 95% condidence in quite a precise estimate: for males, between 69.6 inches and 70.4 inches, and for females, between 64.5 inches and 65.3 inches.[137] If you keep drawing more and more 400-person samples, they don't tend to differ very much; with that sample size, you will generally do quite a good job approximating the underlying population, which is why the confidence interval is narrow. Meanwhile, the 20-person sample gives you wider 95% confidence intervals, each spanning more than three inches—a much rougher estimate.

But what if you wanted to use your 400-person sample not to estimate the averages for the population, but to predict the height of just the next random woman you meet? Your single best guess—the one that is statistically expected to err by the lowest margin—would be the group mean from your sample, which is 64.9. But you wouldn't be *nearly* as confident in that prediction as you would in the prediction for the group mean. In fact, within that sample, only 13.5% of women have heights that are between 64.5 inches and 65.3 inches, which was your 95% confidence interval for the group mean. If you wanted to give an individual forecast for that next woman that you could be 95% confident in, it would have to be much less precise—you could predict that she would be somewhere between 59.5 inches and 70.3 inches, the 95% prediction interval for the individual forecast that is shown in Table 1. That's a range of nearly

[137] To describe something as a 95% confidence interval for an estimated group mean is to express confidence that 95% of the time, when one draws a random sample and uses the same estimation procedure, the interval one estimates will contain the true group mean for the underlying population.

eleven inches—in other words, you don't know much at all about how tall to expect the next woman to be.[138]

One could make the example much more complicated, with multiple variables and more irregular distributions of outcomes, but the prediction interval for an individual forecast is always wider than the confidence interval for the mean—generally *much* wider.[139] Note that while the confidence intervals for the means gets much narrower as the sample gets larger, the prediction interval does not. The underlying uncertainty that it reflects is not mainly the possibility of having gotten an unusual sample; it's the variability in the underlying population that we saw in Figure 1. One *could* narrow the prediction interval by adding variables to the regression that help to explain this underlying variability—for example, the heights of the individual's parents.

The same basic intuition also applies to models of binary outcomes, like whether a defendant will recidivate—the expected outcome for an individual is much less certain than the expected rate for a group. Some of the recidivism risk prediction instruments include confidence intervals for the probabilities they predict. Indeed, some scholars have urged that confidence intervals should always be provided (rather than mere point estimates) so that judges can get an idea of how precise the instruments are.[140] But given that judges are using the instruments for the purpose of predicting a specific individual's probability of recidivism, providing them a confidence interval for the *group* recidivism rate might even be more misleading than not providing any at all. For instance, if judges are told "The estimated probability that Defendant X will recidivate is 30%, and the 95% confidence interval for that prediction is 25% to 35%," that may well sound to the judge like a reasonably precise individual prediction, but it is not. It is merely a reasonably precise estimate of an average recidivism rate.[141] If the underlying study has a large sample size, such a prediction could be very precise even if the model's variables do not capture much of the variation in individual probabilities at all.

With binary outcomes, though, while the confidence interval for the mean may be misleading, the "prediction interval" is not a very useful alternative way of expressing the precision of an individual forecast, because it does not tell you anything that was not already

---

[138] Note that the estimated uncertainties in Table 1 are based on a regression of height on gender using standard Stata postestimation prediction commands. By construction, the uncertainties are the same for men and women. Another way to estimate a 95% prediction interval for the height of the next woman you meet would be to just ignore the men and give the range within which the middle 95% of the women in your sample fall. Because female height has a slightly narrower distribution, your interval would then be a bit narrower (about 10 inches), but this method would produce a wider interval for the next male's height (about 12 inches). These ranges are marked on Figure 1.

[139] *See* Cooke & Michie, *supra*, at 271 (illustrating this point using simulated data on violence risk among psychiatric patients, and showing how measurement error for subjective criteria amplifies the uncertainty of individual predictions).

[140] *E.g.*, McGarraugh, *supra*, at 1095-96.

[141] This problem has some similarities to the broader problem of assessing scientific evidence of causation in legal contexts, in which "the law is interested not simply in whether a particular variable causes a particular effect [in general], but, ultimately, in whether a particular variable did cause the effect [in the specific case]." David L. Faigman, *A Preliminary Exploration of the Problem of Reasoning from General Scientific Data to Individualized Legal Decision-Making*, 75 BROOK. L. REV. 1115, 1119 (2010). But this issue is not identical, and my objection here is not that the models cannot establish "individual-level causation," McGarraugh, *supra*, at 1101. The models are predictive, and make no causal claims, so their advocates cannot be accused of confusing correlation with causation. And they aim to predict future probabilistic events, not to prove what caused a particular past event. When one's goal is merely to predict, correlations can be useful, even if the causal pathway is uncertain. For instance, how one voted in the 2012 presidential election is no doubt a very strong predictor of how one will vote in 2016—information campaign strategists can use even if the former does not cause the latter.

made clear by the point estimate itself. Unless the predicted probability is extremely low or extremely high, a 95% confidence interval for an individual prediction will by nature always run from 0 to 1.[142] Recidivism is rarely nearly certain or nearly impossible. So even a good recidivism prediction model could produce prediction intervals of [0,1] for essentially *every* defendant: that is, the only prediction that can be made with 95% confidence about any given individual is that she will either recidivate or not. This fact does not reflect poorly on the design of the prediction instruments or the quality of the underlying research. It reflects the inherent uncertainty of this predictive task and the binary nature of the outcome.

In order to assess how well a model predicts recidivism risk for individuals, some other metric is necessary.[143] There is no single, agreed-upon method for assessing the individual predictive accuracy of a binary model, but there are several possibilities. One common metric used in the recidivism prediction literature is called the "area under the curve" (AUC) approach.[144] This method pairs each person who ended up recidivating with a random person who did not; the score is the fraction of these pairs in which the recidivist had been given the higher predicted risk score. A perfect, omniscient model would rank all eventual recidivists higher than all eventual non-recidivists, and the AUC score would be a 1, while coin flips would on average produce a score of 0.5. The best published scores for recidivism prediction instruments appear to be around 0.75, and these are rich models that include various dynamic risk factors, including detailed psychological assessments, rather than the simple point systems based on objective factors.[145] Many studies have reported AUC scores closer to 0.65.[146] By comparison, a prominent meta-analysis of studies of psychologists' clinical (non-actuarial) predictions of violence found a mean AUC score of 0.73, which the author characterized as a "modest, better than chance level of accuracy."[147] As another point of comparison, if one turns height into a binary variable called "tall" (which denotes being above the median height of the sample), our basic, one-variable model does much better at predicting who will be tall than any

---

[142] *See* R. Karl Hanson & Philip D. Howard, *Individual Confidence Intervals Do Not Inform Decision-Makers about the Accuracy of Risk Assessment Evaluations*, 34 L. & HUM. BEHAV. 275, 276 (2010)

[143] *See* Hanson & Howard, *supra*, at 276. Stephen D. Hart et al., *Precision of Actuarial Risk Assessment Instruments*, 174 BRIT. J. PSYCHIATRY s60 (2007), offer an alternative way of calculating a prediction interval for an individual. They use a traditional method for estimating the confidence interval for a probability prediction given a point estimate for the probability and a sample size, and calculate it for each risk-level category in two common violence prediction instruments, using a sample size of 1. *See* E.B. Wilson, *Probable Inference, The Law of Succession, and Statistical Inference*, 22 J. AM. STAT. ASSOC. 209 (1927). The intervals Hart et al. calculate do not always run from 0 to 1, but they are always very wide, ranging between 79 and 89 percentage points in width. The authors conclude that it is "impossible to make accurate predictions about individuals using these tests."

Hart et al. interpret their intervals as follows: "Given an individual with an ARAI score in this particular category, we can state with 95% certainty that the probability he will recidivate lies between the upper and lower limit.'" This is a slightly odd interpretation, given that, as the authors state, Wilson's confidence intervals are normally interpreted as expressing an interval within which one is confident that the *actual observed rate* for the new sample (not the *ex ante* probability) will fall. The actual observed binary outcome for one individual always must be 0 or 1, however, so I agree with Hanson and Howard, *supra*, that the prediction interval for all but the extreme cases should be 0, 1 (rather than, say, .10 to .94). But either way, it is wide.

[144] *See* Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. CONSULTING & CLINICAL PSYCH. 783 (1994) (describing the method as well as competing approaches).

[145] *See* Mairead Dolan & Michael Doyle, *Violence Risk Prediction*, 177 BRIT. J. PSYCH. 303, 305-07 (2000); AOUSC, *supra*, at 9.

[146] Dolan & Doyle, *supra*, at 305-07.

[147] Mossman, *supra*, at 788.

actuarial model does at predicting who will recidivate—it has an AUC score of 0.825.[148] This is despite the fact that, as we saw, that model gives only rather wide bounds for individual predictions of height—gender is actually quite a strong predictor of height (most men are taller than most women), but it still leaves considerable individual variation unexplained.[149]

Another simple measure of prediction accuracy is the linear correlation between the predicted probabilities and the actual outcomes for offenders; this measure will be 0 if the instrument explains nothing more than chance and 1 if it predicts perfectly.[150] In 1994, a prominent meta-analysis of studies comparing several actuarial recidivism prediction instruments found that the LSI-R (the instrument that the Indiana Supreme Court upheld) had the highest reported correlation with outcomes, at 0.35.[151] By comparison, the gender-only model of the binary "tall" variable has a correlation coefficient of 0.65 (in the same sample used above).

All in all, these metrics suggest that the prediction models do have individual predictive value, but they do not make a resounding case for them. Again, this should not be seen as an indictment of the quality of the science—it is just that even given all the best insights of decades of criminological and psychological research, recidivism remains an extremely difficult outcome to predict at an individual level, much more difficult than height. The models improve considerably on chance, which for some policy purposes (or for the purpose of mental health treatment decisions, which is what many of the models were originally developed for) is no doubt quite valuable. But to justify group-based discrimination in sentencing, both the Constitution and good policy require a much more demanding standard for predictive accuracy. Moreover, note that the accuracy measures discussed here assess the *total* predictive power of each recidivism model, combining all its variables, and are thus overly generous for the purpose of assessing whether particular variables should be included in the model. The marginal predictive power added by just the constitutionally problematic variables is even less, as discussed in the next Section.

The basic difference between individual and group predictions has been pointed out by some scholars in the empirical literature surrounding the risk prediction instruments.[152] But it is lost in much of the EBS legal and policy literature, and more importantly, it may be lost on judges and prosecutors, who may have an inflated understanding of the estimates' precision. Hannah-Moffat explored this issue by interviewing lawyers and probation officers in Canada,

---

[148] This is estimated in the same 400-person sample used above, pairing each "tall" person with one "short" person, scoring the prediction as correct (i.e., 1) if the tall person was male (i.e., predicted to be taller) and the short person was female, incorrect in the reverse case (0), and as 0.5 if the two had the same gender (i.e., predicted to have the same height), following the standard tie-breaking procedure used to calculate AUC scores. Conversely, if one pairs 200 random women with one random man each (eliminating the possibility of "tied" gender), the man is taller 89% of the time—much better than the chance level of 50%.

[149] Note that a 95% prediction interval for an individual forecast of the binary variable "tall" would run from 0 to 1 for both men and women—one could not be anywhere close to 95% confident that any given woman would be short, or that any given man would be tall. In the sample, 17.5% of women and 82.5% of men were "tall."

[150] The square of this correlation coefficient is one variant on the "fit" measure "pseudo R-squared." This and several other variants could be used to assess a model's ability to explain individual variation, although none should be interpreted as a measure of the overall quality of the model. For a concise summary, see Institute for Digital Research & Education, *FAQ: What are pseudo R-squareds?*, http://www.ats.ucla.edu/stat/mult_pkg/faq/general/Psuedo_RSquareds.htm.

[151] Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Recidivism: What Works!*, 34 CRIMINOLOGY 575, tbl. 4 (1994).

[152] *See, e.g.*, Hart et al., *supra*; Cooke & Michie, *supra*.

where risk instruments are common. She found that even if caveats about the difference between group and individual predictions are provided, the message often does not get through:

> [F]ew understand and appropriately interpret probability scores. Despite receiving training on these tools and their interpretation, practitioners tended to struggle with the meaning of the risk score….Rather than understanding that an individual who obtains a high risk score *shares characteristics* of an aggregate group of high-risk offenders, the individual is likely to become *known* as a high-risk offender. Instead of being understood as correlations, risk scores are misconstrued in court submissions, pre-sentence reports, and the range of institutional file narratives that ascribe the characteristics of a risk category to the individual.[153]

Advocates of actuarial methods, in this and other contexts, have often sharply criticized the claim that it is not safe to draw conclusions about individuals based on group averages. Mark Cunningham and Thomas Reedy argue that the "distinction between individualized as opposed to group methods is a false dichotomy," contending, essentially, that truly individualized methods do not exist; the discipline of psychology, and its sub-discipline of violence prediction, draws its fundamental scientific character from its willingness to draw insights from data collected on groups and apply them to individuals.[154] Likewise, EBS advocate Richard Redding quotes Paul Meehl, an early pioneer in actuarial prediction in psychology: "If a clinician says 'This case is different' or 'It's not like the ones in your [actuarial] table,'…the obvious question is 'Why should we care whether you think this one is different or whether you are surer?"[155] Jennifer Skeem and John Monahan, quoting Grove and Meehl, argue:

> Our view is that group data can be, and in many cases empirically are, highly informative when making decisions about individual cases….[C]onsider the revolver analogy of Grove and Meehl:
>
> > …Two revolvers are placed on the table, and you are informed that one of them has five live rounds with one empty chamber, the other has five empty chambers and one live cartridge, and you are required to play Russian roulette….Would you seriously think 'Well, it doesn't make any difference what the odds are. Inasmuch as I'm only going to do this once, there is no aggregate involved, so I might as well pick either one of these two revolvers; it doesn't matter which?"[156]

These responses strike me as off base. I do not argue, nor could anybody, that group averages have nothing to do with individual behavior. Of course group averages will *on average* predict outcomes for the individuals in the group—that much is a tautology—and thus provide some information that could guide individual decision-making. But that does not always mean that the group average tells us *much* about what to expect for any given individual. One does not have to be naïve to think that an individual case may be different from the average if it's a situation in which individual outcomes in fact vary widely. The question is how much individual variation there is in a given population, and how much of that variation the variables in the

---

[153] Hannah-Moffat, *supra*, at 12-13.

[154] Mark D. Cunningham & Thomas J. Reidy, *Violence Risk Assessment at Federal Capital Sentencing*, 29 CRIM. JUST. & BEHAV. 512, 517 (2002); *accord* Jessica M. Tanner, *"Continuing Threat" to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings*, 17 CAP. DEF. J. 381, 402-05 (2005).

[155] Redding, *supra*, at 12 n.52 (quoting Paul E. Meehl, CLINICAL VERSUS STATISTICAL PREDICTION (1954)).

[156] Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, U. Va. School of Law Public Law and Legal Theory Research Paper No. 2011-13, 9-10.

model explain. In the recidivism context (unlike, for instance, the Russian roulette context), the variables included in the instruments leave most of the variation unexplained.[157]

One could defend the instruments on the ground that the precision of individual predictions does not matter from an efficiency perspective. If the group average estimates are good, then the model will, averaged across cases, improve judges' predictions of recidivism, leading more efficient use overall of the state's incarceration resources to prevent crime.

There are two main problems with this response. First, it almost certainly does not suffice for constitutional purposes, at least with respect to any variable triggering heightened scrutiny. The argument amounts to the claim that it doesn't matter whether an instrument has any meaningful predictive power for individuals, so long as the group generalizations have some truth to them. But this is exactly the kind of statistical discrimination defense that the Supreme Court has repeatedly rejected. This point is one reason the Russian roulette analogy is inapt. I would, of course, choose the gun with just one bullet. And if the same dictator forced me to choose between driving on a highway on which 2% of the drivers were drunk and one in which 0.18% of the drivers were drunk, I would choose 0.18% every time. But just that disparity did not suffice, in *Craig v. Boren*, to justify a gender-discriminatory alcohol law. When demographic and socioeconomic characteristics are used to justify the state's serious adverse treatment of individuals, the Constitution requires more than a statistical generalization. Nobody would worry that choosing the gun with one bullet is unfair or harmful to the gun with five. But it is not harmless to base an individual's incarceration on a statistical inference that, based on his poverty or gender, treats him as the human equivalent of a loaded gun.

Second, the "efficient discrimination" argument is not even necessarily correct in terms of efficiency. It is not true that any model with *any* improved predictive power over chance will provide efficiency gains, because EBS isn't replacing chance. If the actuarial instruments don't capture much of the individual variation in recidivism probability, then there is certainly a possibility that the thing EBS is meant to displace—judges' "clinical" prediction of risk—might actually be more efficient because it captures more of that variation. This point is explored further in the next Section.

B. Do the Instruments Outperform Clinical Prediction and Other Alternatives?

The *Bearden* test requires assessment of whether other available and nondiscriminatory (or less discriminatory) alternatives could accomplish the state's penological objectives. Here, I consider two such alternatives: actuarial methods that *do not* rely on constitutionally troubling variables; and judges' exercise of their professional judgment ("clinical" prediction). Even if analysis of alternatives were not constitutionally required, if EBS does not improve at least on the clinical method that it seeks to replace, it does not substantially advance the state's penological interests, and is also undesirable on policy grounds.

EBS advocates have concluded that it is superior to available alternatives, but they have had to stretch the existing evidence quite far to support this claim. J.C. Oleson, for instance, argues that even inclusion of race would be constitutionally permissible, and concludes that it is

[157] In the Russian roulette hypothetical, the decision-maker is given the only variable that matters. The number of bullets quite strongly predicts the individual's probability of dying; it would explain most of the individual variation, with the remaining variation being pure chance. The recidivism models are not in the same ballpark.

"straightforward" to show that no less restrictive means is available.[158] To support this conclusion, he cites just a single study from 1987, by Joan Petersilia and Susan Turner, for the proposition that "omitting race-correlated factors from a model to predict recidivism reduced the accuracy of the model by five to twelve percentage points." Even taking this at face value, it hardly seems obvious that a statistical advantage this modest would justify explicit sentencing discrimination based on race; the Supreme Court has rejected gender discrimination based on stronger statistical evidence than that. And given the Supreme Court's disparate impact jurisprudence, it is odd to justify including race itself based on the predictive power of *race-correlated* factors from the model.

More importantly for present purposes, the Petersilia and Turner study actually suggests that demographic and socioeconomic factors could be excluded from risk prediction instruments without losing any significant predictive value. The "race-correlated factors" in their study *included criminal history and crime characteristics*, which accounted for *all* the additional explanatory value provide by correlates of race (and which no sentencing scheme ignores).[159] Once those factors were already included, adding "demographic" and "other" variables—which included employment, education, marital status, substance abuse, and mental health variables—did not significantly improve the model's predictive power. This is presumably because conduct is generally a better predictor of future conduct than static characteristics are, a point other studies corroborate. For instance, Douglas Mossman's 1994 meta-analysis of studies concerning violence prediction found that "the average accuracy of predictions based on past behavior is higher" than either mental health professionals' clinical judgments or actuarial instruments.[160]

More recent studies of risk prediction instruments have typically not broken down the extent to which adding socioeconomic and demographic variables improves the overall predictive power of the model (a distinct question from the *coefficients* on those variables). But Peterilia's and Turner's results, at least, suggest that a viable alternative is to base actuarial prediction only on crime characteristics and criminal history. Of course, existing sentencing schemes already incorporate those variables, so perhaps providing judges with risk predictions based on them would be redundant. It would be more sensible to have the sentencing commission or legislature incorporate the instruments' insights when determining sentencing ranges. But the fact that an instrument like this might not be terribly useful to judges does not mean that the instruments with the additional variables are *more* useful; the Petersilia and Turner study, at least, suggests that they are not.

Even setting aside the possibility of using *different* actuarial instruments, what about the basic question whether the instruments outperform clinical prediction? It is gospel in the EBS literature that they do. But while scores of studies have found that actuarial prediction methods outperform clinical judgment, this finding is not universal, the average accuracy edge is not drastic, and the vast majority of studies are from wholly different contexts (such as medical diagnosis or business failure prediction). In one widely cited meta-analysis, Grove et al. evaluated all the studies addressing the actuarial versus clinical comparison that were published

---

[158] Oleson, *supra*, at 1386; *see id.* at 1387 (also concluding that "[o]nce the constitutional door is open to race, all other sentencing factors can pass through: gender, age, marital status, education, class, and so forth.").

[159] Petersilia & Turner, *supra*, at 171 (showing, in the table for "All Convicted Defendants," that 57% of outcomes could be accurately predicted by chance, 60% when racially noncorrelated factors were added, 67% when crime characteristics were added, 70% when criminal history variables were added, and still 70% when demographic and "other" variables were added).

[160] Mossman, *supra*, at 789-90.

between 1945 and 1994 and that met certain quality criteria; just five criminal recidivism studies made the cut, plus 131 other studies.[161] Overall, actuarial prediction performed on average about 10% better, but the authors warned: "However, our results qualify overbroad statements in the literature opining that such superiority is completely uniform; it is not. In half of the studies we analyzed, the clinical method is approximately as good as mechanical prediction, and in a few scattered instances, the clinical method was notably more accurate."[162]

If the actuarial advantage does not exist in half of studied contexts, then it is obvious that the specifics matter. And the EBS literature often cites research on far more complicated instruments than the simple ones (like Missouri's, described above) that states actually use. Take, for instance, a study by Grant Harris, Marie Rice, and Catherine Cormier testing an instrument called the Violence Risk Appraisal Guide, which has been cited by EBS advocates.[163] The VRAG consists of twelve variables, the first and most heavily weighted of which is itself a composite of twenty variables: "conning, lying, manipulation, callousness, lack of remorse, proneness to boredom, shallow affect, irresponsibility, impulsivity, poor behavior controls, criminal versatility, juvenile delinquency, sexual promiscuity, and parasitic lifestyle."[164] Assessing these factors requires an elaborate psychological profile, which in the study was carried out by groups of mental health clinicians who "knew the patients well."[165] Nothing like this is typically involved in EBS. Even in the case of sentencing instruments that try to use somewhat nuanced personality characteristics, like the LSI-R, it is not at all obvious that a probation officer filling out a presentence report can carry out a comparable analysis. The VRAG's success simply says nothing about the potential success of a totally different instrument and assessment process. Moreover, the comparability of the populations is also dubious; the VRAG studies involved Canadian psychiatric patients.[166]

Indeed, the past success of instruments that rely on elaborate personality profiles may, if anything, suggest a *disadvantage* of the EBS instruments. The studies show that ideally, after a trained clinician collects all the relevant information and makes the numerous required qualitative assessments, her ultimate predictions will be better informed if she then uses an actuarial model to tell her how much weight to give each factor. This result is unsurprising. But it is a far cry from saying that a different actuarial model that relies on far less overall information (completely ignoring all of the qualitative personality factors) will outperform the judgment of a judge who has had a chance to assess the individual defendant and the complete facts of the case. The relevant comparison, in short, is not just between actuarial versus clinical weighting of variables. It is between actuarial weighting of a few variables versus clinical weighting of a much wider range of variables.[167] It is possible that the actuarial instruments would win that comparison, but we cannot conclude that based on existing research.

---

[161] W.M. Grove et al, *Clinical vs. Mechanical Prediction: A Meta-analysis*, 12 PSYCH. ASSESSMENT 19, 22-24 (2000) (listing studies.

[162] *Id.* at 22-24.

[163] Grant T. Harris et al., *Prospective Replication of the "Violence Risk Appraisal Guide" in Predicting Violent Recidivism Among Forensic Patients*, 26 LAW & HUM. BEHAV. 377 (2002); *see* Wolff, *supra*, at n.73.

[164] Harris et al., *supra*, at 378.

[165] *Id.* at 379.

[166] *Id.* at 381.

[167] Psychologist Stephen Hart states that similar simplified instruments for predicting sexual violence arguably do not deserve even the label "evidence-based" because "scientific and professional literature would not consider [it] informed, guided, or structured since they only include a relatively small set of risk factors." Stephen D. Hart, *Evidence-Based Assessment of Risk for Sexual Violence*, 1 CHAPMAN J. CRIM. JUST. 143, 155, 164 (2009).

A review of each of the five older recidivism studies that Grove et al. included in their meta-analysis likewise does not produce any meaningful support for the modern EBS instruments. Two of the five studies found no discernable advantage for actuarial prediction.[168] Glaeser (1955), one of two studies that found a substantial advantage, involves an archaic prediction instrument in which the most strongly predictive variable was the offender's (clinically assessed) "social development pattern": "Respected Citizen," "Inadequate," "Fairly Conventional," "Ne'er-Do-Well," "Floater," "Dissipated," and "Socially Maladjusted."[169] It also involved very few clinical decisionmakers (four psychiatrists and four sociologists who worked in a parole system in the 1940s), so one possible explanation for the results is that a couple of these people might have not have been terribly good at their jobs.[170] A study by Wormith and Goldstone (1984) evaluates an instrument with more objective criteria and also found that it predicted recidivism better than did the parole board's actual (clinical) decisions. But the study relied on a small Canadian sample that the authors warned "should not be construed as being representative of incarcerated offenders either nationally or internationally."[171] The authors also warned that their measures of clinical and actuarial judgment were not really fairly comparable, in that the "clinical prediction" was not actually a risk prediction at all (instead, it was a binary parole decision), whereas the actuarial prediction was.[172] Finally, a study by Sacks (1974) includes a brief analysis of the clinical versus actuarial comparison, but the comparison it draws is nonsensical (the clinical measure is a parole decision, but only those granted parole are included in the sample) and the purported actuarial advantage is in any case small and not tested for significance.[173]

Nor are more recently published studies more compelling. Oleson et al. (2011) purport to compare the accuracy of clinical and actuarial judgment in federal probation officers' assessment of a probationer's recidivism risk.[174] The study included over a thousand decision-makers (but only one individual's case) and used a modern instrument recently developed by the Administrative Office of the U.S. Courts, called the Federal Post-Conviction Risk Assessment

---

[168] Terrill L. Holland et al., *Comparison and Combination of Statistical and Clinical Predictions of Recidivism Among Adult Offenders*, 68 J. APPLIED PSYCH. 203 (1983) (finding that individual decisionmakers better predict violent recidivism, but actuarial prediction better predicts some measures of overall recidivism); James Smith & Richard I. Lanyon, *Prediction of Juvenile Probation Violators*, 32 J. CONSULTING & CLINICAL PSYCH. 54 (1968) (finding that a juvenile recidivism base expectancy table was slightly more accurate than the predictions of two clinical assessors, but was less accurate than simply predicting that everyone would recidivate would have been).

[169] Daniel Glaser, *The Efficacy of Alternative Approaches to Parole Prediction*, 20 AM. SOC. REV. 283, 285(1955).

[170] *Id.* Problems like this recur in other actuarial versus clinical studies as well—they state a sample size consisting of the number of subjects, and calculate statistical significance as though all of the observations were independent. This approach is misleading because there are usually a far smaller number of clinical decision-makers involved in the study (standard errors should instead be calculated with clustering on the decision-maker).

[171] J. Stephen Wormith & Colin S. Goldstone, *The Clinical and Statistical Prediction of Recidivism*, 11 CRIM. JUST. & BEHAV. 3 (1984).

[172] *Id.* at 20. A general issue with studies that compare real-world "clinical" parole decisions to recidivism risk prediction instruments is that the predictive value of a *prediction* is being compared to that of a *decision*. Wormith et al. explain that it is unsurprising that the parole decision does not predict recidivism as well as an actuarial prediction does, because the parole decision might be affected by factors unrelated to risk prediction, and by the desire to err on the side of caution. *Id.*

[173] Howard R. Sacks, *Promises, Performances, and Principles: An Empirical Study of Parole Decisionmaking in Connecticut*, 9 CONN. L. REV. 347, 402-403 (1977).

[174] J.C. Oleson et al., *Training to See Risk: Measuring the Accuracy of Clinical and Actuarial Risk Assessments Among Federal Probation Officers*, 75-SEP FED. PROBATION 52 (2011).

(PCRA).[175] The researchers asked officers to watch a video about an individual and predict his risk, and then to redo the exercise after being given the individual's PCRA score and training in the PCRA method. The researchers concluded that the officers were "more accurate" when they had the PCRA.[176] But their only evidence for that claim is that officers' risk scores after being given the PCRA and instructed on its implementation were *more consistent with the PCRA.* That is, in a study purporting to assess whether the PCRA improved prediction accuracy, the researchers assumed the PCRA was perfectly accurate; there was no other measure of what the "accurate" score was.[177]

In sum, the shibboleth that "actuarial prediction outperforms clinical prediction" is—like the actuarial risk predictions themselves—a generalization that is not true in every case. Its accuracy depends on the outcome being evaluated, the actuarial prediction instrument, the clinical predictors' skills, the information on which each is based, and the sample. There is little evidence that the recidivism risk prediction instruments offer any discernable advantage over the status quo, and even if they did, that does not mean particular contested variables need to be included in the model. Alternative models might work as well or better.

C. Do the Risk Prediction Instruments Address the Right Question?

Even if the instruments *could* identify high-risk offenders, does that mean that using them would substantially advance the state's interests? EBS's advocates have typically taken this for granted, but the answer may well be no. The instruments tell us, at best, who is at the highest risk of recidivism. They do not tell us whose risk of recidivism will be the *most reduced* by incarceration. The two questions are not the same, and only the latter directly pertains to the state's penological interests.

At the outset, let's precisely identify the state interest that EBS is designed to serve. Its advocates generally refer either to crime prevention, reduction of incarceration, or both. These can be seen as two sides of the same coin: EBS is meant to help the state balance these interests, which are at least potentially in tension. I agree that this objective is compelling. Crime inflicts great harm on society, and so does excessive incarceration. Striking an appropriate balance between these concerns is an enormous and vital challenge.[178]

But that does not necessarily mean actuarial prediction of recidivism—even if it were perfect—substantially advances that interest. Suppose a judge is considering whether to sentence a defendant to five years in prison versus three. Assuming that the costs of incarceration are the same across defendants,[179] the question is whether the additional two years' incarceration will reduce enough crime to justify those costs. The EBS prediction instruments do not seek to answer that question. Their predictions are not conditional on the sentence. The

---

[175] This instrument includes qualitative and dynamic factors plus objective factors like age and education. It is in use for planning probation supervision and treatment interventions, not sentencing. Admin. Office of the U.S. Courts, Office of Probation and Pretrial Services, *An Overview of the Federal Post Conviction Assessment* 1 (Sept. 2011).

[176] Oleson et al, *supra*, at 54-55.

[177] The AOUSC's other validation studies for the PCRA did not compare its effectiveness to clinical prediction, and did not find anything close to *perfect* accuracy. AOUSC, *supra*, at 9.

[178] One could frame the state interest as being about the efficient use of finite incarceration resources to maximize crime prevention effects. Unless states have reached their prison capacities and cannot expand, though, I assume that the incarceration rate isn't fixed, so sentencing judges don't think about incarcerating one defendant as trading off with incarceration of another. Instead, they think about whether that particular sentence is worth its costs.

[179] This assumption may not be true. Some defendants have families that are affected, for instance.

samples in the underlying studies include people given all kinds of sentences. They measure recidivism within a particular period, measured from the time of release or (for probationers) from sentencing, but there are no variables relating to the sentence in the regressions. The judge accordingly cannot use the instrument to answer the question "How much crime should I expect this defendant to commit if I incarcerate her for five years?", or three years, or any other potential length. The judge only knows how "risky" she is in the abstract.[180]

This point has been ignored by the EBS literature. Bernard Harcourt, however, makes a similar point about the general deterrence consequences of police profiling and criminal history-based sentencing enhancements.[181] Some have argued that it is efficient for police to focus on groups that commit crimes at greater rates because it concentrates the deterrent effect of policing on the more dangerous groups. Harcourt responds that the fact that members of a particular group commit more crimes on average does not mean that that group is more readily deterred by policing. In fact, high-risk, socially disadvantaged groups may be less willing to cooperate with police, or less deterred by the marginal increase in detection risk, meaning that policing in their communities may actually deter *fewer* crimes than policing in other communities. The relevant question, Harcourt argues, is not rate of crime commission; it is "elasticity" to policing.[182]

Harcourt's argument focuses on general deterrence effects on community crime rates, but a similar problem arises when one considers the effects of marginal changes in incarceration specifically on the defendant's own future crime risk—that is, the very thing that the risk prediction instruments are ostensibly there to help judges minimize. If we are going to base incarceration length on group averages with the objective of reducing crime, then surely the relevant group characteristic is how much incarcerating its members reduces crime—its elasticity to incarceration. And that question is not the same as the question of recidivism probability. There is no particular reason to believe that groups that recidivate at higher rates are also more responsive to incarceration. EBS advocates presumably think that point is intuitive: lock up the people who are the riskiest, and you will be preventing more crimes. But that intuition oversimplifies the relationship between incarceration and recidivism.

Incarceration's effect on an individual's subsequent offending has two components. First, there is an *incapacitation effect*: while behind bars, he cannot commit crimes that he would have committed outside.[183] If the incapacitation effect were the *only* effect that incarceration has on subsequent crime, then it would be logical to assume that the state's incarceration resources are best targeted at the highest-risk offenders. But the situation is not that simple, because of the second component: the effect on the defendant's *post-release* crimes. I will refer to this as the "specific deterrence" effect, but it is really more complicated—it includes on the one hand specific deterrence (fear of reincarceration) plus any rehabilitative effect of prison programming, and on the other hand potentially criminogenic effects of incarceration (interfering with

[180] A related concern is that the length of incarceration may be a confounding variable in the underlying predictive model. If the people who have one set of characteristics tend to get longer sentences than those with other characteristics, then the comparison of their recidivism rates could be apples-to-oranges, because one group's rate is the average after, say, an average of 3 years of incarceration and the other group's rate is the average after 5. We thus don't even know from the models who is the riskiest *today*, much less who is the riskiest X or Y number of years from now.

[181] HARCOURT, *supra* note 12, at 122-36.

[182] *Id.*; Bernard E. Harcourt, *A Reader's Companion to* Against Prediction, 33 LAW & SOCIAL INQUIRY 265, 269 (2008).

[183] This incapacitation effect should be discounted for crime in prison, a complication I will bracket for simplicity.

subsequent employability, building criminal networks, and so forth). There is no intuitive reason to assume that the specific deterrence effect is determined by, or even correlated with, the defendant's recidivism risk level. It is very possible that higher-risk defendants (or some of them, anyway) might be more *inelastic* to specific deterrence and rehabilitation, and might be more vulnerable to the possible criminogenic effects of incarceration. If so, lengthening high-risk offenders' sentences might be more likely to increase the risk they pose after they get out, or at least to lower that risk less than locking up some low-risk offenders might.

If so, this disadvantage has to be weighed against the incapacitation advantage. Implicitly, the current EBS instruments (by ignoring the elasticity question) embrace the premise that only incapacitation matters, but this is not obvious. Most incarceration sentences are fairly short: in 2006, the median prison sentence in state courts was 1.7 years (and that is excluding jail sentences, which are shorter).[184] Moreover, EBS advocates often emphasize its value in determining whether a person should be incarcerated at all, versus probation; presumably, in cases on the incarceration margin, the incarceration sentence being considered is quite short. So, suppose a judge is considering whether to incarcerate a person for one year, versus zero. In that case the potential incapacitation effect lasts a year—a one-year slice of the defendant's offending is taken away. But all the other effects of the judge's choice may last, at least to some degree, the rest of the defendant's lifetime after that year.

There is simply no reason to assume the incapacitation effect is the most important factor, much less the only important factor—and if it is not, then the correspondence between risk prediction and crime-elasticity prediction may well be wholly lost. And this complication arises even if one assumes the relevant state interest only relates to reducing the *defendant's* crime risk. If we also consider effects on *other* individuals' crime commission, there are many more factors to consider, none of which have any intuitive connection to recidivism risk scores: general deterrence, expressive effects on social norms, future crime risk from the defendant's family members, substitution effects in criminal markets, and so forth.

While much of the current EBS literature totally ignores the question of responsiveness of recidivism risk to incarceration, some advocates have taken the general position that incarceration *increases* recidivism risk, citing as evidence simply the fact that persons released from prison recidivate at higher rates than probationers.[185] But this reasoning relies on an apples-to-oranges comparison. It is unsurprising that prisoners recidivate more often than probationers, because prisoners are usually more serious offenders with more prior criminal history. Also, the claim that incarceration generally increases recidivism would make the entire premise of EBS dubious: unless one is considering a life sentence, why identify the most dangerous criminals in order to incarcerate them if incarceration will only make them *more* dangerous? Risk prevention is only a plausible justification for incarceration if the sign on incarceration's effects goes the other way for at least some offenders—and a truly useful risk prediction instrument would try to identify who those offenders are.

---

[184] Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistics* tbl. 1.3 (2009), http://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

[185] *E.g.*, McGarraugh, *supra* , at 1107; Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 594 (2009); Michael A. Wolff, *Lock 'Em Up and Throw Away the Key? Cutting Recidivism by Analyzing Sentencing Outcomes*, 20 FED. SENT. R. 320, 320 (2008).

Drawing solid causal inferences in this area is difficult. Some studies have used regression or matching methods to compare recidivism rates after controlling for observed characteristics like crime type and criminal history.[186] But while this approach is better than a raw comparison of means, it still does not produce strong causal identification. Causal inference based on regression depends on the assumption that all the important potentially confounding variables have been observed and controlled for. This assumption is often not valid, so one has to be very cautious not to interpret regression results to mean more than they do.

A particular concern arises when the treatment variable of interest (here, incarceration) might itself be influenced by a decision-maker's anticipation of the outcome of interest (here, recidivism). Measuring a statistical association between the two variables provides no way to disentangle which component comes from incarceration causing recidivism, which from anticipated recidivism risk causing incarceration, and which from other confounding variables that affect both sentencing decisions and recidivism outcomes. Regression does not solve the reverse causality problem unless the control variables in the regression account for *all* the reasons that a judge might think a defendant poses a higher risk. As we have seen already, though, even the best recidivism models do not even come close to accounting for all of the sources of individual variation in risk. They surely do not account for all of the sources of variation in judicial anticipation of risk, either—for instance, judges' appraisal of the detailed facts of the case or defendants' courtroom demeanor.

Some recidivism studies have used more rigorous quasi-experimental methods to assess causation, seeking to exploit an exogenous source of variation in incarceration length—that is, a source of variation that is not itself affected by anticipated recidivism risk or by any of the other various factors that affect recidivism risk.[187] Several studies take advantage of the random assignment of judges or public defenders. The intuition is that getting randomly assigned to a particularly harsh judge, or to a less capable public defender, will tend to increase a defendant's sentence in a way unrelated to the defendant's characteristics—thus, while the sentence is not entirely random, it has an effectively random component. Instrumental variables methods are used to estimate the effect of this exogenous increase in sentences on subsequent recidivism. Other studies take advantage of legal reforms that introduce sentencing variation.[188]

These studies have fairly consistently found that increased sentence length on average reduces subsequent offending, although the effect seems to be nonlinear—the marginal effect of increasing sentence lengths declines and eventually disappears as sentence lengths get longer.[189] Thus, specific deterrence lengths on average cut in the same direction as incapacitation effects do.[190] Reported incapacitation effects typically appear larger,[191] but the results of the two types of studies are hard compare. Incapacitation studies generally estimate the number of crimes

---

[186] *See, e.g.*, Oregon Dep't of Corrections, *The Effectiveness of Community-Based Sanctions in Reducing Recidivism* 18-19 (Sept. 2002).

[187] For a useful recent review of this literature, see David A. Abrams, *The Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 929-36 (2013).

[188] *E.g.*, Shawn D. Bushway & Emily G. Owens, *Framing Punishment: A New Look at Incarceration and Deterrence* (Jan. 2010) (unpublished manuscript), www.human.cornell.edu/pam/people/upload/Framing-Jan-2010.pdf; Ilyana Kuziemko, *Going Off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime* 13-22 (Nat'l Bureau of Econ. Research, Working Paper No. 13380, 2007), available at http://www.nber.org/papers/w13380.pdf?

[189] *See* Abrams, *supra*, at 936.

[190] *Id.* at 936-39 (reviewing incapacitation studies)..

[191] *Id.*

avoided during each "person-year" of incarceration,[192] measuring incapacitation's full effect, whereas specific deterrence studies of subsequent recidivism do not estimate the full specific deterrence effect (that is, the change in crime commission over the defendant's whole remaining lifetime). Instead, such studies mostly have quite short follow-up periods, and generally measure not number of crimes committed but recidivism "survival," i.e., whether an offender makes it through the study period without being rearrested or reconvicted, and if not, how long he lasts.[193] Moreover, incapacitation studies sometimes use reported crime as their measure,[194] whereas recidivism studies use the more underinclusive measures of rearrest or reconviction.

Regardless, what the existing research on causal effects has *not* done is to estimate either specific deterrence or incapacitation elasticities that are conditional on the kinds of characteristics that are included in the EBS risk prediction instruments. Instead, the research has focused on estimating the causal relationship between incarceration and crime at a more general level, perhaps subdivided by broad crime category or by deciles of the sentencing-severity distribution, but not by detailed socioeconomic, demographic, and family characteristics. One Urban Institute study, by Avi Bhati, does estimate incapacitation elasticities that are gender, race, and state-specific, but not specific deterrence elasticities, and not broken down by socioeconomic status. It finds no major differences in the total number of crimes averted by either gender or race.[195] Notably, variations by state were far more dramatic, suggesting the need to worry about another problem with the risk prediction instruments: extrapolation from the sample on which they were developed to different offender pools in different jurisdictions. A study by Ilyana Kuziemko on specific deterrence effects finds that incarceration length increases have a "much stronger deterrent effect for older offenders than younger ones, for whom time served actually weakly increases recidivism." That is, young age—one of the most heavily weighted predictors of increased recidivism risk in the current instruments—actually appears to correspond to a lower effectiveness of incarceration length increases in deterring post-release recidivism. This suggests that the EBS instruments are weighing this factor in the wrong direction.

Perhaps future research will improve matters. To effectively inform the state's pursuit of its penological objectives, the research underlying future instruments would have to satisfy the following criteria:

(1) the use of valid causal identification methods, e.g., exploiting random assignment of judges;

(2) application of those methods to obtain estimates for incarceration's effects that are interacted with the variables that the state seeks to include in the instrument;

(3) accounting for nonlinear effects of incarceration length (e.g., the effect of a tenth year of incarceration is probably not the same as the effect of a first);

---

[192] *E.g.*, Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?* 28 (Oct. 2010) (unpublished manuscript), http://ist-socrates.berkeley.edu/~ruckerj/johnson_raphael_crimeincarcJLE.pdf.

[193] *E.g.*, Kuziemko, *supra*, at 22.

[194] *E.g.*, Johnson & Raphael, *supra*, at 24

[195] *E.g.*, Avi Bhati, *An Information Theoretic Method for Estimating the Number of Crimes Averted by Incapacitation*, Urban Institute Research Report 24 tbl. 2 (July 2007) (showing estimated male elasticities that were slightly greater in most states, but not in every state and by very small margins). Expressed as a *percentage* reduction in crime rate, rather than an absolute number of crimes averted, females were actually more responsive to incarceration in every state studied. *Id.* at 27 tbl. 4.3.

(4) long enough follow-up periods to allow researchers to meaningfully approximate the change in an individual's lifetime recidivism risk;[196]

(5) incorporation of both incapacitation and specific deterrence effects, with comparable outcome measures;

(6) testing of the instrument within the jurisdiction in which it will be used, on a representative sample; and

(7) evidence of substantial *additional* explanatory power for each constitutionally problematic variable that the state seeks to include.

The current instruments do not do anything like this, and I am not optimistic that this research challenge will be overcome soon. And even it is, the above-discussed problems concerning the uncertainty of *individual* predictions would still apply to the prediction of individual elasticities.

Finally, it might also be objected that it would be unfair to treat an individual's greater expected responsiveness to incarceration as the basis for incarcerating her for longer—offenders might be penalized for *not* being incorrigible. I am sympathetic to this objection. But once sentencing is based on predicting future actions on the basis of demographic and socioeconomic considerations, "fairness" is no longer a decisive sentencing criterion anyway. I do not really advocate it, but at least an elasticity-prediction sentencing instrument would be connected to the state's penological interests. The current instruments are not.

IV. Will Risk Prediction Instruments Really Change Sentencing Practice?

Advocates of EBS sometimes defend it against disparity and retributive justice objects by arguing that it will not really change very much at all. These "defenses" come in two forms. The first is to observe the risk prediction instruments don't directly determine the sentence--they merely provide information to judges. The second defense is that minimization of the defendant's future crime risk already plays an important role in sentencing, so perhaps EBS merely replaces judges' individual judgments of that risk with more accurate actuarial predictions. I address these points in Sections A and B, respectively.

A. Does EBS Merely Provide Information?

One response to disparity concerns is to defend the instruments as innocuous insofar as they only provide information, rather than completely controlling the sentence.[197] The judge can take or leave the information, supplement it with her own clinical assessments of risk, and weigh other, non-recidivism-related factors. As a constitutional defense of EBS, this point could be framed in two ways. The strong form of the argument would assert that the state's adoption of

[196] Collecting data on an offender's entire life is unrealistic, but follow-up periods substantially longer than the typical one or two years are needed. Most people eventually desist from crime, and people who have not recidivated for 7 or 8 years (after release, if they were incarcerated) have quite low subsequent recidivism rates. *E.g.*, Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006). Thus, to study the effect of a first year of incarceration (versus none), eight or ten years of outcome data would probably be fine. The study should simply estimate total crime by each individual over a fixed period of time beginning at sentencing, conditional on (among other things) the share of that time that is spent in prison—that measure would incorporate both incapacitation and specific deterrence effects.

[197] *E.g.*, Malenchik v. State, 928 N.E.2d 564, 573 (Ind. 2010); David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1456 (2011); Kleiman, *supra*, at 301.

the risk prediction instrument does not itself amount to disparate "treatment" at all. Rather, it merely provides social scientific information to a government decision-maker, and surely the Constitution does not require sentencing judges to be ill-informed.

The problem with this framing, however, is that the point of evidence-based sentencing is for the sentence to be *based* on the statistical "evidence," at least in part. The risk score is not calculated for academic purposes. Even if the instrument itself is "only information," the sentencing process that incorporates it is not. Sentencing law already tells judges to consider recidivism risk,[198]and the instrument tells the judge how to calculate that risk. Inescapably, unless judges completely ignore the instruments (rendering them pointless), some defendants will receive longer sentences than they would have but for their group characteristics, such as youth, male gender, or poverty. And that, indeed, is the whole point: if the state did not want unemployed people to be, on average, given longer sentences than otherwise-identical employed people, why put unemployment in the risk prediction instrument? Moreover, arguably even the information provision itself is constitutionally troubling: it represents state endorsement of statistical generalizations like those that, in the gender and poverty contexts, the Supreme Court has condemned.

To be sure, for any individual defendant, each factor included in the risk prediction models is not the *only* determinant of the sentence—it is merely one determinant of the risk score. If a court were looking for ways to distinguish *Bearden*, it could seize on this difference. That case involved revocation of probation, and the Court emphasized that because the trial court had initially chosen probation, it was clear that "the State is seeking here to use as the *sole* justification for imprisonment the poverty of a probationer."[199] This distinction is unpersuasive, however. Anything treated as a sentencing factor will at least sometimes solely trigger a change in the sentence relative to what it would otherwise have been. To give a simple illustration, if a sentence is based on crime severity plus gender, and these factors together produce a 10-year sentence for a male when an otherwise identical woman would have received seven years, male gender is not solely responsible for the sentence; crime severity establishes the baseline of seven years. But male gender is solely responsible for the extra three years.

If this point is slightly more obscured in EBS cases than in *Bearden* itself, it is only because judges won't routinely state what alternative sentence they would have given if the defendant had had different characteristics. In *Bearden* the dispositive role of poverty could not be hidden because of the posture of the case: the defendant had been sentenced to probation and restitution until he failed to pay. But surely if a court's decision-making is unconstitutional in substance, it cannot become constitutional through obscurity of reasoning. In any event, here the use of the discriminatory factor is not obscure, even if its specific consequence for any given defendant is not transparent. A defendant subjected to an unconstitutional decision-making process should be entitled to resentencing.[200] Notably, the Supreme Court has often applied heightened constitutional scrutiny to the mere *consideration* of constitutionally suspect factors. In *Fisher v. University of Texas at Austin*, for instance, the Supreme Court applied strict scrutiny to the use of race as one of many factors in university admissions—indeed, as Justice Ginsburg

[198] *E.g.*, 18 U.S.C. 3553(a).
[199] *Bearden*, 461 U.S. at 671.
[200] *See* Chapman v. California, 386 U.S. 18 (1967).

characterized it in dissent, as a "factor of a factor of a factor of a factor" that very likely was not the reason that the plaintiff in the case was denied admission.[201]

The claim that "it's just information" thus should not enable EBS to *avoid* heightened equal protection scrutiny. A weaker, and more persuasive, version of this claim is that it should make it easier for EBS to *survive* such scrutiny under a "narrow tailoring" requirement. Analogously, in the affirmative action cases, the Court has held that race may be used as a "plus factor" (if there is no race-neutral alternative that will suffice), but it has squarely rejected the use of racial quotas.[202] But the fact that the risk prediction instruments do not completely displace all other sentencing factors is a point in its favor when assessing narrow tailoring, but it is hardly dispositive, as *Fisher* suggests. One must also consider the extent to which they advance the state's interests as well as the availability of alternatives.

Moreover, although *Fisher* made narrow tailoring somewhat challenging to demonstrate even in the affirmative action context, it should be even harder to show in the EBS context. Educational affirmative action involves a state interest that is itself defined in race-conscious terms: student body diversity, of which "racial or ethnic origin" is an "important element," although not the only one.[203] It is more than plausible that considering race as one admissions factor is narrowly tailored to the objective of ensuring racial diversity, and that no totally race-blind alternative will suffice to achieve that objective. In the EBS context, however, the state's penological interests are not defined in group-conscious terms, and the problematic classifications in the instruments are not so closely linked to those interests.

B. Does EBS Merely Replace One Form of Risk Prediction With Another?

Another response to the disparity concern (and to the retributivist objection raised by other critics) is to say that none of this is new: risk prediction is already part of sentencing.[204] If judges are *not* given statistical risk predictions, many will predict risk on their own, perhaps relying implicitly on many of the same factors that the statistical instruments use, such as gender, age, and poverty; actuarial instruments will merely allow them to do so more accurately.[205] One could take this argument further: Conceivably, judges' current clinical assessments could *overweight* some of those variables relative to the weights assigned by the actuarial instruments.[206] These possibilities not been empirically tested and cannot be ruled out.

As a constitutional matter, this "substitution" defense is not very persuasive. It is not likely that courts would uphold an across-the-board state policy explicitly endorsing an otherwise impermissible sentencing criterion on the rationale that the same variables *might* sometimes

---

[201] Fisher v. University of Texas at Austin, 570 U.S.__, ___ (2013) (Ginsburg, J., dissenting).
[202] *Fisher*, 570 U.S. at __.
[203] *Id.* at __.
[204] *See, e.g.*, 18 U.S.C. 3553.
[205] *See, e.g.*, Oleson, *supra*, at 1373; Patton, *supra*, at 1456; Jennifer Skeem, *Risk Technology in Sentencing: Testing the Promises and Perils*, 30 JUSTICE Q. 297 (2013); Bergstrom & Kern, *supra*, at 2; Commentary to Draft MPC § 6B.09; *Michael H. Marcus, MPC--The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 757 (2009); Branham, *supra*, at 169.
[206] This is perhaps a particularly realistic possibility with respect to race, because of its absence from the instruments: if judges currently implicitly take race into account in predicting recidivism risk, it is possible that giving them a statistical prediction that is not race-specific could cause them to stop doing so. Thus, even if EBS increases the weight given to socioeconomic variables that are correlated with race, it could reduce the weight given to race itself, offsetting or even reversing its expected effect on racial disparity.

already have been used *sub rosa*. In general, the difficulty of eradicating subtle unconstitutional discrimination does not justify codifying or formally endorsing it.

Moreover, the "substitution" defense depends on a questionable empirical premise. Do the EBS instruments really merely substitute one form of risk prediction for another? Or does providing judges with statistical estimates of recidivism risk increase the salience of recidivism prevention in their decision-making vis-à-vis other punishment objectives? Notably, some EBS advocates affirmatively express the hope that EBS will lead to an expanded emphasis on recidivism prevention.[207] If it does, it will almost surely increase the role of the individual demographic and socioeconomic characteristics used in the EBS instruments. Those characteristics are not relevant to retributive motivations for punishment (or may even cut the other direction).

There are logical reasons to suspect that EBS might increase the emphasis judges place on risk prediction. Most judges no doubt recognize that predicting recidivism risk is difficult, and that difficulty might well lead many of them to discount this factor. If such a judge is presented with a quantified risk assessment framed as scientifically established, they may well give it more weight.[208] In many other legal, policy, and other decision-making contexts, scholars have observed that judges and other decision-makers often defer to scientific models that they do not really understand, and to "expert" viewpoints.[209] Moreover, sentencing is high-stakes, complex decision-making that many judges describe as weighing heavily on their emotions,[210] rendering the use of a simple, seemingly objective algorithm potentially appealing.[211] For elected judges, research has shown that political considerations influence sentences,[212] and reliance on risk predictions might provide political cover for release decisions while making it

---

[207] *E.g.*, Hyatt, Bergstrom, & Chanenson, *supra*, at 266.

[208] *See* Hannah-Moffat, *supra*, at 7 ("Risk scores impart a moral certainty and legitimacy into the classifications that they produce, 'allowing people to accept them as normative classifications and therefore as scripts for action."); Harcourt, *supra*, at 273 (describing the "pull of prediction").

[209] *E.g.*, Janine Pearson, *Construing* Crane: *Examining How State Courts Have Applied its Lack-of-Control Standard*, 160 U. PA. L. REV. 1527, 1550-53 (2012) (discussing jury overreliance on expert testimony of dangerousness in civil commitment hearings); Michael H. Shapiro, *Updating Constitutional Doctrine: An Extended Response to the Critique of Compulsory Vaccination*, 12 YALE J. HEALTH POL'Y, L. & ETHICS 87, 128-29 (discussing the problem of judicial overreliance on expert claims of causation); Kathryn M. Campbell, *Expert Estimates from 'Social' Scientists*, 16 CAN. CRIM. L. REV. 13 (2011); Robert L. Kane, *Creating Practice Guidelines: The Dangers of Over-Reliance on Expert Judgment*, 23 J.L. MED. & ETHICS 62, 63 (1995); Robert E. Schween & Steven P. Larson, 32 ROCKY MTN. MINERAL L. INST. PROC. 22 (1986) (describing courts' and policymakers tendency to overrely on models and perceived expertise in the environmental context); Case, *Problems in Judicial Review Arising From the Use of Computer Models and Other Quantitative Methodologies in Environmental Decision Making*, 10 B.C. L. REV. 251, 256 (1982) (same).

[210] *See* Oleson, *supra*, at 1330 & n.2 (citing sources); D. Brock Hornby, *Speaking in Sentences*, 14 Green Bag 2d 147, 157 (2011); Judge Robert Pratt, *The Implications of* Padilla v. Kentucky *on Practice in United States District Courts*, 31 ST. LOUIS UNIV. PUBLIC L. REV. 169, 169 (2011) ("Sentencing is unquestionably the most difficult job of any district court judge."); Judge Thomas M. Hardiman, *Foreword*, 49 DUQ. L. REV. 637, 637 (2011) ("Any preconceived notions that a judge may have about sentencing upon taking the bench are quickly dwarfed by the awesome responsibility it entails.").

[211] This point may help to explain the continuing heavy weight federal judges give to the sentencing guidelines that they are not required to follow.

[212] Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004) (finding that judges increase sentences as elections approach).

politically difficult to release offenders rated as high-risk.[213] Prosecutors might similarly feel political pressure to push for harsh sentences for offenders rated high-risk, but free to offer better deals to those rated low-risk.[214]

To be sure, some of the research on clinical versus actuarial prediction has suggested that clinicians may resist reliance on actuarial instruments, but that research comes from medical and mental health diagnosis settings in which the clinician may be much more confident in their professional diagnostic skills than judges are in their ability to foresee a defendant's future.[215] Even if a particular judge does not really trust the instrument, its prediction might influence her thinking through anchoring.[216] And presenting the judge with a risk prediction instrument may simply remind her that risk is a central basis on which the state expects her to base punishment.

All of this is speculative; no empirical research documents how risk prediction instruments affect judges' weighting of recidivism risk versus other factors. To provide some suggestive evidence informing the question, I carried out a small experimental study, with 83 law students as subjects. All subjects were given the same fact patterns describing two criminal defendants and told to recommend a sentence for each. The key experimental variation was that for half the subjects, the descriptions also included a paragraph with the defendant's score on a Recidivism Risk Prediction Instrument (RRPI) and a brief explanation of what the RRPI was.

The cases involved the same conviction (grand larceny of $100,000 worth of jewelry) and the same minimal criminal history (one misdemeanor underage-drinking conviction). Both defendants were male, and no race was mentioned. Beyond that, their characteristics varied sharply. Robert was a middle-aged, married, college-educated executive in a jewelry store chain, and was motivated to steal from the chain's stores by concern about the cost of his daughters' college education. William was a 21-year-old, single, unemployed, alcoholic high school dropout with incarcerated siblings, recently evicted from his parents' home, who was visiting a mall looking for retail work when he saw a jewelry display case open and spontaneously grabbed a bunch of items. These fact patterns allowed some possible distinctions between the defendants' criminal conduct. William's crime was spontaneous, while Robert's involved an extended course of conduct, elaborate deceptive behavior (replacement of the jewels with fakes), and arguably more victims (buyers of the fakes). These distinctions allowed subjects primarily motivated by retribution to have a possible basis for distinguishing the two—likely in William's favor—whereas those inclined to rely on a defendant's characteristics to assess future dangerousness would likely give William a longer sentence.[217] Subjects were given a wide statutory sentencing range (zero to 20 years) and not told what punishment theories to prioritize.

All subjects were given all these underlying facts; the difference was whether they were also translated into an RRPI score. Robert's probability of recidivism was rated "low risk" while William's was "moderate-to-high risk." Although the RRPI is fictional, these ratings realistically approximate the difference that one would see using real instruments. For instance, on the Missouri instrument's -8 to 7 scale, Robert would have a perfect score of 7, while William

---

[213] Hannah-Moffat, *supra*, at 30 ("The use of risk scores can have considerable cache[t] with 'elected' judges and prosecutors who must defend their decisions to an electorate concerned with security.").
[214] *Id.*
[215] *E.g.*, Atul Gawande, THE CHECKLIST MANIFESTO (2009).
[216] *See* Prescott & Starr, *supra*, at 325-30 (reviewing anchoring research); Cass R. Sunstein et. al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1170 (2002).
[217] Students' comments after completing the exercise supported this interpretation.

would score -1 ("below average"). Subjects considered the scenarios in a prescribed, randomized order.

The results in Table 2 suggest that the RRPI score sharply affected the relative sentences some subjects gave to Robert and William. Among the 43 students who were not given the RRPI score, 17 gave Robert (the "low-risk" defendant) the higher sentence, 13 gave them the same sentence, and 13 gave William the higher sentence. Among the 40 students who received the RRPI score, only 8 gave Robert the higher sentence, 9 gave them the same sentence, and 23 gave William the higher sentence.

Table 2: An Experiment: Risk Prediction Instruments and Relative Sentence Outcomes

	(1) Robert Higher	(2) William Higher	(3) Which Higher? (William, Same, Robert)	(4) Sentence
	(Probit)	(Probit)	(Ordered Probit)	(OLS)
RRPI	-0.603*	0.710*	0.662**	-0.871
	(0.305)	(0.284)	(0.257)	(0.733)
William				-0.711
				(0.473)
william*RRPI				1.67*
				(0.61)

Cols. 1 & 2 show probit regressions of indicators for giving the "low-risk" or "high-risk" defendant, respectively, a higher sentence. Col. 3 shows an ordered probit regression of a variable valued at 2 if the high-risk defendant's sentence was higher, 1 if they received the same sentence, and 0 if the low-risk defendant's sentence was higher. Col. 4 is an OLS regression with sentence in years as the outcome. An indicator for which case the subjects considered first was also included. Standard errors in parentheses. *p<0.05, **p<0.01

I assessed the size and statistical significance of this shift toward higher sentences for William in several ways, using different definitions of the outcome variable. First, I used probit regressions to estimate the change in the probabilities that Robert would be given a higher sentence (Col. 1) or that William would (Col. 2.). These two are not just mirror-image inquiries, since there is a third option of giving both the same sentence. I next used an ordinal probit regression to assess change in the relative probability of each of these three possible outcomes (Col. 3). Next, I used the recommended sentence, in years, as the outcome variable, an approach that takes into account the magnitude and not just the direction of the sentencing distinctions (Col. 4). The results are statistically significant, and fairly sizeable, in all specifications. The use of the RRPI instrument is associated with an increase in William's sentence, relative to Robert's, of about 1.67 years (that is, 20 months), or about one-third of the overall average sentence (5 years). The average sentence given to William was about 0.8 years higher in the RRPI condition; the average sentence given to Robert was about 0.9 years lower.[218]

A reasonable interpretation of these results is that receiving the RRPI score caused at least some subjects to emphasize recidivism risk more, relative to other sentencing considerations, than they would have otherwise. Moreover, the instrument's apparent effect on sentences was not unidirectional—the instrument's estimated effect on the difference between

[218] Subjects who were given William's case first gave significantly higher sentences to both defendants than those who were given Robert's case first. But order did not significantly affect the *relative* sentences given nor the effect of the RRPI.

the two defendants reflected a combination of an increase in the high-risk defendant's sentence and a reduction in the low-risk defendant's sentence.

These results provide a piece of suggestive evidence that quantified risk assessments might affect the weight placed on different sentencing considerations. However, the study is small, and moreover, although much experimental research on decision-making uses student subjects, one has to be cautious in extrapolating the results of such studies to "real world" settings. A real criminal case is not a four-paragraph vignette, and judges are not law students—their experience and expertise may make them less suggestible. Still, it cannot be assumed that judges are wholly resistant to attempts to influence their sentencing decision-making. After all, judges tend to defer to non-binding sentencing guidelines, and research from other legal settings suggests that courts tend to defer to scientific expertise.[219] While it remains an unsettled question, for now there is no empirical evidence pointing the other way, and little reason to believe that EBS will *merely* substitute one form of risk prediction for another.

CONCLUSION

The inclusion of demographic and socioeconomic variables in risk prediction instruments that are used to shape incarceration sentences is normatively troubling and, at least with respect to gender and socioeconomic variables, very likely unconstitutional. As the EBS movement charges full steam ahead, advocates have minimized the first concern and almost wholly ignored the second. This is a mistake. To be sure, EBS has an understandable appeal to those seeking a politically palatable way to cut back on the United States' sprawling system of mass incarceration. It is difficult to persuade policymakers to reduce incarceration at the cost of increased crime, and EBS offers a technocratic solution to this normative dilemma: just identify the people who can be released without increasing crime. But this identification is not that easy, and moreover, there is no reason to assume, and no good way to ensure, that EBS will only lead to sentences being reduced. Even if it does, there is something troubling, at best, about using group identity and socioeconomic privilege as a basis for reducing defendants' sentences.

Note that while I have focused on sentencing, essentially the same arguments apply to use of actuarial instruments in - decisions, which is now routine in thirty states, including almost all of those that have not abolished discretionary parole.[220] This practice has been given little attention by legal scholars or the public,[221] and has rarely been challenged in court, perhaps because of the absence of counsel in parole proceedings or because parole decision-making is not very transparent. Many prisoners may not even know of the existence of the risk prediction instruments, much less understand how they work or their constitutional infirmities.[222] But while risk prediction unquestionably is properly central to the parole decision,[223] the use of

[219] *See supra* note 209.

[220] HARCOURT, *supra*, at 78-80.

[221] Scholarly criticism has focused on procedural concerns—mainly on the prisoner's lack of counsel at parole hearings. For this reason, the MPC claims to "'domesticate[]' the use of risk assessments by repositioning them in the open forum of the courtroom"—that is, by using them in sentencing instead of in parole (which the MPC seeks to abolish entirely). Draft MPC § 6B.09 cmt. (a). *See also* McGarraugh, *supra* (advocating barring the instruments at parole but using them in sentencing).

[222] In some states, the basis for the parole decision is confidential by law, so the parole board may refuse the prisoner's request to see the risk assessment. McGarraugh, *supra*, at 1079 & n.5.

[223] Indeed, risk is arguably the *only* legitimate parole consideration, because considerations such as retributive justice or general deterrence have already been considered by the sentencing judge. The only reason to leave the

demographic and socioeconomic variables to predict risk raises the same disparate treatment concerns that EBS does.[224] Moreover, the parole context may offer additional available alternatives to the constitutionally objectionable variables. For instance, rather than basing parole decisions on a prisoner's prior education or employment, one could consider his efforts while in prison to improve his future prospects, such as participation in job training or education programs. Such factors would speak to the prisoner's individual efforts to achieve rehabilitation, rather than to his socioeconomic background.

In contrast, it is easier to defend the use of risk prediction instruments in assignment of prisoners, probationers, and parolees to correctional and reentry programming (*e.g.*, job training), and to shape conditions of supervised release (*e.g.*, drug tests).[225] In this context, risk assessment is often combined with instruments assessing "criminological needs" and predicting "responsivity" to various such interventions. The empirical merits of such instruments are beyond this paper's scope, though I note that the responsivity instruments at least address the right question: what can be gained by treating an offender in a certain way? In any event, such uses of actuarial instruments raise less serious constitutional and policy concerns. To be sure, supervision conditions may be burdensome, especially if they affect the likelihood that probation or parole will be revoked, and programming decisions can affect access to valuable services. Still, the stakes are not as high as they are in sentencing, and therefore there is less reason to apply heightened scrutiny to socioeconomic classifications and other traits that are not treated as suspect outside the criminal justice context. Distributing access to correctional programming based on risk, needs, and responsivity assessments is not particularly different from distributing access to non-correctional social services and government benefits to those populations who most need them, which is a routine government function, subject to rational basis review unless suspect or quasi-suspect classifications are involved.

In sentencing, however, the defendant's most fundamental liberties and interests are at stake, as are the interests of families and communities. EBS advocates have not made a persuasive case that this crucial decision should turn on a defendant's gender, poverty, or other group characteristics. The risk prediction instruments offer little meaningful guidance as to each individual's recidivism risk, and they do not even attempt to offer guidance as to the way in which sentencing choices affect that risk. The instruments, and the problematic variables, advance the state's penological interests weakly if at all, and there are alternatives available. Risk prediction is here to stay as part of sentencing, and perhaps actuarial instruments can play a legitimate role. But they should not include these problematic variables, which do not offer much additional predictive value once crime characteristics and criminal history are taken into account. The current instruments simply do not justify the cost of state endorsement of express discrimination in sentencing.

---

sentence indeterminate is to account for the fact that recidivism risk may evolve over time; those who believe risk prediction is an improper basis for punishment should simply oppose indeterminate sentencing. *See, e.g.*, Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Sentencing*, 48 SAN DIEGO L. REV. 1127, 1128-30 (2011).

[224] Note that while the Supreme Court once labeled parole an "act of grace," the deprivation of which a prisoner could not contest, this theory is now considered "long-discredited." Samson v. California, 547 U.S. 843, 864 n.5 (2006). States have no obligation to provide a system of parole, but once they do, its operation is constrained by the Constitution. Board of Pardons v. Allen, 482 U.S. 369, 378 (1987); Morrissey v. Brewer, 408 U.S. 471, 482 (1982).

[225] *See* Nat'l Ctr for State Cts, *supra*, at 16-20; Warren, *supra*; Melissa Aubin, *The District of Oregon Reentry Court: An Evidence-Based Model*, 22 Fed. Sent. R. 39 (2009) (discussing evidence-based practices in federal "reentry courts").

Prepared Remarks for Guggenheim Symposium
Sonja Starr

Thanks to organizers; it's an honor to be here.

Anne's been a strong proponent of the expanded use of risk assessment in the criminal justice system, and I've been a vocal critic, though we've had a chance to talk about these issues in recent months and as it turns out we've discovered a lot of common ground. We both believe in using data to improve the practice of criminal justice, and we both care about equality concerns that arise when people are treated differently based on their characteristics. Anne's organization has been working to develop risk assessment instruments that try to address some of these equality concerns, which is a positive development, and she'll tell you a bit more about that shortly.

But my focus, meanwhile, is on calling the attention of the legal community and the media and the public to the very, very serious problems that exist with almost all of the risk assessment instruments that are already in widespread use in criminal justice systems around the country. We are already subjecting millions of criminal defendants to procedures that determine their treatment based on actuarial instruments that explicitly treat socioeconomic and demographic factors as risk factors, and that means that poor people and people with the "wrong" demographics are being systematically and purposely treated more harshly by the criminal justice system. This is a serious injustice that has not received much attention, in large part because the instruments are not transparent and people who are not social scientists tend not to understand how they work. Those of you who are journalists can play an important role in bringing this problem to light.

These actuarial instruments have been around for decades in the context of parole board decision-making especially, and they are also now used in a variety of other criminal justice contexts. My own research has focused mostly on the use of risk assessment in sentencing, which is the fastest-growing trend in this area. In at least 20 states, many or all judges are being given risk scores for defendants before they sentence them, often as part of a presentence investigation report. Many other states are considering legislation to do the same, and prominent organizations like the National Center for State Courts and the American Law Institute, which drafts the Model Penal Code, have called for the expansion of this practice, which they often refer to as "evidence-based sentencing."

I find "evidence-based sentencing" to be something of a misnomer, bordering on doublespeak, because the risk scores don't actually have anything at all to do with the evidence in the defendant's own criminal case, which is normally the main thing that determines the defendant's sentence. Instead the "evidence" in question comes from studies of past offenders with similar preexisting characteristics—it's extrapolating the defendant's future crime risk based on a profile. So really, a better term for this is "profiling." And judges are told to use these profiling-based risk

predictions to determine the defendant's sentence, just like parole boards use them to decide whether to release a prisoner early.

There are a number of reasons to be concerned about this practice, but my primary concern is that many of the characteristics that are included in these profiles are inappropriate--and in some cases unconstitutional--bases for punishment. Put simply, people should not be punished extra, or for that matter punished less, based on who they are or how much money they have.

The instruments being used in sentencing and parole vary, but all contain several variables related to criminal history. Most also contain gender, age, employment status, education level, and marital status. The most popular instruments, like the LSI-R, include a whole battery of questions that relate to the defendant's financial status and history, family background, and neighborhood. For example, from the LSI-R:
--Financial problems, such as past or present trouble paying bills, rated from 0 to 3
--Reliance on social assistance, including welfare, unemployment, disability pensions
--Dissatisfaction with marital or equivalent situation: they rate the happiness of a person's relationship from 0 to 3
--Rewarding nature of a person's relationship with his parents—so an absent parent or one with whom the defendant has a bad relationship counts against him
--Similar ratings for relationships with other family members
--Whether parents or other family members have a criminal record
--Quality of accommodations
--Stability of accommodations—how often the person has moved
---High crime neighborhood
--Participation in organized leisure activities like membership in clubs (lack of this is a risk factor)
--Criminal records of acquaintances.

Another popular instrument, COMPAS, which for example just got adopted statewide in Michigan, includes similar factors, plus others, like chance of finding work above minimum wage, high school grades, whether the defendant's parents have been incarcerated, whether the defendant's parents used drugs, whether the defendant or any of his family members have ever been a crime *victim*.

Essentially, every indicator of socioeconomic disadvantage that you can think of has been included, and all of them add to the risk score. I want to make clear that this happens automatically, mechanically—*every* defendant who is on social assistance will have the same number of points added to his risk score because of it. It's built into the formula. We're used to thinking about disparities in sentencing as being something subtle and unconscious, insidious, something we have to detect through complicated empirical analyses—we look for evidence of whether judges are subtly taking inappropriate factors into account. But this is something different. This is the state *codifying* discrimination on the basis of these factors—it is explicitly built

into the instrument. Any time the judge gives any weight to the risk score, she is giving weight to socioeconomic and demographic factors. The point of this system is that the state *wants* poor people, people with all these risk factors, to be punished extra, and it's directing judges to do so.

Somewhat surprisingly, the nature and severity of the crime on which the defendant is being sentenced are not included in any of the instruments. Perhaps it's for this reason that the LSI-R training manual specifically says that it "was never designed to assist in establishing a just penalty," although that is precisely what it is now widely being used for.

Race is generally not included in the assessments, although certainly many of these variables are extremely strongly correlated with race. When you sentence people to extra time for being poor, you are bound to increase racial disparities as well.

The trend toward evidence-based sentencing has been greeted in large part with celebration. Scholars as well as judges, sentencing commissioners, and organizations focused on sentencing reform have embraced it as a new era of scientific, rational, "smarter" sentencing. Perhaps surprisingly, some of the strongest advocates have been progressive critics of mass incarceration, who hope that using risk scores will allow incarceration to be avoided in some cases by helping judges to identify low-risk offenders.

I disagree. It is bad policy and almost surely unconstitutional for the state to direct judges to deem classes of people categorically more dangerous, and sentence them for longer, on the basis of their poverty and their demographic characteristics. I agree that we have a mass incarceration crisis in this country, and we need to think creatively and in data-driven ways about policy solutions, but this particular use of data cannot be the right path. One of the reasons the social impacts of mass incarceration are so worrisome is that they are demographically, socioeconomically, and geographically concentrated. For instance, one in every nine black men under 35 is in prison right now, and one in three young black men will be at some point in his life. And if you narrow your focus to the poorest communities, or to particular crime-ridden neighborhoods, or to young men who are unemployed or lack high school diplomas, you get far higher numbers. There's a large literature documenting the hugely distortive effects on communities when you remove, say, half the young men in them. The risk prediction instruments could exacerbate all of these problems.

And that's one reason that people who maybe don't ordinarily worry so much about discrimination against men, or against the young or the unmarried, for instance, really should worry here. Those are all dimensions along which the impact of the criminal justice system is concentrated and concentration is something we should worry about.

I think that advocates of these instruments are in fact endorsing forms of explicit discrimination that they would never endorse were it not for the fact that they are somehow sanitized by the scientific framing that accompanies them—the fact that it's referred to as "evidence-based" and supported by regressions. But to me, behind this anodyne scientific language is an expressive message that is toxic. Stereotyping groups as criminally dangerous is a practice with a nasty cultural history in this country, and this practice involves the state officially labeling certain groups of people dangerous, on the basis of their identity and poverty, rather than their criminal conduct.

Basing sentences on gender as well as socioeconomic variables is also almost certainly unconstitutional, and my own research has been pitched at lawyers and judges to make this case.

First, gender. It's well established law that gender classifications require an "exceedingly persuasive justification"—this is a really tough test to pass. It's hardly ever legal for the state to treat people differently based on gender. Weirdly, though, even though everybody in the literature seems to take for granted that including race in the instruments would be unconstitutional, the use of gender doesn't seem to bother anyone. If scholars or advocates even mention it, they just say that because men really do on average pose higher recidivism risks, including gender in the instruments advances the state's important public safety interests and thus it passes the "exceedingly persuasive justification" test.

The problem with this response is twofold. First, this assumes the instruments actually advance those public safety interests effectively, which I think has not been persuasively established--I'll address that in a couple of minutes. Second, the argument runs afoul of one of the most central principles of the Supreme Court's gender discrimination jurisprudence: the prohibition on statistical discrimination. In general, the state cannot defend gender discrimination on the basis of generalizations about what men and women tend to do, even if those classifications are not just empty stereotypes but in fact are empirically well supported. In *Craig v. Boren*, for instance, the Court struck down a drinking-age law that discriminated against men even in the face of studies showing that young men posed more than ten times the drunk driving risk of young women.

There are lots of other examples in the case law, and this principle is something that really destroys any attempt to defend gender-based risk assessment, because the whole approach is grounded in reliance on statistical generalizations.

And this same principle is also the reason it's unconstitutional to discriminate in sentencing or parole based on financial factors such as unemployment, education, and income.
Until recently lawyers and legal scholars really had overlooked this problem. The reason for that is that generally, the courts are very tolerant of discrimination on the basis of socioeconomic status—they tend to defer to legislative judgments on that.

And so lawyers tend to think: Bringing a constitutional challenge based on socioeconomic discrimination is a loser.

But that's just not true when it comes to socioeconomic discrimination in the criminal justice system. For more than half a century, the Supreme Court has applied especially demanding scrutiny to policies adversely affecting poor defendants. The seminal case is *Griffin v. Illinois*, which described the provision of equal justice for poor and rich as the "central aim of our entire judicial system."

In *Bearden v. Georgia*, in 1983, the Supreme Court unanimously held that a defendant's probation could not be revoked because after losing his job he had become financially unable to pay a restitution order, since that would impermissibly make his sentence turn on his socioeconomic status.

Crucially, the Court in *Bearden* squarely rejected the state's attempt to argue, based on empirical studies of recidivism risk, that the defendant's unemployment and financial status rendered him an elevated public safety risk. The Court's response to this was much like its response to statistical discrimination in the gender context. It wrote:

"This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future. …[T]he State cannot justify incarcerating [him] solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty."

And that's exactly the problem with so-called "evidence-based sentencing." These actuarial instruments lump defendants together with other people who share their socioeconomic characteristics, and on the basis of those other people's past conduct, they classify defendants as dangerous. They punish a person for his poverty. And the Supreme Court has already unanimously held that unconstitutional—it just seems like everyone's forgotten.

OK, so what if we tried to predict risk statistically, but *didn't* use these demographic and socioeconomic characteristics? Suppose instead, we took into account the nature of the defendant's crime, which current risk instruments mainly ignore, as well as past history? That would be far less morally and legally problematic, because it would be based on the defendant's criminal conduct. And I think there's good reason to believe it would be about as accurate. Nothing predicts future behavior like past behavior, and I know Anne and the Arnold Foundation have found that a behavior-based risk assessment instrument at least in the bail context gets quite accurate results, which is a big step forward.

The thing is, factors like demographics and socioeconomics *are* correlated with crime, but once you already have behavioral factors, current and past criminal conduct, in your model, adding those problematic variables might not add much

marginal predictive value. Sure, adding more factors might get you another percentage point or two or three of accuracy, but I don't think we should pursue every last marginal improvement in predictive accuracy at all costs, at the cost of our most fundamental principles of equality and justice.

Now, beyond these equality concerns, I do have a few other concerns about these risk assessment instruments.

One problem is that if the purpose of risk assessment is to protect the public from the defendant's future crimes, these actuarial analyses are not actually asking the question they would need to ask in order to advance that purpose. They predict recidivism risk in the abstract—just "how risky is this person." They make no attempt to predict how the judge's sentencing choice would affect that risk—i.e., the responsiveness or "elasticity" of recidivism risk to differing lengths of incarceration.

And the people who have the highest recidivism risk are not necessarily the people whose recidivism risk is going to be the most reduced by incarceration—in fact, people who are more crime-prone to begin with may also be more likely to be hardened rather than helped by prison. We really don't have the science in place to know what subsets of people will have their behavior changed for the better by prison. Investigating this question requires studies that use rigorous causal inference methods—it's a very challenging empirical question. And so far, the best research on the way incarceration affects recidivism risk has been more general—does incarceration *generally* reduce crime risk--rather than focused on which characteristics are most associated with a greater responsiveness to incarceration.

Then there are some procedural concerns about risk assessment. One major concern is lack of transparency—people in many states are being sentenced on the basis of corporate, proprietary products that they don't have access to. Neither the defendant nor the judge knows the weight that has been given to each specific variable in producing the risk score. That's outrageous in my view.

In addition, defendants are essentially being forced to participate in an assessment interview, which includes detailed questions about their past and about their mental states. If they don't participate, they will be scored as uncooperative and may be punished for it. That seems like compelled self-incrimination, a violation of the Fifth Amendment.

I've got various other methodological objections that I've outlined in my paper, but I'll stop here. Thanks again, and I look forward to the rest of our discussion.

The JFA Institute
Denver, CO/Malibu, CA/Washington, D.C.

Conducting Justice and Corrections Research for Effective Policy Making

Evaluation of the Current and Future Los Angeles County Jail Population

Prepared by

James Austin, Ph.D.
Wendy Naro-Ware
Roger Ocker
Robert Harris
Robin Allen

April 10, 2012

720 Kearney St. Denver, CO 80220 Ph. 303-377-1556 www.JFA-Associates.com

Acknowledgments

The authors would like to thank a number of people who helped prepare this report. In particular, Sheriff Leroy Baca made himself and senior staff available at all times during the course of the study. Among his senior staff, Chief Alex Yim facilitated all of the data requests and onsite visits. Commander Gerald Cooper and his staff assisted in the extracting of the data needed to conduct the statistical analysis. In particular Sgt. Ryan Vienna and Deputy John Jansen were very helpful in gathering the data required for this study.

About the JFA Institute

Founded in 2003, the JFA Institute is a multi-disciplinary research center whose mission is to conduct theoretical and applied research on the causes of crime and the justice system's responses to crime and offenders. It receives diverse funding from federal, state, and local governmental agencies, as well as from foundations interested in developing and evaluating innovative crime prevention, law enforcement, sentencing and correctional policies and programs designed to reduce crime and to improve the quality of the adult and juvenile justice systems. We disseminate our studies and policy recommendations through research reports, criminal justice and criminology periodicals, books, and seminars.

Since the recent creation of the new JFA organization in 2003, we have become actively involved in conducting research and providing technical assistance to state and local agencies in several states. Our major clients include the National Institute of Corrections, National Institute of Justice, Bureau of Justice Assistance, and over 20 states and local public correctional and law enforcement agencies.

JFA is currently conducting similar jail studies for the New York City Department of Corrections, Orleans Parish Prison, Maricopa County (Phoenix), Baltimore City Detention System, Santa Cruz County, and San Francisco County.

Project Summary

Population, Crime and Arrest Trends

1. There has been a dramatic decline in the County's crime rate since 2000 and it is projected that the crime rate will continue to remain low.
2. The number of adults being arrested for felonies has declined, but the number being arrested for a misdemeanor level crime has not. The major reason why the misdemeanor arrest numbers have not declined is large increases for people arrested for possession of marijuana, violation of city ordinances and Failure to Appear (FTA) violations.
3. Collectively, the county's demographic, crime and arrest trends suggest no increases in the Los Angeles County Jail bookings.
4. While the County population will continue to increase, it will become an older population and have a smaller proportion of the at-risk population.

County Jail Trends

Bookings

5. There were approximately 400,000 admissions to the LASD's jail and field stations in 2011. Of this number about 143,000 were actually admitted to the jail custody division. Due to multiple bookings within a year, there were about 118,000 people booked into the custody division.
6. Consistent with the demographic, crime and arrest trends there has been a decline in bookings. Specifically, in 1990 there were 260,765 bookings. In 2000 it was 162,406. In 2011 it had dropped to 142,862.

Jail Population

7. Consistent with the decline in bookings, the jail population had significantly declined from a peak in 1990 of 22,000 to slightly under 15,000 by September 2011.
8. The decline in the jail population has served to lower the county's jail incarceration rate to 152 per 100,000 population which is well below the state rate of 189 per 100,000.
9. Jail population is largely composed of three separate legal statuses; pretrial (45%), sentenced with a pending charge (18%), sentenced (37%). The majority (78%)of the jail population is either charged or sentenced for a felony level crime.
10. About half of the pretrial inmates are charged with a violent or sex crime. Conversely only 25% of the sentenced population has been convicted of a violent or sex crime.
11. There is a very large medium custody population (about 70%) which is atypical of most California jail systems. The Northpointe Institute's classification system – in particular the re-classification system- is not being used properly which is causing some level of over-classification.

Length of Stay

12. The length of stay (LOS) has not been declining, remaining at the 40 day range. This number is significantly higher than the state average LOS of 17 days.
13. The longer LOS is related to a lack of pretrial release program, delays in court processing of criminal cases, and the sentence lengths being imposed by the court.
14. About 1/3rd of all bookings are released within three days – nearly 40 % are released within 7 days. Those who are not released within 7 days will remain in custody an average of 87 days.
15. Most (about 2/3rds) of the inmates are being released to community and/or under the supervision of probation and state parole.
16. There is a large number of inmates being released to ICE. These ICE inmates occupy about 2,100 beds on any given day in the jail.

Projected Jail Population Projections

17. Had AB 109 not passed, the current jail population would have likely remained at the 14,500 – 15,000 level.
18. With the passage of AB 109, the sentenced population will increase by about 7,000 over the next two years and then stabilize.
19. AB 109 will also serve to reduce the technical parole population and the CDCR inmate population waiting to be transferred to state prison.
20. The overall jail population will reach nearly 20,000 by the end of this year and peak at 21,000 by the end of 2013.

Recommended Alternatives to the Projected Population and Capacity Options

21. The projected 21,000 inmate population can be safely reduced by about 3,000 inmates by implementing the proposed LASD pretrial supervision and a re-entry program for sentenced inmates using the innovative EBI programs.

22. The bed capacity of the entire system can be increased by about 1,500 beds by modifying the NCCF facility and assuming the management of the several CDCR Los Angeles County conservation camps.

23. If the above two recommendations are implemented, the Central Jail can be closed within two years and the LASD would still have sufficient bed space. At a minimum it is feasible to move all men out of Central jail by end of 2013. But this assumes the proposed LASD pretrial and re-entry programs are implemented.

24. Other bed capacity options such as constructing a new female facility at the PCD and/or re-purpose the use of the Mira Loma facility collectively show

that should be more than sufficient bed capacity to manage the long-term projected jail population without the need for the Central Jail facility.

Other Issues

25. The Northpointe re-classification custody system needs to be adjusted to reduce the current level of over-classification of males and female inmates.

26. The COMPAS risk assessment instrument needs to be validated on a sample of released inmates. This is especially the case for the FTA risk instrument.

27. Since the LASD plans to expand the application of the EBI education programs, it would be appropriate at this time to begin a formal impact evaluation. Such a study can and should be done in tandem with the revalidation study of the COMPAS instrument.

28. The LASD should develop a dedicated Research, Planning and Evaluation division. Several existing LASD staff can be recruited to staff this unit.

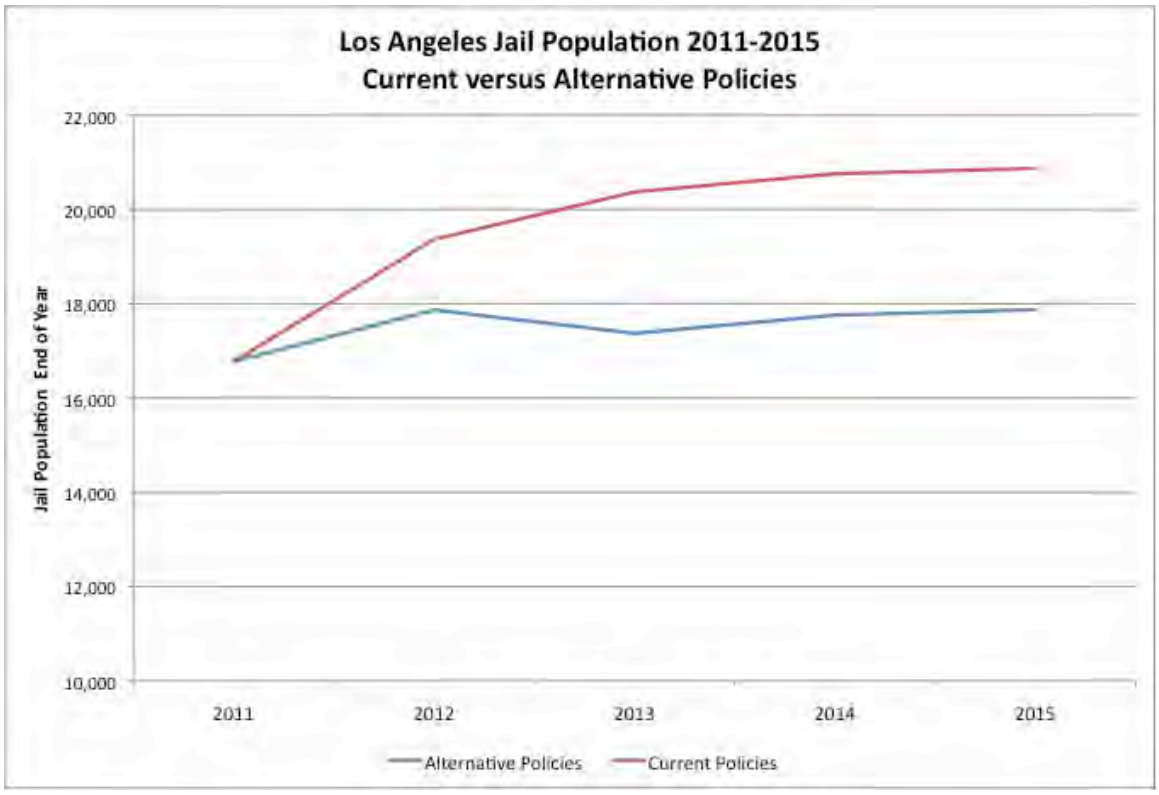
Summary of Population and Capacity Options

Item	Current Trend	Option A	Option B	Option C
Capacity	23,910	21,700	20,700	21,700
Central Jail	5,260	1,500	500	0
Functional Bed Capacity@ 90%	21,519	19,530	18,630	19,530
Populations by 2015				
Pretrial	10,325	9,325	9,325	9,325
County Sentenced	1,830	1,830	1,830	1,830
Awaiting Transfer to CDCR	600	600	600	600
CDCR Tech Violators	400	400	400	400
ICE Mira Loma	625	625	625	625
AB 109	7,096	5,096	5,096	5,096
Totals	20,876	17,876	17,876	17,876
Surplus Beds @90% Occupied	643	1,654	754	1,654

Summary of LASD Suggested Bed Capacity Options

Facility	Current	Option A	Option B	Option C
Central Jail	5,260	1,500	500	0
Twin Towers	4,820	4,820	4,820	4,820
CRDF	2,380	2,380	2,380	2,380
Peter Pitchess DC				
NCCF	4,294	5,294	5,294	5,294
South	1,536	1,536	1,536	1,536
South Annex	1,624	1,624	1,624	1,624
East	1,944	1,994	1,994	1,994
Out Patient	600	600	600	600
Conservation Camps	0	500	500	500
New Women's Facility	0	0	0	1,500
Totals	22,458	20,248	19,248	20,248
Mira Loma	1,452	1,452	1,452	1,452
Grand Totals	23,910	21,700	20,700	21,700
At 90% Capacity	21,519	19,530	18,630	19,530

Los Angeles Jail Population Projection 2011-2015
Current Criminal Justice Policies
Jail Population End of Year
25,000
20,000
15,000
10,000
5,000
0
16,663
16,777
19,369
20,372
20,759
15,367
13,915
13,782
13,741
0
1,410
5,454
6,590
7,018
2010
2011
2012
2013
2014
2015
Non AB 109
Non AB 109
Total Jail Population


Los Angeles Jail Population 2011-2015
Current versus Alternative Policies
Jail Population End of Year
22,000
20,000
18,000
16,000
14,000
12,000
10,000
2011
2012
2013
2014
2015
Alternative Policies
Current Policies

Introduction

This report is designed to provide a comprehensive evaluation of the Los Angles County jail population in terms of its attributes, current and future population trends. More importantly, it provides a plan that will allow the Los Angeles Sheriff's Department (LASD) to safely manage its jail population within its current jail facility capacity by implementing evidence-based policies that have been adopted in other jurisdictions. The plan has been reviewed by Sheriff Baca and he agrees with the plan's recommendations that will allow him to close the antiquated Central Jail facility and still safely manage the growing number of AB 109 inmates and thus avoid costly jail construction.

The study was requested and funded by the American Civil Liberties Union (ACLU). However, it was conducted with the strong support and cooperation of LASD and Sheriff Leroy Baca. A wide array of data were collected to complete the analysis and recommendations that was largely provided by the LASD. These data included detailed data on people admitted and released from the LASD jail system as well as aggregate level data on historical trends in Los Angeles County crime, arrest, jail bookings, releases and overall jail population. These data were used to better understand what factors are driving the jail population and what options can be employed to better manage that population in the future.

In September 2011, the Vera Institute released a major study on the Los Angeles jail system titled "Los Angeles County Jail Overcrowding Reduction Project". [1]That report was based on over two years of research and analysis conducted by Vera. It's fair to say that the report found many inefficiencies in the current criminal justice process that were, collectively increasing the jail population and costs. Over 30 recommendations were made by Vera, most of which were designed to reduce the jail population. Unfortunately to date, none of the recommendations have been adopted by the County's criminal justice system. Vera warned that there would be no impact unless "…every criminal justice agency leader must commit to reducing unnecessary detention and incarceration in the interest of justice and the efficient use of taxpayer resources" (p. iii). This level of commitment has not occurred as of yet.

The recent passage and implementation of AB 109 (California's Realignment Plan) makes it more urgent that action be taken. We estimate and the LASD concurs that the transfer of state sentenced inmates from the California Department of Corrections and Rehabilitation (CDCR) to the local jail will increase the County's jail population by as much as 7,000 inmates by the end of 2014.

This study focuses on actions that the LASD and Sheriff Baca can take to minimize the impact of AB 109 as well as the other issues noted by Vera that serve to inflate the jail population. Just two basic recommendations are offered which if implemented, will lower the projected jail population.

---

[1] *Los Angeles County Jail Overcrowding Reduction Project, Final Report, Revised,* September 2011, Vera Institute of Justice.

Los Angeles County Population, Crime and Criminal Justice Trends

A jail population is the product of the number of people being admitted and how long they remain in custody. In estimating the future size of any local jail population, it's important to understand some of the key factors that influence the number of jail admissions.

One such factor is the current and projected size of the County's resident population that is most likely to be arrested and booked into the adult jail system. This high-risk group consists of males between the ages of 18 and 39. According to the California Attorney General's Office, approximately 70% of the 1.2 million adult arrests that occurred in 2009 were people between the ages of 18 and 39. Further, 85% of these arrests were males. The demographics of the at-risk population is also credited by criminologists with the nation's and in particular California's declining crime rate.

The California Department of Finance provides projections of the state's and each county's future resident population. For Los Angeles County, the total county population is projected to grow by 24% over the next 40 years. However, for males age 15-39, the population grows, but at a much slower pace. Further, the proportion of the males age 15-39 year population declines slightly from 18% to 16 % (a relative rate decline of 9%).

Table 1. Projected Los Angeles County Populations 2010-2050

Year	Total	Males Age 15-39	% Of Total
2010	10,514,663	1,871,503	18%
2020	11,214,237	2,019,401	18%
2030	11,920,289	2,050,341	17%
2040	12,491,606	2,014,661	16%
2050	13,061,787	2,111,033	16%
% Change	24%	13%	-9%

Source: California Department of Finance

The next factor to review is the County's crime rate. The California Attorney General's Office is the repository for all of the crime data that is submitted by each county's law enforcement agency. Within each county are multiple law enforcement agencies which always include the county's sheriff.

The total number of serious crimes, which consists of murder, rape, robbery, assault, burglary, theft and arson, has been declining for a number of years. Between 2000 and 2009, the most recent time frame available for California counties, shows a sharp decline in the total number of serious crime since 2000 (Chart 1 and Table 2). Specifically, there has been a 22% reduction with the largest decline being for violent crimes (53% decline).

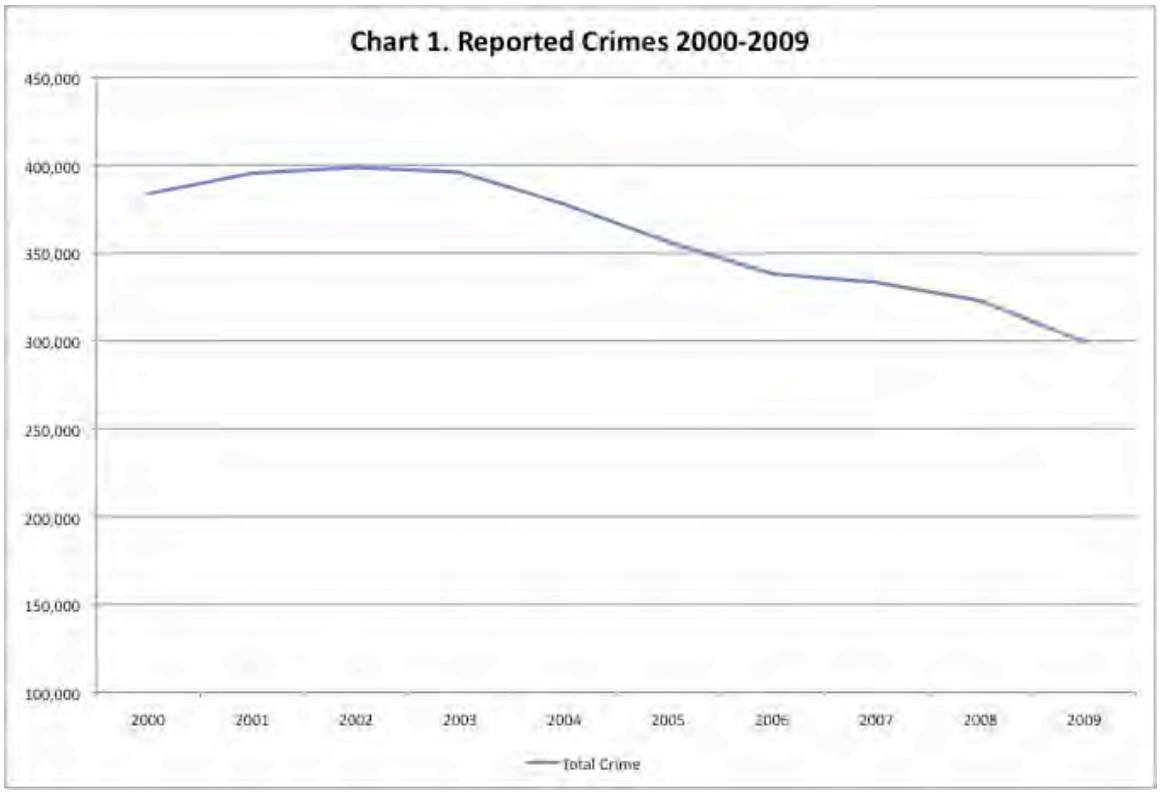


Table 2. Los Angeles County Reported Serious Crimes 2000-2009

Category/Crime	2000	2009	% Change
Violent Crimes	**90,037**	**54,747**	**-39%**
Homicide	1,000	699	-30%
Forcible Rape	2,761	2,114	-23%
Robbery	28,416	24,528	-14%
Aggravated Assault	57,860	27,406	-53%
Property Crimes	**293,735**	**244,672**	**-17%**
Burglary	60,597	50,558	-17%
M.V. Theft	64,265	46,710	-27%
Larceny-Theft	164,602	144,589	-12%
Arson	4,271	2,815	-34%
Total Crime	**383,772**	**299,419**	**-22%**

Source: California Attorney General, Criminal Justice Statistics Center

Both the Los Angeles Police Department (LAPD) and LASD (the two major sources of jail bookings) are reporting more current crime data. The LAPD is showing that serious reported crimes dropped by 7% between 2009 and 2010. The LASD has just released data for 2011 and 2012 for the months of January and February.

In its comparison, the LASD notes an uptick in the overall crime rate per 10,000 population the crime rate for those areas patrolled by the LASD (violent crimes have increased 6% while property crimes increased 10%). However, the five-year trend for the same two-month time period shows a 14% decline. More significantly, the crime rate today in the areas patrolled by the LASD is what it was in 1975 and the homicide rate is what it was in 1966.[2]

The number of people being arrested is a more central statistic as it reflects people who have the potential for being booked into the LASD jail system. In terms of adult arrests, the 2000 to 2009 patterns are somewhat mixed. The total number of arrests per year has increased 287,640 to 328,182.

For felony level arrests there was an increase from 2000 to 2005 followed by decline by 2009. Basically, the number in 2009 was almost the same as it was in 2000 despite an increase in the county population. So, the rate of arrests per 100,000 population has actually declined. The only increase with the felony level crime group was "other" which is not described in any detail.

Misdemeanor arrests represent a much larger group. Here, the trend has been upward but only for three crimes – possession of marijuana, violation of a city ordinance and Failure to Appear (FTA) for court orders. If one removes these three crimes from the total number of misdemeanor arrests, the adjusted total is unchanged. The significant fact about the FTA number is that such an arrest will result in a jail booking.

While this study does not directly concern FTA's, the sharp increase in these arrests suggests flaws in the current pretrial release process. For example, the Vera report noted that once released on bail or bond, the defendant does not receive any reminders from the court for the next scheduled court date. [3]

In terms of more recent data, the LASD reported a total of 48,370 adult felony arrests and 82,589 misdemeanor adult arrests or a total of 130,959 in 2010. This compares to 46,829 felony arrests in 2009 and 80,023 misdemeanors or a total of 126,352. The LAPD reported 129,133 adult arrests in 2010 versus 140,212 in 2009 – a 8% decline. If we combine these two major agency arrest numbers, we see no major increase in total adult arrests between 2009 and 2010.

---

[2] http://file.lacounty.gov/lasd/cms1_148405.pdf

[3] Vera Institute, 2011, page xv.

Table 3. Adult Arrests for Los Angeles County 2000-2009

Crime Type	2000	2005	2009
Adult Felony			
Total Felony	**108,318**	**131,176**	**112,264**
Violent	35,596	31,260	30,808
Property	28,245	32,073	29,302
Drugs	31,894	46,411	30,780
Other Sex	1,685	1,617	1,739
Other	10,898	19,815	19,635
Rate per 100,000 Adults	1,727.40	1,992.20	1,626.50
Adult Misdemeanor			
Total	**179,322**	**197,487**	**215,918**
Marijuana	9,044	10,801	14,727
City Ordinances	28,277	36,178	37,052
FTA	18,154	25,589	40,281
Total Adjusted	*123,847*	*124,919*	*123,858*
Rate per 100,000 Adults	2,859.70	2,999.20	3,128.20
Grand Total	**287,640**	**328,663**	**328,182**
Rate Per 100,000 Adults	**4,587**	**4,991**	**4,755**

Source: California Attorney General, Criminal Justice Statistics Center

Historical Jail Admissions, Length of Stay and Average Daily Populations

We now shift our focus to the three key attributes of a jail system: The number of admissions, their length of stay (LOS), and the resulting daily jail population. In many ways, the size of a jail population is the product of decisions made by other criminal justice agencies. Certainly, the number of people arrested each year is a function of law enforcement deciding whom to arrest and for what charges. Once arrested, the courts decide whether to allow a defendant to be released on pretrial status (either vial bail or own recognizance). If not released, the defendant will remain in custody until the court disposes of the charges that have been filed by the prosecutor. Once sentenced, the now offender may have to serve additional time in the jail until the sentence is completed. There are other nuances in the factors that drive a jail population. If a defendant fails to appear in court and is re-arrested, he or she will be returned to custody. If an offender fails probation or parole, that will also often result in admission to the jail until that matter is resolved. In the next section of the report additional data and analysis is presented on these and other matters affecting the jail population.

As noted in the Vera report, once arrested, there are several locations a person can be detained. The LASD operates over 20 field stations where an arrestee can be held in custody for a short period of time. The LAPD has its own detention facility, as do other law enforcement agencies. Since the focus of this study is the Los Angeles County Jail system which consists of eight major facilities (excluding the Mira Loma facility which is reserved for ICE inmates), we only analyzed people who were admitted to that core jail system.

As shown in Table 4, there has been a dramatic change in all three key jail population indicators. Since 1990, when the jail population was just over 22,000, it had dropped to just below 15,000 by September 2011. Similarly, the jail incarceration rate per 100,000 had dropped from 247 to 152 by October 2011.

The primary reason for decline was a dramatic reduction in the number of bookings – from 260, 765 in 1990 to 142,862 in 2011. The decline in bookings appears to be the result of more persons being diverted at the LASD field stations and greater use of field citations. More recently, as noted above, there has been a decline in the number of persons arrested for felons.

The LOS data shows that since 2000, it has remained at the 40-day level. Compared to other large jail systems, this number appears to be high. For example, Maricopa County (Phoenix), Broward County (Ft. Lauderdale), and New York City, have lengths of stay that are below the 30-day range. But it may be that the LOS has not declined to the levels reported in other jurisdictions because as the Los Angeles jail population has declined, the residual jail population has become increasingly composed of persons charged with or sentenced for felony level crimes.

Table 4. Los Angeles County Jail Bookings, Length of Stay and Population 1990 - 2011

Attribute	**1990**	**2000**	**2010**	**2011**
Jail Bookings	260,765	162,406	151,932	142,862
ALOS	31 days	43 days	40 days	39 days
Jail Population	22,003	19,297	16,663	14,863
Incarceration Rate	247	203	170	152
County Population	8.9 million	9.5 million	9.8 million	9.8 million
Crime Rate	4,595	2,754	2,021	NA

Source: California Department of Finance, California Attorney General , and LASD Booking and ADP Daily Reports

Table 5 makes some direct comparisons between the Los Angeles County jail population and overall California jail population. These data come from the California Department of Corrections (CDCR), Correctional Standards Authority (CSA) website plus data provided by the LASD. What is striking is that the only two statistics that distinguish the Los Angeles County jail population are the much longer LOS (39 days versus 17 days) and the much lower jail incarceration rate. The state's LOS would be much lower if Los Angeles was removed from the calculations. One would have expected the longer LOS to generate a much higher incarceration rate, but it does not.

Table 5. Comparisons Between Los Angles County and State-wide Jail Populations September 2011

Indicator	California	Los Angeles
Total Population	71,293	14,749
Pretrial	71%	70%
Felony	80%	78%
Incarceration Rate per 100,000 population	189	152
Average LOS	17 days	39 days

Source: CDCR, CSA Jail Survey, 3rd Quarter 2011

Current Los Angeles Jail Admissions, Releases and the Daily Population Attributes

The next section of the report evaluates in greater detail the more current trends in Los Angeles County jail admissions, releases and the daily population. The analysis is necessarily separated into two time frames – pre and post AB 109. As most readers are now aware, the passage of AB 109 is and will continue to have a profound impact on both the state prison and local jail populations. Effective October 1, 2011, the state courts began sentencing state prisoners convicted of non-violent crimes and who have no prior violent or sex convictions to serve their sentence in the local jails. It is estimated that over 20,000 inmates labeled as the N3s will now be housed in the local jails. Of that number, about 7,000 are projected to be housed in the Los Angeles County jail system. Consequently, all of the analysis must now take into account the sudden surge in the local jail populations.

Relative to AB 109, the legislation will have no impact on total bookings and releases. The same number of people who are arrested and convicted of N3 crimes will continue to be processed by the court system. The only difference is that after being sentenced, the prisoner will remain in jail until the sentence is completed. All of the good time he or she would have received in the state prison still applies. A major difference is that there is no longer any parole supervision requirements for the offender. Once the sentence is complete, the person's sentence is ended.

Chart 2 shows the most recent trends in the key legal statutes of the LA County jail population. Significantly the two key non-AB 109 populations (pretrial and county sentenced inmates) have actually declined slightly.

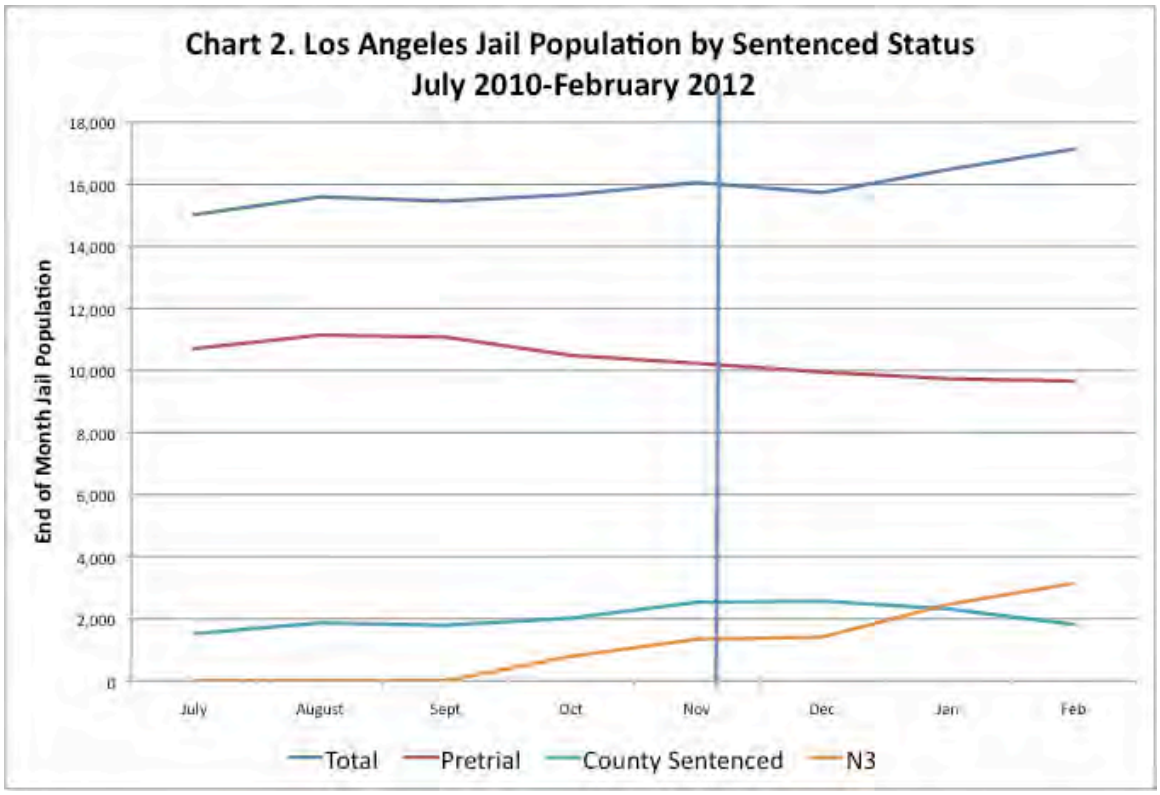


Chart 2. Los Angeles Jail Population by Sentenced Status
July 2010-February 2012
End of Month Jail Population
18,000
16,000
14,000
12,000
10,000
8,000
6,000
4,000
2,000
0
July
August
Sept
Oct
Nov
Dec
Jan
Feb
Total
Pretrial
County Sentenced
N3

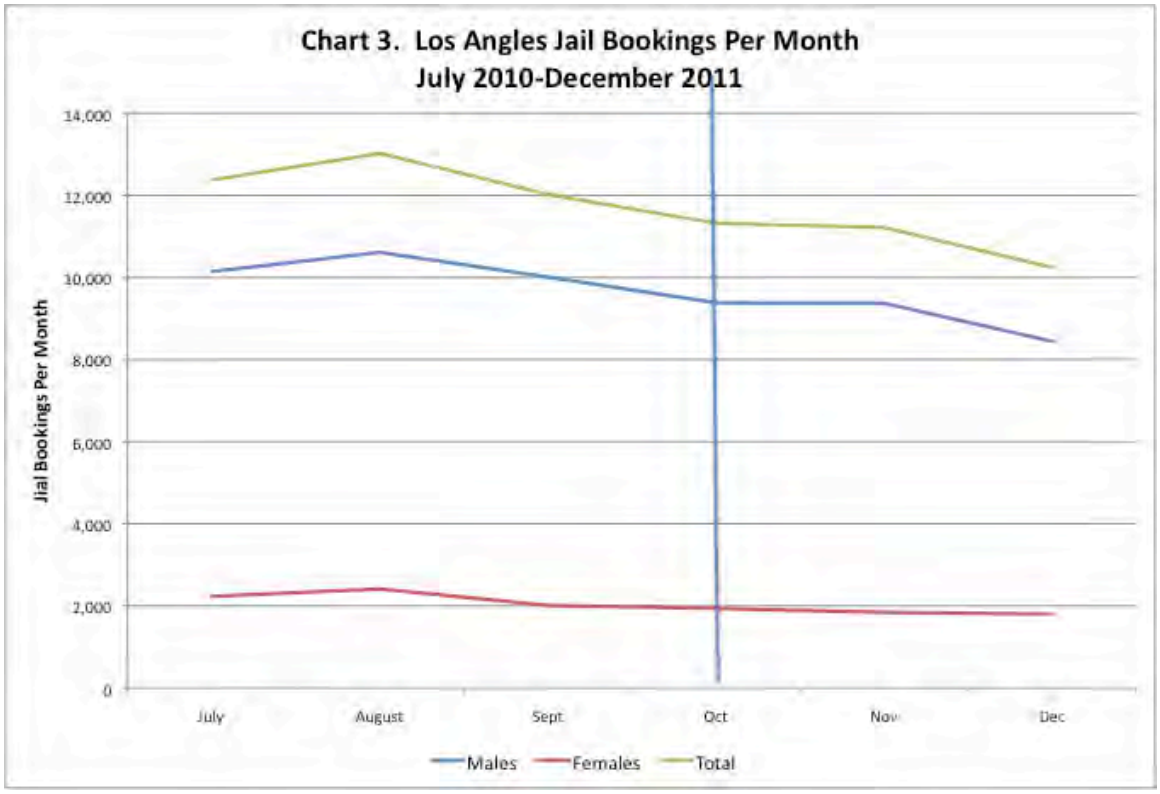


Chart 3. Los Angles Jail Bookings Per Month
July 2010-December 2011
Jial Bookings Per Month
14,000
12,000
10,000
8,000
6,000
4,000
2,000
0
July
August
Sept
Oct
Nov
Dec
Males
Females
Total

In fact, were it not for AB 109 the LA jail population would have been approximately 14,000. The increase has come from the AB 109 population which is rapidly approaching 3,500 and is likely to peak in two years at 7,000. If one looks at the bookings since July 2010, one sees a gradual decline in these numbers – again consistent with the demographic, crime and arrest trends (Chart 3).

As part of the study, JFA received a large data file that consisted of all persons admitted to the Los Angeles jail system via the Inmate Reception Center (IRC) since between January and December 2011. JFA programmers transformed that large data file into two key sub-files: One was a snapshot of the jail population as of December 2011 which consisted of 16,277 people; the other was a file of all inmates admitted and released in 2011. These two data files offered some detailed analysis of the attributes of people admitted and released from custody each year and the daily population that is housed in the system. We also received a second snapshot data file that was created by LASD staff on February 13, 2012 to verify our initial results and continue to track the growing AB 109 population.

The Daily Jail Population

Table 6 summarizes the key attributes of the daily population as of December 2011 for each of the major facilities. These statistics may differ slightly from the formal inmate counts reported by LASD on a daily basis, as there are some delays of entering all of the transfer and placement movements in a timely manner. But in general, the population attributes appear to be accurate and reflective of both the overall population and the population assigned to each facility.

Each facility and the system as a whole have capacities that exceed the inmate population. In total the inmate population was 16,277 while the total bed capacity was 20,445, not including the 1,624 beds at the temporarily closed South Annex facility. The total bed capacity as of this date was about 22,000. But as will be pointed out later on, the excess capacity will be largely exhausted in the next 18 months due to the influx of AB 109 inmates.

The population is largely male (88%) and largely non-white (49% Hispanic, 31% Black, and 15% white) with an average age of 34 years. Approximately 13% of the population is age 50 years or older while 28% are between the ages of 18 and 25 years.

Table 6A shows the primary offense of the February 12, 2012 population by sentence status. The primary offenses are homicide, assault, robbery, drug possession, drug possession with intent to sell, burglary and theft. Overall, about half of the pretrial and pretrial/sentenced populations are charged with violent or sex crimes. This profile shows that most of the minor crimes have been quickly removed from custody via the existing pretrial release process. The fact that most of the sentenced population have been convicted of a non-violent drug offense also shows that a sizeable portion of this population may be more suitable for alternative placements.

Table 6. Attributes of the Los Angeles County Jail Population by Facility - December 2011

Attribute	Central Jail	Twin Towers	CRDF	PDC NCCF	PDC South	PDC East	Out Patient	Mira Loma	Total
Bed Capacity	5,260	4,820	2,380	4,294	1,536	1,944	559	1,452	20,793
Totals	3,763	2,814	1,916	3,523	886	1,491	211	737	15,341
Gender									
Female	0%	1%	100%	0%	0%	0%	0%	0%	12%
Male	100%	99%	0%	100%	100%	100%	100%	100%	88%
Race									
Black	35%	34%	34%	32%	31%	29%	47%	0%	31%
Hispanic	44%	40%	39%	56%	45%	59%	38%	91%	49%
Asian	3%	4%	3%	2%	3%	3%	2%	9%	3%
White	18%	20%	23%	9%	20%	8%	12%	0%	15%
Average Age	36 yrs	38 yrs	35 yrs	31 yrs	39 yrs	28 yrs	45 yrs	34 yrs	34 yrs
Average Days in Custody to Date	150 days	121 days	101 days	106 days	98 days	153 days	123 days	`102 days	127 days
Security Level									
Low	12%	0%	20%	0%	21%	0%	7%	100%	15%
Medium	68%	74%	67%	73%	79%	100%	72%	0%	70%
High	20%	16%	11%	26%	0%	0%	19%	0%	14%
Unclassified	0%	0%	1%	0%	0%	0%	0%	0%	1%
Legal Status									
Pretrial	42%	50%	39%	44%	25%	44%	46%	100%	45%
Pre and Sentenced	21%	19%	15%	21%	10%	25%	18%	0%	18%
Sentenced	37%	32%	47%	35%	65%	31%	36%	0%	37%
Charge Level									
Felony	84%	82%	80%	85%	78%	87%	88%	0%	78%
Misdemeanor	13%	15%	17%	12%	20%	9%	8%	0%	15%
ICE	0%	0%	0%	0%	0%	0%	0%	100%	5%
Other	3%	3%	3%	3%	2%	3%	3%	0%	3%
% of Total	**25%**	**18%**	**12%**	**23%**	**6%**	**10%**	**1%**	**5%**	**100%**

Source: LASD data files. Not included is the temporary IRC population (about 500 inmates) and the PDC South Annex facility which was closed as of December 2011. That facility has a capacity of 1,624.

Table 6A. Los Angeles County Jail Population as of February 2012
Primary Crime by Sentence Status

Most Serious Charge	Pretrial		Pretrial and Sentenced		Sentenced	
Totals	6306	100.0%	3120	100.0%	7022	100.0%
Willful homicide	899	14.3%	555	17.8%	53	0.8%
Vehicular manslaughter	17	0.3%	8	0.3%	16	0.2%
Forcible rape	67	1.1%	32	1.0%	25	0.4%
Robbery	634	10.1%	390	12.5%	257	3.7%
Assault	1,082	17.2%	665	21.3%	1,279	18.2%
Kidnapping	90	1.4%	37	1.2%	10	0.1%
Lewd or Lascivious	169	2.7%	26	0.8%	45	0.6%
Other sex	142	2.3%	65	2.1%	96	1.4%
Sub-Total Violence/Sex	**3,100**	**49.2%**	**1,778**	**57.0%**	**1,781**	**25.4%**
Drug sale	162	2.6%	83	2.7%	298	4.2%
Drug poss w/ intent	167	2.6%	58	1.9%	246	3.5%
Marijuana possession	66	1.0%	34	1.1%	107	1.5%
Possession/other drug	648	10.3%	264	8.5%	1,163	16.6%
Sub-Total Drugs	**1,043**	**16.5%**	**439**	**14.1%**	**1,814**	**25.8%**
Burglary	549	8.7%	280	9.0%	763	10.9%
Theft	440	7.0%	211	6.8%	1,087	15.5%
MV theft	21	0.3%	12	0.4%	47	0.7%
Forgery	75	1.2%	47	1.5%	170	2.4%
Weapons	62	1.0%	44	1.4%	161	2.3%
DUI	107	1.7%	48	1.5%	239	3.4%
Arson	32	0.5%	4	0.1%	14	0.2%
Other felony	390	6.2%	170	5.4%	305	4.3%
Prob./parole violation	39	0.6%	33	1.1%	436	6.2%
Other	448	7.1%	54	1.7%	205	2.9%

The inmate classification system used by the LASD to house inmates is based on a decision-tree system that was developed by the Northpointe Institute. The vast majority of inmates are assigned to medium custody with only 14% placed in high custody and another 15% in low (or minimum) custody (Table 7). The proportion of low custody inmates is quite small compared to other jail systems and California jails. The CDCR, CSA jail survey noted earlier reported that for all of the California jails, the proportion assigned to minimum custody is 24%. That percentage would be even higher if the Los Angeles jail data were removed from the CSA statewide data which includes the LASD data.

Table 7: Comparison of State Jail and Los Angeles County Jail Inmate Custody Levels as of 2011

	State Total		Los Angeles Jail	
Custody Level	**Inmates**	**%**	**Inmates**	**%**
Max	22,478	32%	2,148	14%
Medium	31,425	44%	10,379	70%
Minimum	17,390	24%	2,304	15%
Total	71,293	100%	15,341	100%

Source: CDCR, CSA and LASD data files

There are two probable reasons for the low number of "low custody" inmates. First, the design of the Northpointe Institute decision tree instrument now includes a reclassification instrument that is to be applied to all inmates who have been in custody for 30-90 days depending upon their current custody level. The reclassification instrument, like all custody instruments, is designed to move prisoners to lower custody levels based on their institutional conduct. Since the vast majority of inmates do not become involved in serious disciplinary incidents while incarcerated, there should be a large shift from maximum to medium custody, and, from medium to minimum custody. As shown in Table 6, the average time served for the current jail population is 127 days which means that the vast majority of the current population should be on the reclassification instrument.

The Northpointe instrument design is also unique for three other reasons: It uses legal status as a restriction (pretrial versus sentence), it does not use age which is a good predictor of misconduct, and it does not have a separate scale for the females. All three of these omissions tend to over-classify inmates.

The Northpointe reclassification instrument also makes it difficult for some inmates to move to a lower custody level even if their conduct is positive. Further, based on interviews with the LASD classification staff and Northpointe representatives, the LASD is not applying the reclassification instrument as designed by Northpointe which is further restricting the movement of medium custody inmates to minimum custody thus causing some level of over-classification.

Spot audits of inmates housed at the South Facility found several well-behaved and older inmates who were housed in low security dorms, but were classified by Northpointe as high-medium (levels 7 and 6) custody. Clearly, the Northpointe system and the LASD's lack of adherence to the system needs to be addressed.

Another key statistic in Table 6 is the legal status of the inmate population. We had reported that the LASD aggregate level reports show that 70% of the current jail population is in pretrial status. But what that statistic does not show is that the 70% included inmates who have been sentenced on one or more charges and have at least one pending charge. Thus the percentage of "pure" pretrial cases is 45% and not 70%.

And for those that are in "pure" pretrial status (7,316 as of December 2011), 25% of them had a "no bail" order imposed by the court. These and other factors serve to greatly restrict the number of pretrial defendants who can be released on bail, surety bond or own recognizance. These other factors are described later on in the report.

Jail Admissions, Releases and Length of Stay

Last year, there were over 400,000 admissions into the LASD county-wide custody division which includes the various field stations.[4] As reported earlier, only 142,862 resulted in being booked into the main county jail system. This section of the report provides more detailed information on these admissions. What follows are some of the major findings:

1. Of the 142,862 bookings in a year approximately 25,000 were the same person who was admitted more than once in the 12-month time period. The actual number of mutually exclusive people booked into custody is approximately 118,000 (Table 8).

2. The overall LOS for the people who were released was approximately 40 days.

3. Approximately 37% of the bookings are released within 7 days.

4. Those who are not released within 7 days have an average LOS of approximately 87 days.

5. The vast majority (66%) of the releases are people being released to the community (pretrial) or under probation and parole supervision. Only 18% are being released prior to having their cases disposed of by the courts. This statistic shows that increasing the number of pretrial releases will have less of an impact on the jail population as opposed to a) reducing the time people spend waiting for their cases to be disposed of by the courts or b) reducing their time to serve after being sentenced.

6. The most common reasons for people being released from custody are a) completing inmates completing a sentence or b) being transferred to the custody of another correctional agency.

7. There are large number of releases being made to the CDCR for both new court commitments and parole violations. The numbers of releases will decline significantly with the implementation of AB109. Taking their place, in part, will be persons completing their AB 109 sentences at the Los Angeles County Jail.

8. However, the number of CDCR technical parole violation admissions and releases will decline as use of the parole supervision is not longer required for the AB 109 sentenced offenders.

[4] This number is consistent with the number reported in the previously referenced Vera Institute study.

9. There is a large number of people who are released to the custody of ICE (19,725 releases in 2011). These releases are largely Hispanic males who spend an average of 39 days in custody and occupy approximately 2,000 beds on any given day. They are also largely low and medium custody under the Northpointe Institute classification system.

Table 8. Summary Statistics on Jail Admissions and Releases – 2011

Total County-wide LASD Admissions	400,000
Total Jail System Custody Bookings	142,000
Number of People Admitted	118,000
Overall Length of Stay	39 days
% released within	
1 day	19%
2 days	30%
3 days	36%
7 days	47%
Number Released after 7 days	70,000
Average LOS if not released within 7 days	87 days

Source: LASD data files

Table 9. Primary Release Reason – 2011

Release Reason	Total	%
Pretrial Releases	**24,742**	**18%**
Sheriff release	4,622	3%
Pretrial Release to Detainer	611	0%
Bond or Bail	7,643	5%
Sheriff Misdemeanor Citation	3,780	3%
Dismissal of Charges	1,437	1%
Court Ordered Release	4,198	3%
ROR	2,451	2%
Sentenced Releases	**67,182**	**48%**
Sentence Expired	9,079	7%
Sentenced to Probation	4,139	3%
Transfer to State Parole Supervision	15,153	11%
Sheriff Shortened Sentence	38,811	28%
Transfer to Other Custody	**38,089**	**27%**
Transfer to Other State Prison	548	0%
Transfer to CA Prison	17,816	13%
Transfer to ICE/US Immigration	19,725	14%
Other/Unknown	**9,605**	**7%**
Total	**139,618**	**100%**

Source: LASD data files

Table 10. Summary of Inmates Released to the Custody of ICE 2011

Total ICE Releases to USIM	**19,725**	**100%**
Hispanic	18,095	92%
Male	19,002	96%
Low Custody	8,574	43%
Medium Custody	10,713	54%
LOS	39 days	
Daily Population	2,100	

Source: LASD data files

Jail Population Projections

Relying upon these trends population projections were developed to estimate the future size of the jail population. These estimates are separated into groups. The first estimate is for the jail population that is not being sentenced under AB 109. In essence, it represents what the population would have been had AB 109 not passed. The second is just for the AB 109 population. It is based on a data file being managed by the LASD which records the offense, sentence length, and projected time to serve as an AB 109 inmate.

Non-AB 109 Inmate Population

The current trends suggest that bookings and releases for the jail are likely to decline slightly over the next five years. The at-risk population for the County is not expected to increase. Crime rates are likely to remain low. In terms of arrests, they should also remain stable as a function of stable crime rates and no additions to the law enforcement patrol work force due to budget constraints. Overall there should be no increases in bookings for next few years under good trends and policies. The LOS for the non-AB109 releases should also remain constant at the 39-40 day rate.

Based on these assumptions, the Non-AB 109 jail population will remain at the current 15,000 with two adjustments. Traditionally, there is a pool of sentenced inmates who are awaiting transfer to the CDCR. Prior to October 1, 2011, this number averages about 1,100 inmates on any given day. Some portion of this group are now the AB 109 offenders who will included in the AB 109 estimate. As of February 1, 2012, the number of state inmates with no pending charges had dropped to 612 or about 500 below the pre AB 109 time period.

The second adjustment will be for the CDCR technical parole violators. Under AB 109, there is no post release supervision requirements for the N3 offenders. This means that the number of CDCR technical violators housed in the jail will also decline. Prior to AB 109, that number was 1,259. By February, it had declined to 748. One would expect that number to decline even further over the remainder of the year.

Based on these two adjustments, the base projection for the Non-AB 109 jail population declines to about 14,000 by the end of 2012 and remains at that level (See Table 11). Should crime rates continue to decline there would be a further reduction in the jail population but probably no more than another 1,000 reduction by 2015.

AB 109 Population Projections

The LASD has provided JFA with a data file that records key information about the number and attributes of persons being sentenced under AB 109. As shown in Table 12, as of February 29, 2012 there had been 3,535 persons so sentenced. The average sentence is 765 days with a projected length of stay of 305 days (which includes their pretrial credits). Based on these numbers, this population will reach approximately 5,454 by the end of this year and peak at about 7,000 by the year 2014.

Table 11. Current and Projected Los Angeles Jail Population

	End of Year				
Population	**2011**	**2012**	**2013**	**2014**	**2015**
Male Pretrial	9,275	9,182	9,228	9,182	9,219
Female Pretrial	1,062	1,051	1,057	1,051	1,056
Male County Sent	1,728	1,711	1,719	1,711	1,718
Female County Sent	367	363	365	363	365
CDCR Sentenced	815	600	603	600	600
CDCR Tech Parole	754	400	402	400	400
ICE Mira Loma	751	625	628	635	625
Non AB 109 Total	**14,752**	**13,933**	**14,002**	**13,942**	**13,982**
AB 109 Males	1,542	4,482	5,460	5,822	5,896
AB 109 Females	298	972	1,130	1,196	1,200
Sub-Total AB 109	1,410	5,454	6,590	7,018	7,096
Grand Total	**16,162**	**19,387**	**20,592**	**20,960**	**21,078**

This number of 7,000 is consistent with an early projection made by JFA as part of the federal court order in the *Plata/Coleman* case governing prison crowding in the CDCR. That analysis also showed that significant percentages of this population were classified by the CDCR using its risk assessment tool as moderate to low risk to recidivate (Table 13).

Some California counties have been reporting a drop in probation dispositions as defendants opt out for an AB 109 sentence. This is due to the fact that most of these inmates have already served 3-6 months in pretrial status, and would prefer to serve the rest of their sentence in the jail with no post-release probation supervision.

Based on all of these trends it is estimated that the LA County Jail will reach almost 20,000 inmates by this year and peak at about 21,000 the following year and remain at that level through 2015. Again these projections may be reduced is the crime rate and bookings continue to decline albeit at a reduced rate. Any changes in the court processing of pretrial cases by the courts would also serve to reduce the length of stay and thus the pretrial population. Finally the size of the ICE population being held at the Mira Loma facility which numbered about 600 as of March 2012 is subject to change.

Table 12. Key Attributes of AB 109 Sentences
October 2011 – February 2012

	N	%	Avg. Sent. (days)	Avg. Days to Serve
Total AB 109 Sentences	3,535	100.0%	765.0	305.5
Gender				
Male	2,898	82.0%	775.2	310.2
Female	637	18.0%	718.4	284.4
Most Serious Charge				
Vehicular manslaughter	4	0.1%	851.5	406.0
Forcible rape	3	0.1%	730.0	216.3
Robbery	9	0.3%	635.2	214.7
Assault	115	3.3%	737.8	259.5
Burglary	509	14.4%	691.5	286.8
Theft	884	25.0%	712.8	287.2
MV theft	39	1.1%	698.5	268.5
Forgery	118	3.3%	654.8	261.3
Marijuana	94	2.7%	691.5	271.2
Other drug	4	0.1%	699.3	321.3
Other sex	2	0.1%	486.0	55.5
Weapons	161	4.6%	613.0	234.5
DUI	102	2.9%	617.0	244.9
Hit and run	4	0.1%	608.0	214.5
Arson	1	0.0%	1095.0	206.0
Other felony	197	5.6%	715.3	272.6
Drug possession	915	25.9%	728.9	288.0
Drug possession/intent	193	5.5%	1189.6	484.3
Drug sale	170	4.8%	1437.1	597.2
Missing	11	0.3%	-	-

Table 13. Expected Attributes of the Los Angeles County AB 109 Inmates Based on Inmates Housed in the CDCR July 2011.

Attribute	Inmates	%	Attribute	Inmates	%
Total	**7,195**	**100%**	CDCR Risk Level		
			High Drug	958	13%
Race			High Property	1,525	21%
Black	2,314	32%	High Violent	927	13%
White	1,320	18%	Moderate	2,149	30%
Hispanic	3,245	45%	Low	1,493	21%
Gender			Mental Health Problem	1,050	15%
Male	6,098	85%	Gang Member?	1,167	16%
Female	1,097	15%	Any Prior Felonies?	4,331	60%
Crime			Any Prior Serious Felonies	0	0%
Person	569	8%	Any Prior Violent Felonies	0	0%
Drugs	3,400	47%	Committed Crime on Parole	2,146	30%
Property	2,724	38%	Committed Crime on Probation	1,120	16%
Other	502	7%	ICE Hold	648	9%

Source: CDCR data file

Recommended Population Control Options

In order to prevent the projected increase in the jail population two basic recommendations are being made to the LASD – implement a pretrial release program and a comprehensive re-entry program for all sentenced inmates. This section of the report describes what these two programs would look like and their impact on the projected jail population.

Pre-Trial Release

There is no question that the County lacks a comprehensive pretrial program. Although the Los Angeles County Probation Department operates such a program, it has little if any impact on those people being admitted to the custody division. What is required is such a program that will deal with the significant number of inmates who eventually are being released by the courts but are spending an excessive period of time in custody.

To test this proposition a pilot or "stress" test of criteria that could be applied to the pretrial population was conducted with the assistance of the LASD. The focus was on the existing pre-trial population. We began with the total pretrial population (about 10,545) and then applied the following criteria for all pretrial cases that had been in custody for at least 7 days with the number of inmates who are left after the criteria is applied:

1. Original pool of 10,545 pretrial inmates in custody;
2. Less those not already sentenced to another crime (7,044);
3. Less those with no outstanding warrants (4,978);
4. Less those with no "no bails" (2,964);

5. Less those with assaultive crimes that prohibit pretrial (1,753); and,
6. Less those in maximum or high security (1,367).

Here one can see that the number eligible for pretrial release drops to only 1,367. We then applied to a random sample of the COMPAS risk instrument and found that a large percentage were classified as high risk. However, the COMPAS risk instrument may need to be adjusted for three reasons. First, it has not been normed on the Los Angeles County population. Second, a prior study of COMPAS on Broward County jail population by the Florida State University found the FTA risk instrument was not a strong predictor or FTA. Third, as pointed out by JFA in its study of Broward County, the so called high risk pretrial releases actually have low FTA and pretrial arrest rates. So a better use of risk for this purpose would be *higher risk* rather than *high risk*.

The LASD has formulated a very comprehensive and detailed plan to implement a pretrial supervision program.[5] Based on the stress test noted above, that program, if implemented with a sound risk assessment and supervision component, should be able to reduce the projected pretrial population by 750 males and 250 females.[6]

Sentence Re-entry Programs

The most effective way to safely reduce the jail population will be to develop a re-entry program where sentenced inmates would have their imposed sentences reduced by participating in services that will serve to reduce their risk of re-offending.

The LASD has already made great strides in the area through its newly launched Education Based Incarceration (EBI) program. On any given day, approximately 1,200 inmates are receiving counseling and education services that are designed to reduce their risk.

As the same time, the County is not using so called "blended" sentences for the N3 inmates. Conversations with Contra Costa and San Diego County Probation Chiefs indicate that their counties are using the blended sentences in a large proportion of their AB 109 cases. But, it does not appear that this will occur any time soon in Los Angeles. However, under AB 109, the Sheriff has the legal authority to place these inmates in the community prior to the completion of their sentence under some form of supervision. In Los Angeles, this supervision would be similar to the level being provided by the proposed LASD pretrial community control division.

Prior research also shows that altering the inmate's LOS does not have an impact on recidivism for this class of offenders.[7] The CDCR has also reported that significant

---

[5] "Pretrial Services Project, Research, Roadmap, and Vision. Reducing jail population by target-specific measures while maintaining public safety." LASD, Offender Services Division.

[6] Such a program could also be operated by the Los Angeles Probation Department or a program operated jointly by the LASD and Probation Department.

[7] California Expert Panel on Adult Offender and Recidivism Programming. (2007). Sacramento: CA: California Department of Corrections and Rehabilitation.

proportions of the AB 109 are not high risks to recidivate. So we can be confident by using the EBI program as re-entry program , it will be possible to moderately reduce their LOS without jeopardizing public safety.

One way that this could be achieved is for inmates who are sentenced to the county jail (after having served several months in pretrial custody) be given the opportunity to participate in one of the EBI's many programs. Upon completion of a program, the inmate would be released to community supervision and continuation of services as required.

The impact on the AB 109 population can be estimated based on the following assumptions.

1. There will be an estimated 8,500 AB 109 admissions each year.
2. 75% of these inmates will participate in the EBI programs prior to being released.
3. Upon completion, they will have their sentence reduced by an average of four months.
4. 20% of these people will be re-arrested and be returned to custody for an average of two additional months.
5. Based on these assumptions, the projected AB 109 population of 7,000 would be reduced by approximately 2,000 inmates.

Bed Capacity Options and Recommendations

As noted earlier in the report, the current jail system has over 22,000 beds that if staffed can be used to house inmates. This number does not include the 1,452 bed Mira Loma facility located in Lancaster which is currently used exclusively for ICE detainees. This section of the report describes several immediate and long-term opportunities to further increase the current bed capacity and that ultimately would allow the closing of the antiquated and poorly designed Central Jail facility. These are not the only options available but suggest some pragmatic steps the LASD could take.

There is consensus within the LASD and other external observers that the long-term objective is to eventually remove all of the male inmates now housed at the Central Jail facility. But in so doing, the LASD will lose 5,260 beds. The so-called "new" part of Central Jail has 1,836 beds but it is currently closed. The remainder of Central Jail is used for a wide variety of low, medium and high custody inmates. In particular, there are nearly 500 beds that are reserved for administrative segregation inmates and others that must be kept separate from other inmates (K-10s).

One option to increase the bed capacity and in particular the maximum security beds that the LASD would lose if Central Jail were to close, is to modify the current space at the North County Correctional Facility (NCCF). NCCF is a modern maximum security complex that is well suited for housing inmates in high and medium custody. It is designed to operate as five separate units and provide for disciplinary segregation and

excellent medical and mental health service capabilities. It also contains three large vocational service areas for printing, sign painting and clothing production. One option we would recommend is to transform the three vocational training units into secure housing units.

We estimate that the vocational area space could hold 600 cells, each being capable of being double celled for a total additional bed capacity of 1,200 inmates. But assuming that 100 of the cells would only be used for single cells, the more realistic bed capacity would be 1,000. This would be more than sufficient to cover the K-10 and Administrative Segregation beds now being used at Central Jail.

The vocational training services would be re-located in the newly constructed and larger vocational training and education service center for the Sheriff's EBI rehabilitation programs.

The second opportunity to add approximately 500 minimum security beds would happen by assuming the management of five CDCR conservation camps (including the Malibu 105 bed female unit).[8] These five camps are being relinquished by the CDCR and can be taken over by the LASD. These beds could be easily used to the rising AB 109 population since prior to the passage of AB 109, many of the inmates who are AB 109 candidates were housed in these camps

These two options, as shown in Table 14 would increase the overall LASD jail bed capacity by about 1,500 beds.

A second option would be to reconfigure and renovate part of Central Jail and use it to house most of the 1,900 women now housed at Century Regional Detention Facility (CDRF). The logic of this alternative would be as follows: The current negative culture associated with Central Jail would be transformed by having a much lower security population there. CRDF would be used largely to house medium and low custody male inmates. Having females would be a temporary move until a more permanent and modern facility could be constructed for the women.[9]

Finally, there is the potential to construct a new female facility. The LASD has preliminary plans for a 1,500 bed facility at the PDC. If the recommended pretrial and re-entry programs are implemented such a facility would be sufficient to house the entire female population. At issue is whether it would be wise to have all of the women at a single location or be able to house some portion of the population in the downtown area to facilitate court appearances and access to the medical facilities at the Twin Towers facilities. These are details that need to be developed once the full effects of the pretrial release and AB 109 re-entry programs are fully implemented.

---

[8] There are an additional 5 fire camps that the county could add to the ones that are now being used to house state inmates.

All of the jail bed capacity figures are reduced by 10% to allow for seasonal fluctuations in the jail population and the need to separate special need and high-risk inmates. The 10% reduction will ensure the jail system will not be crowded for any sustained period of time.

Table 14. Summary of Possible Bed Capacity Options

Facility	Current	Option A	Option B	Option C
Central Jail	5,260	1,500	500	0
Twin Towers	4,820	4,820	4,820	4,820
CRDF	2,380	2,380	2,380	2,380
Peter Pitchess DC				
NCCF	4,294	5,294	5,294	5,294
South	1,536	1,536	1,536	1,536
South Annex	1,624	1,624	1,624	1,624
East	1,944	1,994	1,994	1,994
Out Patient	600	600	600	600
Conservation Camps	0	500	500	500
New Women's Facility	0	0	0	1,500
Totals	22,458	20,248	19,248	20,248
Mira Loma	1,452	1,452	1,452	1,452
Grand Totals	23,910	21,700	20,700	21,700
At 90% Capacity	21,519	19,530	18,630	19,530

Projected Populations and Capacity Options

Assuming the LASD is able to successfully implement the supervised pretrial and sentenced re-entry programs program, plus make the recommended capacity adjustments, would there be sufficient bed space to safely house the projected inmate population? The answer is yes. Table 15 summarizes the results of the projected effects of each scenario. The “base projection” represents the status quo with Central Jail remaining operational and opening up its now closed units. It would also mean that the LASD is unable to implement the supervised pretrial release program and the re-entry program.

Option A assumes that Central Jail remains partially opened by temporarily housing the female population at a renovated portion of the facility and the rest of them at one of the conservation camps. Central Jail may also be renovated to create classroom space to provide much needed treatment services to the female population.

Option B reduces the female jail population to 500 and mostly pretrial women whose family reside near downtown Los Angeles. Depending upon the ability of the LASD to launch the pretrial and re-entry programs, it may be possible to relocate a sizeable portion of the female population at the Twin Towers facility.

Table 15. Summary of Projected Inmates Population by 2015 and Capacity Options

Item	Current Trend	Option A	Option B	Option C
Capacity	23,910	21,700	20,700	21,700
Central Jail	5,260	1,500	500	0
Functional Bed Capacity@ 90%	21,519	19,530	18,630	19,530
Populations by 2015				
Pretrial	10,325	9,325	9,325	9,325
County Sentenced	1,830	1,830	1,830	1,830
Awaiting Transfer to CDCR	600	600	600	600
CDCR Tech Violators	400	400	400	400
ICE Mira Loma	625	625	625	625
AB 109	7,096	5,096	5,096	5,096
Totals	20,876	17,876	17,876	17,876
Surplus Beds @90% Occupied	643	1,654	754	1,654

Option C envisions the construction of the new female facility at the PDC complex. Current plans call for a 1,500 bed facility, which may or may not be needed for reasons cited earlier in the report.

All of the options provide sufficient bed space with a 10% vacancy rate throughout the system to ensure the jail system can safely manage the inmate population taking into account seasonal fluctuations in the population and the need to separate high risk and special needs inmates.

Other Issues

Inmate Classification

We have already noted that the current inmate classification system is over-classifying inmates for medium custody. This is occurring due to LASD policy and the design of the Northpointe Institute instrument. It should also be adjusted for females so that it does not over-classify them. This latter point will be important as the Department determines the

best long-term facility solution for the women. These issues can and should be corrected in consultation with Northpointe.

Pretrial Risk Assessment
In a similar manner, the COMPAS risk assessment system should be tested and normed for the LASD jail population. In particular, the FTA risk assessment instrument should not be used until the re-validation work is completed.

Evaluation of the EBI Programs
Since the LASD plans to expand the application of the EBI education programs, it would be appropriate at this time to begin a formal impact evaluation. Such a study can and should be done in tandem with the revalidation study of the COMPAS instrument.

Establish a Formal Research, Planning and Analysis Division
The LASD is fortunate to have a number of staff that are highly skilled in data extraction and analysis. Yet, it seems much of this work and talent is not concentrated or structured within a single unit. The LASD is like a major corporation without a formal R&D capability. Such a unit would be issuing formal population projections every six months, analysis of population trends and critical incidents, and, cost-benefit evaluations of new LASD programs and policies. Such a division would be directed by a person with an advanced degree in research methods, but experience in local corrections.

Supreme Court
of the
State of New York

HON. EDWARD J. MCLAUGHLIN
SUPREME COURT JUSTICE

Personal & Unofficial

JUSTICE'S CHAMBERS
100 CENTRE STREET
NEW YORK, NEW YORK 10013
(646) 386-3972

October 6, 2015

Dear Editor:

Chief Judge Lippman's announced reform of the "broken"bail system insults judges, overlooks that bail review is available presently, fails to provide a complete record of bail/release decisions, and intrudes on the judiciary's independence. As reported, the gist of the press conference was a broad criticism of discretionary decisions made by scores of sincere judges in individual cases. Using the word "broken" and mockingly recalling Alice in Wonderland might raise press interest but it also surely further lowers judicial morale. The accusation is that daily countless judges in five boroughs, without consulting each other, knowingly made incorrect bail decisions. Merit judicial selection, as some call it, in place for decades, accounts for the vast majority of judges sitting in Criminal Court arraignments (selected judges of the Civil Court are the exception). Judges appointed by every mayor from Koch to de Blasio are accused of presiding over a "broken" bail system. This accusation is false. Their actual bail decisions were correct. That they produce an unwelcome result does not mean the decision was wrong or that the system is broken. When diverse sincere people make determinations over time, independently of each other, the results should be accepted as fair. Judging is not – and should not be – results oriented.

A defendant's failure to post bail does not mean that bail was set too high. Such reasoning is neither persuasive nor logical. It certainly does not justify the administrative branch of the judiciary interfering with the independence of its adjudicative branch. Furthermore, if it were such an egregious and unfair system over which judges have presided during the last decade, why this press briefing only now?

The bail system, indeed, may be broken but not for the reasons the Chief Judge espoused.

Citywide statistics show the huge number of unjailed defendants who do not come to court on their own. Aside from the judges sitting in criminal court and the attorneys who regularly practice there, few people know how many defendants at liberty do not come to court voluntarily. For example, in New York City's Criminal Courts to date in 2015, in the five boroughs, just short of 51,000 warrants were issued for such defendants. Nearly 34,000 of the warrants issued were for defendants who either had been released by judges who set no bail or

had posted bail. Warrants issued in 2013 and 2014 practically were identical. Judges, from their experiences in arraignment and calendar parts, are aware of the plethora of past non-appearances as they begin each new arraignment assignment. They decide the day's cases individually, using only appropriate criteria. Yet, no one suggests that the rampant non-appearance at, or following, arraignment in Criminal Court justifies factoring that data into bail decisions.

Imagine the outrage if the press conference had been devoted to decrying the vast amount of people who did not come to court. What would the reaction be were an administrator to state, "too many defendants do not come to court" or release conditions are "too low?" How would the press and public greet urging judges to consider carefully the embarrassing number of persons who have failed to return to court as an appropriate consideration in future bail decisions? Judges are sanctioned in the rare instance when they attempt to influence another judge's handling of a case. How should judges perceive the subject matter of the press conference in their future bail decisions?

Furthermore, however well-intentioned the Chief Judge as administrator was, the public's understanding of their criminal justice system was not aided by his conveying the misleading and insulting impression that his opinion could influence discretionary decisions of judges. The word "retraining" is particularly insulting. It is reminiscent of recent bureaucratic action where error could reasonably be assumed. "Retraining" to make discretionary decisions implies that the judges who made the tens of thousands of bail decisions, to which there are objections, were unaware of available statutory options or chose an illegal course. Perhaps most significantly, his remarks severely undermined judicial independence by implying that he could suggest a goal and that judges, like lemmings, would dutifully comply rather than make individualized, case-specific decisions as we are ethically obligated.

Noteworthy is the failure to provide contextual data about bail decisions made by the judges now faulted for setting the "too high" bail. The judges being criticized for detaining defendants are the same judges who release defendants. Discretion is designed to produce varying results. An independent judiciary, unfettered by interference, usually from without, is the guardian of our country's democracy.

Unexecuted bench warrants and absent defendants, covering every level of offense, vastly exceed the number of defendants incarcerated pre-trial. This mass thumbing of noses at the legal system followed sincere judicial bail decisions seemingly is neither noticed nor noted in the Chief Judge's announcement. Yet, defendants who fill courtrooms during calendar calls, having been released without bail or who have posted the required bail, evidence correct discretionary decisions.

Defendants released statutorily (CPL 170.70 and 180.80) could have provided a measure of empirical data missing in the "bail-is-too-high" assumption. The announcement did not

mention any study of this data source. Defendants who fail to return following statutory release provide some evidence that the bail set was appropriate. Defendants who appear, having been statutorily released, demonstrate that bail was unnecessary. Discretionary decisions are case-by-case, individual assessments, not preordained ones driven by an administrative goal or policy.

The Legislature enacted laws related to bail and trusts judges to follow them. Now, as administrator, Chief Judge Lippman feels that bail decisions are being incorrectly made, not because of legal error, but rather because he, and others, are dissatisfied with the number of people who cannot post the amount set by judges. Those judges, screened and appointed due to their fairness and commitment to the law, should be presumed to perform their duties accordingly. Dissatisfaction with discretionary decisions does not allow administrative interference. Legal ways exist to challenge any condition of bail. Since being enacted in 1971, the Criminal Procedure Law has provided for both setting and reviewing bail decisions. Review can occur both in the Supreme Court and the Appellate Division, depending on the jurisdictional and crime level factor of bail set in Criminal and Supreme Court. The review is initiated by the supposedly aggrieved party and counsel. An accused, unable to meet the bail conditions set by a judge, is not without legal remedy.

Announcing that bail generally is too high is tantamount to asserting that judges in thousands of bail decisions have ignored the law purposefully for unstated reasons, perhaps to curry favor, avoid criticism, or assure continued incarceration. "Purposefully" is apt because the bail statute lists factors to be evaluated, in the individual judge's discretion. Under existing law, to obtain a reduction of existing bail conditions, a reviewing court must determine that an abuse of discretion occurred in the original decision or that circumstances have changed from those known to the original judge. It would be insufficient, and illegal, for a reviewing judge to adjust bail conditions merely as a different exercise of discretion or from a perception that bails generally are "too high."

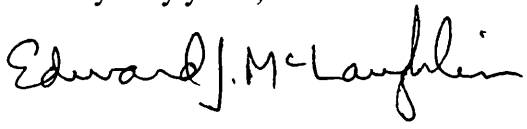
The reform plan establishes one judge per county to review bail decisions when a person had been incarcerated for a specified period without posting bail. The underfunded, understaffed court system often cannot provide requested trials and hearings for jailed and unjailed persons alike. For a designated judge to conduct a meaningful review of bail, the judge needs to become familiar with each case, including current data regarding the supposed proof and information about the statutory criteria as originally presented to the bail setting judge. The newly designated judge would hear from both sides about the situation, likely needing some investigation of a defense contention about viability or altered circumstances of the case. Would such a continual review process allow the designated judge to conduct any trials for defendants, especially incarcerated ones, or would the process reduce, by nearly five citywide, the judges available for trials?

Whether the court system reports the results of this process was not addressed at the news

conference. Did some persons, released by this process, not return to court as directed or allegedly commit a new crime? How often did a reviewing judge lower bail? How often did the reviewing judge maintain the existing conditions? Will the original judge's decision be seen as correct when circumstances thereafter justify a change in bail condition? Is it presumed that the original judge would not adjust bail upon hearing the new facts or that the defense attorney or the prosecutor would not alert the court to a change circumstance?

Speaking only for myself, I am offended by the tenor of Chief Judge Lippman's remarks and dismayed at the incomplete record on which he rests his case.

Very truly yours,



EJM/fjl

Estimating the Cost of the Proposed New Jersey Pretrial Service Unit and the Accompanying Legislation

Daraius Irani, Ph.D., Executive Director
Zachary Jones, Research Assistant

June 11, 2014

Regional Economic Studies Institute

TOWSON UNIVERSITY

Table of Contents

Table of Contents 2
1.0 Executive Summary 4
2.0 Introduction 8
2.1 Legislation Language 8
3.0 Cost Analysis 11
3.1 Data Note 11
3.2 Start-up Costs 11
3.3 Operating Costs 18
3.4 Indirect Costs 22
3.5 Conclusion 26
4.0 Additional Cost Considerations 27
4.1 Cost Model 27
4.2 Reductions in Pretrial Populations 28
4.3 Time-to-trial 30
4.4 21st Century Justice Improvement Fund 31
5.0 Economic Impact Analysis 32
5.1 Findings 32
5.2 Conclusion 33
6.0 Legislation Review 33
6.1 The District of Columbia Pretrial Service Agency 34
6.2 Kentucky Pretrial Services 35
6.3 Conclusion 36
7.0 Literature Review 37
7.1 "Exploring the Impact of Supervision on Pretrial Outcomes" 37
7.2 "The Hidden Costs of Pretrial Detention" 38
7.3 "Investigating the Impact of Pretrial Detention on Sentencing Outcomes" 39
8.0 References 41
Appendix A—Methodology 45
A.1 IMPLAN Model Overview 45
A.2 Input Assumptions 45
Appendix B—Glossary 47
Appendix C— Detailed Economic Impacts 48
Appendix D—Release Conditions Legislation 51
Appendix E—Release Hearing Legislation 56

Table of Figures

Figure 1: Cost Estimates by Expense Category 4
Figure 2: Potential Net Cost 5
Figure 3: Assessment Staff 12
Figure 4: Supervision Staff 13
Figure 5: Hiring and Training Costs 14
Figure 6: Entry-Level Desktop Computers 16
Figure 7: Case Software 17
Figure 8: Total Start-Up Cost 18
Figure 9: Facilities and Upkeep 19
Figure 10: Personnel Expenses 20
Figure 11: Programming 22
Figure 12: Annual Operating Cost 22
Figure 13: Potential Indirect Costs 26
Figure 14: Cost Summary 27
Figure 15: Total Economic Impacts 33
Figure 16: Total Fiscal Impacts 33
Figure 17: Glossary of Terms 47
Figure 18: Detailed Employment Impacts 48
Figure 19: Detailed Output Impacts 49
Figure 20: Detailed Wages Impacts 50

1.0 Executive Summary

The Regional Economic Studies Institute (RESI) of Towson University has been tasked with enumerating the potential costs to the State of New Jersey of instituting Senate Bill No. 946 (2014) and Assembly Bill No. 1910 (2014), both of which will alter the current pretrial process and establish the New Jersey Pretrial Service Unit (NJPSU).

Through the use of current pretrial service statistics, RESI enumerated the potential cost to New Jersey based on three separate categories, as described below.

- **Start-up costs** consist of the spending necessary to launch the NJPSA. These costs include the hiring and training of staff, the purchasing of equipment, and the furnishing of the workspace required.
- **Operating costs** were those incurred through the year-to-year functioning of the NJPSU. These costs included employee expenses, software licenses, facilities and upkeep, and programming provisions.
- **Indirect costs** quantify the potential expenses that would be incurred by the State as a result of the change in judicial practices as the bills mandate or as a result of actions by the NJPSU. These costs were collected from additional public defender and courtroom usage, and the failure to appear (FTA) and recidivism of released defendants. FTA and recidivism cost money to the state through rearrest costs and damages to the community. These costs can increase if levels pretrial misconduct are not properly managed through supervision and programming.

Figure 1: Cost Estimates by Expense Category

Expense	Cost Estimate
Start-Up Costs	$16,591,360
Operating Costs	$379,589,599
Indirect Costs	$65,069,321

Source: RESI

As shown in Figure 1, RESI projected that NJPSU start-up costs would amount to approximately $16.6 million, the annual operating cost of the NJPSU would amount to $379.6 million, and the indirect cost to the state that would be induced by the bills could potentially reach at least $65.1 million.

This cost projection was modeled off the DCPSA program as it best reflects the legislation provided for the NJPSU because it must provide for similar costs of living and because it is widely regarded as the most effective pretrial release program. It is important to note that the NJPSU also has a provision that requires it to consider monetary release conditions only as a final resort when non-financial conditions will not reasonably assure the safety of the community and the appearance of the defendant in court. In comparison, the DCPSA is to first

consider monetary conditions before assigning DCPSA program release. Ultimately, this provides the potential for the NJPSU to experience even higher levels of program spending per arrest than the DCPSA.

RESI also considered the cost saving that would be generated by diverting pretrial defendants away from jail and prison due to release. Using figures from New Jersey's "Report of the Joint Committee on Criminal Justice," RESI found that decreasing the level of pretrial detention by 50 percent could save the New Jersey state budget approximately $164 million dollars. However, there are several things to consider with this figure. First, the committee's assumption that approximately 50 percent of pretrial detainees are being held needlessly is very generous, because most populations see a total release rate of approximately 50 percent. Furthermore, with each release there is an increased change of FTA and recidivism, incurring additional costs against the state. Finally, still considering the $164 million in potential savings, RESI projects that the annual operating costs of the NJPSU would still result in a net budget cost of more than $215 million per year.

Figure 2: Potential Net Cost

Expense	Cost Estimate
Operating Costs	$379,589,599
Pretrial Detainment Savings	$164,250,000
Net Cost	**$215,339,599**

Source: RESI

The NJPSU and associated legislation were designed to shorten the aggregate time-to-trial and, as a result, reduce the time defendants remain in pretrial detention. From streamlining the pretrial process in such a way, a goal of the bills is to save the State money on the pretrial defendants. However, several provisions from the bills will likely extend the time-to-trial and the associated costs, including the following:

- Changing the "initial appearance" phase from an informational court appearance into something that more closely resembles an adversarial hearing.
- Granting defendants the right to appeal the release decision made in aforementioned hearing.
- The use of non-monetary release conditions compared to monetary bonds, which can result in a substantial increase in the time-to-pretrial release of a defendant. This does not affect the overall time to trial, but affects the underlying source of cost (time in pretrial detention).

Time-to-trial is also affected by the judicial caseload. The additional appearances that will be necessary will have to be dispersed among an already overloaded judiciary.

The bills also establish the 21st Century Justice Improvement Fund and grant the Supreme Court the power to increase statutory fees on filings and other matters, funds that are meant to then be distributed to several state judicial departments. However, considering the funding goals and the limit on additional fees (maximum of $50 per instance), there would need to be approximately

- 300,000 applicable crimes committed to meet the $15 million dollar funding cap for the NJPSU;
- 640,000 applicable crimes committed to meet the $17 million funding cap for the e-court initiative; and
- 842,000 applicable crimes committed to meet the $10.1 million funding cap for Legal Services of New Jersey.

The number of applicable crimes needed to meet the Legal Services cap is more than twice the number of arrests in 2012 (301,744) and would constitute the commission of an applicable crime by almost one of every ten citizens of New Jersey. The funding of the later programs may become difficult depending on where the courts find it applicable to increase fees.

The bills are also likely to the negatively impact the commercial bonding industry and likewise hurt the New Jersey economy. If New Jersey enacts the NJPSU, it will divert pretrial release traffic to non-financial conditional release and away from commercial bondsman. The resulting loss in commercial bail usage will be manifested in the loss of commercial bail employees and, eventually, the closing of commercial bonding firms. RESI conducted an economic impact analysis using IMPLAN input/output modeling software. For every 10 employees lost in the commercial bail bonds industry, New Jersey would experience the following economic and fiscal impacts:

- Lose an additional 7 jobs.
- Lose nearly $2.1 million in output.
- Lose nearly $0.6 million in wages.
- Resulting in a loss of approximately $103,000 in tax revenues.

Some of these losses could possibly be offset by the effects of employment gains in the NJPSU; however, the resulting wages would come from the budget of the state government, rather than from the private sector. Spending and employment by commercial bonding firms created a positive net fiscal impact. When the private employment changes to public employment, the net fiscal impact on the state government will be substantially negative.

A review of pretrial research illustrated the importance of maintaining a highly effective pretrial justice process. The presence of supervision on non-monetary releases is highly important, as the level of pretrial misconduct is highly correlated with the presence of proper supervision over all defendants. This indicates the importance of maintaining high quality supervision for non-monetary releases. Other research also further reinforced the importance of rapid pretrial

processing as the length of pretrial detention was directly correlated with the likelihood of FTA and recidivism. Finally, research indicated that pretrial detention is directly correlated with the trial outcome and imprisonment. Though this correlation is often seen to be an injustice to detained defendants, it could also be an indication that the judiciary has substantial insight into correctly detaining those defendants who are likely to be guilty.

RESI found the net costs to the State of New Jersey of instituting Senate Bill No. 946 and Assembly Bill No. 1910 to be at least $215,339,599 considering all potential savings. This cost could likely be higher if the NJPSU does not function quickly and effectively. Depending on the losses experienced by the commercial bail industry, the New Jersey State Government could also lose anywhere from $100,000 to millions in tax revenue. Additionally, reductions in spending that stem from reductions in programming are likely to bring even greater costs in the form of FTA and recidivism. Considering the use of conservative figures throughout this report, RESI holds a $215,339,599 cost to be a conservative estimate of the cost of Senate Bill No. 946, Assembly Bill No. 1910, and the NJPSU.

2.0 Introduction

The New Jersey Senate and General Assembly have recently introduced companion bills that require the provision of pretrial services for all arrested individuals in New Jersey. Senate Bill No. 946 (2014) and Assembly Bill No. 1910 (2014) establish a New Jersey Pretrial Release Services Unit (NJPSU).[1] This prospective entity will be responsible for assessing a defendant shortly after his or her arrest and submitting a release recommendation to the courts based on that defendant's characteristics. This release recommendation can include a myriad of release conditions that the NJPSU can utilize to reasonably assure reappearance of a released defendant and the safety of the community. Additionally, it is the responsibility of the NJPSU to oversee and ensure adherence to these conditions and manage sanctions when the conditions are violated.

The bills also give the NJPSU the power to recommend that a defendant be detained indefinitely until the trial if he or she poses a serious risk of failure to appear or recidivism. The bill contains additional provisions that are not directly associated with the creation or operation of the NJSPU; however, they are necessary for the practical implementation of the program. One of these provisions is a more intensive Initial Appearance before the court to accommodate the judgment process regarding pretrial release conditions. The bills additionally allow the appeal of this judgment, therein adding another potential step in the criminal justice process. The bill also creates a fund to be paid into through the assessment of additional court fees to help fund the NJPSU and several other judicial initiatives.

2.1 Legislation Language

To analyze the cost of the NJPSU and compare it to existing pretrial service programs, certain assumptions must be made about the intent and implementation of the provisions in the bills. SB 946 and HB 1910 provide an expansive, but vague framework for the establishment of a NJPSU. Some provisions are not fully detailed in terms of implementation. Other provisions contain language that must be interpreted contextually.

First, it is stipulated that the NJPSU will assess all arrested individuals. This function is derived from section 10, where it is provided that, "The Pretrial Services Unit shall conduct, prior to a bail hearing or first appearance, an assessment of all criminal defendants…"[2] RESI assumed that any individual who has been the subject of an arrest has been so arrested with the purpose of pursuing criminal charges against that individual. and that therefore, every arrest is subject to a

[1] This study was conducted with the support of the American Bail Coalition. All statements herein are the opinions of the Regional Economics Studies Institute of Towson University.
[2] State of New Jersey, Senate No. 946 (2014): 8, http://www.njleg.state.nj.us/2014/Bills/S1000/946_I1.pdf.

bail hearing or a first appearance and the criminal defendant status. It then follows that every arrested individual will be assessed by the NJPSU.

Section 10 continues to provide that assessments will be made, stating, "…for the purpose of making recommendations to the court concerning the appropriate disposition…"[3] This language establishes that every assessment made will require the submission of a recommendation to the court as to the necessary conditions for the safe release of a defendant, if they so exist. These non-financial conditions under the NJPSU authority are enumerated in section 3, subsection b. of the bills.

Section 10 also stipulates that every defendant released on any number of non-financial conditions will be supervised by the NJPSU. It states, "the Pretrial Services Unit shall monitor each defendant released pursuant to subsection b. of section 3 to ensure that the defendant adheres to the condition or combination of the conditions of the defendant's release ordered by the court."[4]

The bills establish that various sanctions, penalties, and other punitive actions will be taken against released defendants who violate the terms of their releases.[5] The duties of administering sanctions against supervised-release defendants who violate the terms of their non-financial release conditions are not explicitly assigned in the bills. As the NJPSU is the agency responsible for the supervision of the defendants under non-financial release conditions, RESI assumed that this agency will also be charged with filing and/or processing the sanctions against violating defendants.

Additionally, the NJPSU will be assumed to conduct drug testing of its participants as part of both the assessment and supervision phases of the program. Among the section 6 provisions that establish the assessment criteria, the bills state that the assessment should include a consideration of the defendant's "history relating to drug and alcohol abuse."[6] As it cannot be assured that defendants will be forthcoming about this information, drug testing would likely be required to properly assess drug abuse. Additionally, one of the conditions of release that can be set by the NJPSU is that defendants "refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner."[7] Again, this would necessitate drug testing to ensure accurate supervision.

---

[3] New Jersey Senate No. 946/Assembly No. 1910 (2014), 8.
[4] Ibid.
[5] Ibid, Section 7 and Section 9.
[6] Ibid, 6.
[7] Ibid, 3.

The language of the bills also implies that the NJPSU will be responsible for providing proper medical, psychological, and psychiatric assistance for defendants released on non-financial conditions. One of the non-financial release conditions provided for use by the NJPSU in section 3 is to require that a defendant "undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose."[8] The bills do not specify whether the cost of this treatment would be deferred to the defendant or if it would fall to the NJPSU and the state government. However, in the following sections, it is made clear that the costs of this program and other similar to it will likely be expensed to the NJPSU itself.

One of the additional release options involving electronic monitoring states that the "costs attributable to the electronic monitoring of an offender shall be borne by the Pretrial Services Unit in the county in which the defendant resides."[9] This passage seems to indicate that costs of programming will likely be the responsibility of the NJPSU rather than that of the defendants it supervises. Additionally, many of the defendants who require the provision of treatment services may be low-income, and may not have the means to cover their treatment expenses. As one of the purported purposes of these bills is to eliminate financial release-barriers caused by commercial bonds, it seems unlikely that the bills would institute a self-payment policy that would exclude the release of a defendant based on financial disposition.

Based on the review of SB 946 and HB 1910, RESI compiled the following catalogue of services that it assumes the NJPSU will be responsible for providing:

- Assess all arrested individuals;
- Compose risk assessments and recommendations to the court as to whether or not defendants should be granted pretrial releases and, if so, on what conditions these releases should be granted;
- Supervise all defendants who are released pretrial on non-financial conditions;
- Administer sanctions against individuals who violate their non-financial release conditions;
- Test assessed and supervised defendants for current or continued drug or alcohol abuse;
- Secure proper medical, psychological, and psychiatric assistance for defendants released on non-financial conditions; and
- Provide electronic monitoring as a supervision method for defendants.

---

[8] New Jersey Senate No. 946/Assembly No. 1910 (2014), 3.
[9] Ibid.

RESI used these program assumptions to predict the level of services that the NJPSU is likely to provide so that an assessment of the projected program cost could be more accurately conducted.

3.0 Cost Analysis

To formulate a projection of the total fiscal cost of the NJPSU, RESI examined three cost sources of implementing the legislation. These costs sources include the following:

- Start-up costs,
- Operating costs, and
- Indirect costs.

When applicable, these costs were calculated using the empirical and budget data from other pretrial service programs. RESI utilized informed assumptions to evaluate the cost of other variables where necessary.

3.1 Data Note

RESI utilized the in-depth budget report released by the District of Columbia Pretrial Service Agency (DCPSA) in multiple calculations as a baseline for the levels and cost of employees. Although the DCPSA provides some services that are currently outside the scope of the NJPSU provisions, RESI used this source because of the high level of detail that it provides. This high level of detail allows for the effects of these additional services to be easily removed from calculations when necessary. RESI also used total adult arrest data from the FBI Uniform Crime Report as the measure of a jurisdiction's total pretrial program participation.[10] [11] The use of this arrest data ensured a universal and consistent inter-program variable.

3.2 Start-up Costs

Start-up costs consist of the likely expenditures that the NJPSU would incur in establishing its operations. Some of these costs are one-time expenses, while others may reoccur in the future as part of ongoing operations. These costs may be accrued over the course of several months to several years, depending on the rate at which the NJPSU develops its operations to full function. Variables included in the start-up costs of the NJPSU are the costs of staff hiring and training, facilities, and computer hardware and software.

---

[10] As the FBI UCR does not include arrest from Washington D.C.'s primary police force, the Metropolitan Police Department, RESI combined the UCR total with arrests reported in the Metropolitan Police Department's annual report.

[11] Metropolitan Police Department, "Annual Report (2012)," 30, accessed April 18, 2014, http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/2012_AR_1.pdf.

Staffing

The cost of hiring and training the NJPSU staff first requires calculating the number of employees that the unit requires. To do this, RESI assessed the number of employees that will be needed in the two primary service functions: assessment and supervision. RESI then developed a metric for calculating the cost of hiring and training of the NJPSU staff based on existing employee turnover research conducted by the Center for American Progress.

Assessment Staff

To calculate the number of assessment agents needed for the NJPSU, RESI used a ratio of cases per assessment agent. This ratio was gleaned from the DCPSA's 2012 operations data in conjunction with the 2012 arrest data from Federal Bureau of Investigation's Uniform Crime Report data. The DCPSA employed 61 assessment employees to manage 42,455 arrests. This yielded a ratio of 696 cases per assessment personnel, which was applied to the 301,744 arrests occurring in New Jersey in the same year.[12] This resulted in a projected need for approximately 433 assessment full time employees (FTEs) to oversee New Jersey's caseload.[13]

Figure 3: Assessment Staff

Pretrial Organization	Cases	Cases Per Assessment Employee	Assessment Employees
DCPSA	42,455	696	61
NJPSA	301,744	696	433

Sources: DCPSA, FBI Uniform Crime Report, Metropolitan Police Department Annual Report, RESI

Supervision Staff

The supervision staffing needs were calculated using a methodology similar to that employed in the previous subsection. The DCPSA supervised 19,146 cases between its 173 supervision employees. This equates to a rate of approximately 111 supervisions per employee. The number of prospective supervisions that will occur through the NJPSU was derived by applying the DCPSA ratio of supervisions per arrest to the level New Jersey arrests, resulting in 136,078 prospective New Jersey supervisions.[14] The rate of supervision FTE per supervision was then applied to the level of prospective NJPSU supervisions, resulting in a total of 1,230 supervision FTEs required for New Jersey.[15]

---

[12] Uniform Crime Reports, Table 69 in "Crime in the United States 2012," accessed April 21, 2014, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/69tabledatadecpdf.
[13] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification," 15, accessed April 14, 2014, http://www.csosa.gov/about/financial/budget/2014/FY14-PSA-Budget-Submission.pdf.
[14] RESI made the assumption that the ratio of supervisions to arrest will be the same in New Jersey as it is in D.C.
[15] Pretrial Services Agency for the District of Columbia, FY 2014 Congressional Budget Justification, 15–21.

Figure 4: Supervision Staff

Pretrial Organization	Supervisions	Supervisions per Supervision Employee	Supervision Employees
DCPSA	19,146	111	173
NJPSA	136,078	111	1,230

Sources: DCPSA, RESI

The total FTE for assessment and supervision staff for the NJPSA will be approximately 1,664 employees.

Cost of Hiring and Training

RESI conducted a literature review of the research on the cost of hiring and training new employees. However, RESI found that there was no study that adequately estimated these costs exclusively. To compensate for this lack of data, RESI used employee turnover cost research as a baseline.

Employee turnover cost differs from the cost of employee hiring and training because it encompasses the additional component of separation. As is explained in an employee turnover study conducted by faculty of the University of Nebraska, the cost associated with the turnover process consists of three parts: separation of the old employee, hiring of a new employee, and training the new hire.[16] Because of a lack of information regarding the separation process of the NJPSU, RESI made the assumption that cost of separation would not exceed one third of the total cost of employee turnover figures, and that the remaining two thirds are the costs for hiring and training.

With this assumption, RESI derived hiring and training cost from an employee turnover study by the Center for American Progress. This study consists of a comprehensive review of 11 research papers and 31 case studies. RESI gleaned two data points from this report:

- First, the average turnover cost for non-physician, non-executives is 20.7 percent of the yearly salary.
- Second, in a case study contained within to be most similar, the turnover for government child protective services (CPS) workers was approximately $10,000 per employee.

[16] Graef, M. I. et al, "Costing child protective services staff turnover," Child Welfare 79 no. 5: 521, accessed April 15, 2014 via EBSCOhost.

Applying the assumption that an employee hiring and training constitutes the remaining two thirds of the turnover cost, hiring and training alone will cost approximately 13.8 percent of employee salary or, alternatively, about $6,667 per employee.[17]

According to the DCPSA budget, the average employee salary was approximately $85,115. Applying this to the prescribed 13.8 percent of salary resulted in a new hire and training cost of $11,727 per employee. The per employee training rates were then applied to the total FTE projections, resulting in a total of $19,503,515 in hire and training cost based on the percentage of salary, and $11,087,519 in cost based on the $6,667 flat rate cost for CPS government employees. RESI calculated that hiring and training cost could range from $11,087,519 to $19,503,515. To keep the cost estimate conservative, RESI assumed a training cost of $11,087,519.[18]

Figure 5: Hiring and Training Costs

	Cost of hiring and training per NJPSU Employee	NJPSU predicted Employment	Total Hiring and Training Cost
Ratio of Salary Cost	$11,727	1,664	$19,503,515
Flat Rate Cost	$6,667	1,664	$11,087,519

Source: RESI

Facilities

To conduct the day-to-day functions of the NJPSU, its employees will require office space. RESI assumed that, with support from current practices, every employee requires his or her own computer and workspace.[19] This space must be procured and furnished.

Office Space

RESI calculated facilities costs based on the space requirements for the previously calculated total FTE. A frequently cited survey conducted by CoreNet found an average of approximately 176 square feet per employee. RESI reviewed several reports on the average cost of leasing office space in New Jersey and found concurring figures in the range of $23 to $25 per square

[17] Heather Boushey and Sarah J. Glynn, "There Are Significant Business Costs to Replacing Employees," November 16 (2012): 2, accessed April 15, 2014, http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.
[18] Pretrial Services Agency for the District of Columbia, FY 2014 Congressional Budget Justification, 33.
[19] Personal Com., DCPSA

foot.[20] RESI used a median of $23.88 per square foot.[21] To accommodate the 1,663 employees required of the NJPSU, approximately 292,711 square feet will be required. Given RESI's assumptions, this square footage of office space will cost approximately $6,989,927 per year.

The lease estimates also assume that the state government does not have vacant facilities that are suitable to house the NJPSU, nor will they be constructing new facilities, which would require greater start-up funds.

Furnishing

RESI used a cost calculator from AllSteel, an office furnishing company to develop a cost estimate based on FTE levels and total projected office space. This source also calculates cost based on the type of workspace being used, such as private managerial office or open workspace for non-managerial employees. According to an analysis of the Baltimore City Pretrial Service Program's current practices, the Maryland Department of Legislative Services found that approximately 5.4 percent of pretrial staff is managerial staff.[22] Applying this ratio to the NJPSA FTE level yields approximately 90 managerial positions and 1,573 non-managers. With these factors, the AllSteel calculator estimated a cost of $21 per square foot for economy-level furniture, which totals to a furnishing expense of $6,146,920. [23]

Alternatively, Business Furniture Incorporated provides a general purpose furnishing budgeting tool that uses inputs of employees and office space. This company provides furnishing to both federal and state governments in New York and New Jersey and is purportedly "New Jersey's largest State Contract furniture dealership."[24] Its price estimates were based on case studies of twelve different businesses. Business Furniture Incorporated found furniture costs to be approximately $15 to $30 per square foot and $3,000 to $5,000 per person.[25] Using this source,

---

[20] Cassidy Turley Commercial Real Estate Services, "Office Market Snapshot: Central New Jersey Third Quarter 2013," 1, accessed April 11, 2014, http://www.cassidyturley.com/DesktopModules/CassidyTurley/Download/Download.ashx?contentId=2901&fileName=Central+NJ+Office+Q3+2013_FINAL.pdf.

[21] "Northeast Snapshot, March 2011: New Jersey Office Market," Northeast Real Estate Business, accessed April 11, 2014, http://northeastrebusiness.com/articles/MAR11/snapshot1.html.

[22] Maryland Department of Legislative Services, "Fiscal and Policy Note: House Bill 1232," Maryland General Assembly (2014): 11, accessed April 18, 2014, http://mgaleg.maryland.gov/2014RS/fnotes/bil_0002/hb1232.pdf.

[23] "Square Footage Budgeting Tool," Allsteel, accessed April 14, 2014, http://squarefootbudgeting.office.com/Pages/Home.aspx.

[24] "Government," Business Furniture, Inc, accessed April 14, 2014, http://www.bfionline.com/government-workplace-furniture.html.

[25] Business Furniture, Inc, "What Does Furniture Cost?," PowerPoint presentation, accessed April 14, 2014, http://www.slideshare.net/fullscreen/rbrandeisky/what-does-furniture-cost/1.

the approximate cost of furnishing the NJPSU facilities would likely range from $4,390,658 to $8,781,315.

RESI assumed that the cost of furnishing the NJPSU facilities will cost between $4,390,658 and $8,781,315. To keep the NJPSU cost estimate conservative, RESI utilized the $4,390,658 figure for its total cost estimate.

Computing Equipment

RESI estimated computing equipment cost based on its employment estimate of 1,664 FTE and the assumption that each employee is issued his or her own computer. Based on an assessment of current entry-level business computer cost, RESI assumed a conservative price estimate per computer to be $668.98. This cost includes the computing unit, the monitor, a keyboard and mouse, and Microsoft Office Home and Business 2013 software. RESI included this software in the calculation as RESI assumed that every computer will need this basic computing software to fulfill its function. This software is specifically licensed to each computer and is expected to last the lifetime of the computer.

Figure 6: Entry-Level Desktop Computers

Computer	Hardware (except monitor)	Monitor	Software	Total Cost
Inspiron One 20[26]	$429.99	$109.99	$209.25	$749.23
HP Pavilion 500-205t[27]	$479.99	$89.99	$219.00	$788.98
Lenovo H500[28]	$379.00	$109.99	$179.99	$668.98

Sources: Dell Inc., Hewlett-Packard Company, Lenovo Group Ltd.

Applying the cost of $668.98 per computer to 1,664 employees results in total start-up costs of $1,113,182.72 for purchasing computing equipment.

Case Software

In addition to basic computing equipment, NJPSU will likely require software designed for the assessment and supervision of pretrial defendants.

---

[26] "Shop for Work: New Inspiron Desktop 3000 Series," Dell, accessed April 15, 2014, http://configure.us.dell.com/dellstore/config.aspx?c=us&cs=04&fb=1&l=en&model_id=inspiron-3847-desktop&oc=smi3847mtw7p13573d&s=bsd&vw=classic.

[27] "HP Pavilion 500-205t Desktop PC with Windows 7," Hewlett-Packard Company, accessed April 15, 2014, http://www.shopping.hp.com/en_US/home-office/-/products/Desktops/HP-Pavilion/F9A61AV?HP-Pavilion-500-205t-Desktop-PC-with-Windows-7.

[28] "Lenovo H500," Lenovo, accessed April 15, 2014, http://shop.lenovo.com/us/en/desktops/essential/h-series/h500/#customize.

Loryx Systems provides a full-service suite called Monitor that offers support for pretrial interviews, court report preparation, risk assessment, and supervision.[29] The software license costs approximately $1,000 per license per year. [30] This cost would result in maximum cost of $1,664,000 per license-year to purchase the Monitor software for every employee. It is important to note that the actual figure would likely be lower as not every NJPSU employee will require this software. Without more information on the duties of specific NJPSU employees, RESI advises that the calculating cost on a per user-license basis is difficult to conduct accurately.

New Dawn Technologies provides the same suite of service as the Loryx Systems Monitor software. However, unlike Loryx Systems, the company provides pricing on a "per case" basis. Based on a system of more than 350 users, New Dawn charges a flat rate of $1.25 per case. Since it is assumed that the NJPSU will be conducting assessments on every arrested in individual (per the explanation in Section 1.1 of this report), the cost of 301,744 cases at $1.25 a case results in a total cost of $377,180 per year.[31]

RESI determined a third price point using New Dawn Technologies's typical fixed price for case management software for more than 350 system users. The company cites a flat cost of $1,840,000 and an annual service and upgrade cost of approximately $138,000.[32] It is important to note that these figures are estimated at a base of 350 employees, roughly one-fifth of the expected NJPSU employee count.

Figure 7: Case Software

Software	Cost	Licenses/Cases	Total Annual Cost	Cost of Initial Installation
Loryx Systems (Monitor)	$1,000 per license	1,664 licenses	$1,664,000	n/a
New Dawn Technologies	$1.25 per case	301,744 cases	$377,180	n/a
"Typical Pricing"	n/a	350+	$138,000	$1,840,000

Sources: Loryx Systems Inc., New Dawn Technologies Inc., FBI Uniform Crime Report, RESI

[29] "Monitor Pretrial Services," Loryx Systems, accessed April 11, 2014, http://www.loryxsystems.com/solutions/pretrial_services.html.
[30] Personal communication with Loryx Product Manager, April 14, 2013.
[31] "Transaction-Based Pricing," New Dawn Technologies, accessed April 11, 2014, http://newdawn.com/solutions/purchasing-options/transaction-based-pricing/.
[32] Ibid.

RESI used the New Dawn Technologies per-case cost estimate of $377,180 per year for the final cost projection as this estimate captured the potential cost of software by the most accurate method available. By paying on a per-case model, it assures that the NJPSU would only be paying for its exact needs.

Start-up Cost Conclusion

Start-up costs totaled to a sum of $16,591,360. The office space and case software portions were not included in the start-up expenses as they will be paid for annually, and will therefore be considered operating costs.

Figure 8: Total Start-Up Cost

Category	Total
Hiring and training	$11,087,519
Furnishing	$4,390,658
Computer hardware	$1,113,183
Start-Up Cost Total	**$16,591,360**

Source: RESI

3.3 Operating Costs

Aside from start-up costs, RESI calculated the expenses necessary for NJPSU's annual operations. Included in these costs are personnel expenses, office upkeep and utilities, programming, and electronic monitoring.

Office Facilities and Upkeep

In measuring the cost of office upkeep and utilities, RESI focused on substantial and foreseeable costs, including energy, furniture, computer hardware, and software. RESI did not include cost estimates that are likely to be relatively negligible, such as sewage and water, or that may be unforeseeable, such as renovations and natural disaster damage.

Facilities

As was calculated in Section 2.1 of this report, the annual lease for the NJPSU facilities will amount to approximately $6,989,927 per year.

Energy

According the Department of Energy, energy costs for a commercial building averaged approximately $2.27 per square foot in 2014. Extrapolating this average against the total area

estimate of 292,710 square feet results in a total projected annual energy cost of $664,452.87 to power NJPSU office facilities.[33]

Furniture

Based on tax standards, the depreciation rate for office furniture is approximately seven years. Using this depreciation rate against the total cost of furniture, $4,390,658, the annual cost for replacing furniture will be approximately $627,237.[34]

Computing Equipment

The typical lifespan of an office computer is three to five years. In general, desktop computers are expected to last longer than their mobile counterparts because they are less likely to be dropped, bumped, or scratched in transit.[35] For this reason, RESI assumed that the computer turnover rate is five years. Additionally, the standard computer depreciation rate used for tax purposes assumes a five-year life span.[36] At that rate, the approximate annual cost to the NJPSU for computer depreciation/upkeep is $222,636.54.

Based on the case software option selected in Section 2.1 of this report, the annual cost for case software for the NJPSU is $377,180.

Figure 9: Facilities and Upkeep

Category	Cost
Facilities	$6,989,927
Energy	$664,452
Furnishings	$627,237
Computer Hardware	$222,636
Software	377,180
Total Facilities and Upkeep	**$8,881,432**

Source: RESI

[33] U.S. Department of Energy, "3.3: Commercial Sector Expenditures," *Buildings Energy Data Book* (April 16, 2014): http://buildingsdatabook.eren.doe.gov/TableView.aspx?table=3.3.8.
[34] "Depreciation of Business Assets," Intuit TurboTax, accessed April 18, 2014, https://turbotax.intuit.com/tax-tools/tax-tips/Small-Business-Taxes/Depreciation-of-Business-Assets/INF12091.html.
[35] "What Is the Average Lifespan of a Computer?," *RecoverySoftware.com*, March 9, 2012, accessed April 17, 2014, http://www.recoverysoftware.com/what-is-the-average-lifespan-of-a-computer/.
[36] "Depreciation of Business Assets," Intuit TurboTax.

Personnel Costs

RESI derived total personnel cost from the projected FTE levels for the NJPSU in conjunction with average employee cost based on the DCPSA budget. As documented in the DCPSA budget, the total employee cost for FY 2012, including salary and other expenditures, was $44,548,000. This figure was averaged across 364 employees for an average employee cost of $122,385.[37] [38] When applied to the estimated 1,664 NJPSU employees, the total cost for NJPSU personnel will be approximately $203,812,571 per year.

Figure 10: Personnel Expenses

	Total FTE	Expenses per FTE	Total Personnel Expenses
DCPSA	364	$122,385	$44,548,000
NJPSU	1,664	$122,385	$203,812,571

Sources: DCPSA, RESI

Programming

As discussed in Section 1.2 of this report, there are a number of programs that the NJPSU will likely be responsible for including drug testing, mental health treatment, and rehabilitation. Aside from the loose provisions in the legislation, these programs are important to include in a pretrial unit to mitigate instances of both failure to appear and recidivism. RESI assumed that these programs will be included in the practices of the NJPSU.

Drug Testing

The DCPSA spent $3,897,000 on drug-use assessments for 42,455 arrests in 2012.[39] Scaling up the DCPSA spending to the 301,744 arrests under jurisdiction of the NJPSU resulted in a prospective $27,697,476 in drug-use assessment spending.

Drug Rehabilitation

The DCPSA referred 1,809 defendants for mental health treatment out of their 42,455 arrests in 2012, spending a total of $12,532,000 on drug treatment and reducing drug use.[40] This spending went to support in-house drug treatment by the DCPSA, as well as contracted drug treatment providers. They referred approximately 4.3 percent of their arrests for drug rehabilitation treatment. When the DCPSA rate was applied to the NJPSU arrest load of

[37] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification."
[38] According to this DCPSA data, the average salary of employees made up $85,115 of the average employee total cost.
[39] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification," 14, (Budget Strategy 3.1).
[40] Ibid, 14.

301,744, it resulted in approximately 12,857 prospective drug rehab referrals. Scaling up the cost of treating the DCPSA's 558 referrals to treating NJPSU's 12,857 referrals resulted in approximately $89,069,739 of predicted drug rehabilitation program spending for the NJPSU.[41]

Mental Health

The DCPSU referred 558 defendants for mental health treatment of their 42,455 arrests in 2012, spending a total of $4,772,000. This spending went to support a clinically trained mental health assessment and treatment staff as well as funding to contracted mental health service providers. The DCPSA referred approximately 1.3 percent of their arrests for mental health treatment. When the DCPSA rate was applied to the NJPSU arrest load of 301,744, it resulted in approximately 3,966 NJPSU mental health referrals. Scaling up the cost of treating the DCPSA's 558 referrals to treating NJPSU's prospective 3,966 referrals resulted in approximately $33,916,438 of mental health program spending for the NJPSU.[42]

Electronic Monitoring

The NJPSU legislation states that the unit shall provide electronic monitoring of select defendants and will be responsible for bearing the cost of these programs. The DCPSA's High Intensity Supervision Program is responsible for supervising defendant with electronic monitoring through Global Positioning Systems and provides a model by which RESI can calculate the potential cost of such a provision in the NJPSU.

Of the 42,455 D.C. arrests, there were 1,268 defendants being electronically monitored by the DCPSA in FY 2012. DCPSA expenditures for assuring compliance through these systems and the associated partnerships totaled to $2,281,000. Assuming the same rate of electronic supervisions to arrest for the NJPSU as exists for the DCPSA, NJPSU spending on electronic monitoring will amount to $16,211,943 for 9,012 defendants.[43]

---

[41] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification," 21.
[42] Ibid, 14.
[43] Ibid, Budget Strategy 2.1 and 4.1 of HISP.

Figure 11: Programming

Program	DCPSA		NJPSU	
	Participants	Program Spending	Participants	Program Spending
Drug testing	-	$3,897,000	-	$27,697,476
Drug rehabilitation	1,809	$12,532,000	12,857	$89,069,739
Mental health treatment	558	$4,772,000	3,966	$33,916,438
Electronic monitoring	1,268	$2,281,000	9,012	$16,211,943
Total Cost	**-**	**$23,482,000**	**-**	**$166,895,596**

Source: DCPSA, RESI

Operating costs totaled $379,589,599 per fiscal year based on 2012 data and budgets.

Figure 12: Annual Operating Cost

Category	Cost per Year
Facilities and Upkeep	$8,881,432
Personnel	$203,812,571
Programming	$166,895,596
Total	**$379,589,599**

Source: RESI

3.4 Indirect Costs

The indirect costs of the NJPSU legislation contained within the sister bills are those costs that the NJPSU itself will not be responsible for financing. The indirect costs are those cost that will be incurred by state government as a result of the practices and provisions of the NJPSU and the provisions of the bills. These costs include the increased spending on public attorneys and court room time caused by the additional step in the criminal justice process and the additional opportunity for a court decision to be appealed.

State government may also accrue costs due to an increase in failures to appear (FTA). Similarly, an increase in recidivism by pretrial release defendants could increase costs to state and local law enforcement agencies. There are also numerous social costs, including crime to persons

and property, to community wellness, to personal security, and quality of life, that are beyond the scope of this study.[44]

Public Defenders and Court Costs

Current New Jersey law establishes the Initial Appearance (IA) phase of the criminal justice process as a non-adversarial hearing in which the defendant is informed of his or her rights and the charges against him or her, future court dates are established, and bail decisions are set.[45] SB 946 and HB 1910 alter the IA phase by stipulating that judges will make rulings regarding defendants' applicability for pretrial release or detention and provide defendants with a right to council during this process. By extension, the bills guarantee public defenders to low-income defendants during this phase. Additionally, the bills allow the presentation of evidence and witnesses, making the IA an adversarial hearing.[46]

Public Defender Costs

The provision of public defenders to indigent defendants incurs significant costs to state government. RESI used a study conducted by the Maryland Department of Legislative Services (DLS) to approximate the cost of the additional public council provisions. The DLS study examined the added cost to state government for public defenders after the ratification of a law that requires the Maryland judiciary to provide indigent defendants with representation at the IA phase of a criminal trial. This result is identical to the outcome that the New Jersey provisions will have. DLS found that, in Maryland, this provision would cost $33,000,197 per fiscal year.

RESI assumed that the portion of indigent defenders per arrest in New Jersey is similar to that of Maryland. Under this assumption, RESI scaled the cost of IA public defenders from 191,281 arrests in Maryland, to 301,744 arrests in New Jersey. This resulted in a potential increased IA public defender cost of $52,057,504 in New Jersey. This estimate includes the cost of assistant public defenders, support staff, IT employees, fiscal clerks, and human resources employees.

Court Costs

The additional IA provisions in the bills are likely to result in an increase in required court resources. The adversarial hearing will require more time from the court, as evidence and witnesses must be presented. By extension, this change will require additional spending on

---

[44] Kathryn E. McCollister, Michael T. French, and Hai Fang, "The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation," *Drug and Alcohol Dependence* 108 (2010): 98–109, accessed April 14, 2014, http://www.sciencedirect.com/science/article/pii/S0376871609004220.
[45] "RULE 3:4. Proceedings Before the Committing Judge," New Jersey Courts, accessed April 15, 2014, http://www.judiciary.state.nj.us/rules/r3-4.htm.
[46] State of New Jersey, Assembly No. 1910 (2014): 5, http://www.njleg.state.nj.us/2012/Bills/A5000/1910_I1.pdf.

employee labor and may cause a potential space issue as IA hearing times increase. As the bills call for the use of a uniform risk assessment tool, the defense may often call into question issues of the actuarial sciences behind the tool, which will require expert witnesses provided by state government.[47]

These cost, though they are substantial, are incalculable given the scope of this analysis. RESI cannot reasonably estimate the increase in court resource demand in practice. However, these costs are likely to incur a substantial burden on the courts.

Failure to Appear

Failure to Appear (FTA) occurs when a defendant who is released pretrial does not appear in court for his or her hearing. FTAs incur costs to state government through the need for law enforcement to recapture the fugitive as well as court downtime caused by the missed hearing. Whereas, with commercial bail, the cost of recapture is born by the bail bonding agency, under a pretrial service program, these costs fall to state and local jurisdictions.

RESI used two studies to calculate the potential cost of additional FTA caused by the implementation on pretrial services. A research report prepared by Robert G. Morris, Ph.D., surveyed the FTA and recidivism rates of released defendants in Dallas County, Texas, based on the method of release. These defendants encompassed both misdemeanor and felony charges. The survey found that defendants released on pretrial services had a FTA rate of 37 percent, while those release on commercial bonds had an FTA rate of 23 percent.

In a similar study, the United States Department of Justice surveyed the FTA rates for the 75 largest counties in the nation. The study focused on the FTA rate of 250,000 felony defendants. Again, the FTA rate is higher under pretrial conditional release, at 22 percent, than under commercial surety bonds, at 18 percent.[48]

Based on the above studies, RESI assumed a possible increase in FTA ranging from 4 percent to 16 percent when utilizing pretrial service releases instead of commercial bonds. To calculate the potential increase in FTA occurrences in New Jersey that could be caused by a change from commercial bail system to a pretrial service release system, RESI first estimated the number of New Jersey releases. The common standard for release rate is 50 percent of defendants. Applying this assumption to the 301,744 arrests in the jurisdiction results in approximately

---

[47] New Jersey Senate No. 946/Assembly No. 1910 (2014), 5.
[48] U.S. Department of Justice Office of Justice Programs, "Pretrial Release of Felony Defendants in State Courts," Bureau of Justice Statistics Special Report (November 2007): 9, accessed April 18, 2014, http://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

150,872 releases. This equates to a potential increase in FTA of 6,035 to 24,140 defendants. According to the Morris report, the average FTA incurs a cost to state government of approximately $1,775.[49] At this cost level, pretrial service releases have the potential to incur $10,711,912 to $42,847,684 in costs to state government.

It is important to note that these FTA rates are from a variety of jurisdictions that do not necessarily provide the same levels of pretrial programming as the DCPSA, the agency by which the NJPSU has been modeled thus far. The DCPSA maintains an FTA rate of 11 percent only on the cases that it is supervising and therefore may not include the FTAs of defendants who the agency had suggested to release on recognizance or personal bond.[50]

Recidivism

Recidivism occurs when a defendant who is released pretrial commits another crime. The cost of recidivism to state government includes the cost of rearrest and reprocessing by the criminal justice system. Additionally, recidivism can incur property and social costs, such as loss of life, loss of property, diminished community quality of life, and loss confidence in the criminal justice system. However, examining all of the cost associated with these effects is outside the scope of this analysis.

Morris's research examines the effects of release method on the likelihood of defendant recidivism within twelve months of release. The report finds that commercial bond defendants are 1.2 percent less likely to recidivate then those released through pretrial services. In the Department of Justice's study of felony defendants, the data indicate that subjects were less likely to recidivate if they were released through pretrial services by 1 percent.[51]

Upon closer examination of both reports, RESI found that Morris also finds felony defendants approximately 1 percent less likely to recidivate. However, when misdemeanor and felony defendants were aggregated, the rate returns to 1.2 percent, in favor of commercial bonds. Because of the bias effect that restricting the study to felony defendants had on the findings, RESI did not consider the Department of Justice recidivism rate in its projection. Using Morris's reported recidivism levels, RESI assumed that New Jersey would experience approximately 1,810 additional recidivisms.[52]

---

[49] Robert G. Morris, "Pretrial Release Mechanisms in Dallas County, Texas: Differences in Failure to Appear (FTA), Recidivism/Pretrial Misconduct, and Associated Costs of FTA," (January 2013): 7, accessed April 17, 2014, http://www.utdallas.edu/epps/ccjs/dl/Dallas%20Pretrial%20Release%20Report%20-FINAL%20Jan%202013c.pdf.
[50] Pretrial Services Agency for the District of Columbia, "FY 2014 Congressional Budget Justification," 7.
[51] Morris, "Pretrial Release Mechanisms in Dallas County," 8.
[52] Ibid.

The cost of recidivism to state government differs from the cost of a normal arrest. A standalone crime incurs costs for arrest, processing, and detention. The cost of a recidivating criminal on pretrial release, however, should only consider the arrest and processing cost. The detention cost of a recidivating defendant is largely dependent on when the recidivism occurs relative to the defendant trial date. The closer to his or her trial date that a defendant recidivates, the less time he or she will spend in pretrial detention. This results in less detention cost to the state government. There is no available data or studies that would allow RESI to construct an assumption as to the average time to recidivism. Therefore, RESI did not consider the additional cost of detention as a cost of recidivism or an indirect cost of pretrial release.

A study by the Urban Institute Justice Policy Center finds that the minimum cost of processing a defendant up to the point of detention is $1,270.34, with a maximum cost of $2,049.25, based on the rearrest charges.[53] Applying these costs against the 1,810 additional recidivisms resulted in a potential indirect cost of $2,299,905 to $3,710,093 incurred by state government.

Figure 13: Potential Indirect Costs

Category	Potential Cost (low)	Potential Cost (high)
Public defenders and court costs	$52,057,504	$52,057,504
Failure to appear	$10,711,912	$42,847,684
Recidivism	$2,299,905	$3,710,093
Total Potential Indirect Costs	**$65,069,321**	**$98,615,281**

Source: RESI

3.5 Conclusion

The New Jersey Pretrial Service Unit is likely to be a capital intensive project. The level of arrests in New Jersey dictates that a large amount of employees will be needed to process defendants. To facilitate the work environment and resources of these employees, start-up costs will total at least $16,591,360 (using economy and entry level materials). Operating costs will total to at least $379,589,599 annually, a large part of which is driven by high FTE demands and the additional programming provisioned in the bills. The potential indirect costs could come to $65,069,321 a year depending on the intensity at which the NJPSU pursues effective programming and personnel.

[53] John Roman and Aaron Chalfin, "Does It Pay To Invest In Reentry Programs For Jail Inmates?," The Urban Institute (2012), accessed April 22, http://www.urban.org/reentryroundtable/roman_chalfin.pdf.

Figure 14: Cost Summary

Category	Total Cost
Start-up costs	$16,591,360
Operations costs	$379,589,599
Indirect costs	$65,069,321

Source: RESI

4.0 Additional Cost Considerations

The cost projections provided above consider the additional costs likely to be incurred to the New Jersey state government due to the passing of Senate Bill No. 946 and Assembly Bill No. 1910. The above projections do not attempt to account for possible spending reductions within the cost estimate. This addendum will address some of the potential sources of spending reductions.

4.1 Cost Model

Potential spending reductions could be implemented if a less intensive pretrial services system were utilized as a model for the NJPSU. The DCPSA has a high level of spending per arrest when compared to the Kentucky Pretrial Services (KPS). The KPS has a total budget of approximately $12,094,900 to serve approximately 172,434 arrests, while D.C. spent $58,081,000 serving 42,455 arrests.[54] However, KPS does not provide the high level of services that DCPSA provides, nor does it provide the services that NJPSU would be required to provide under the bills.

The congruent services of the DCPSA and the NJPSU have already been established above. However, the KPS does not provide medical and drug rehabilitation services to its released defendants. Additionally, the Kentucky judiciary still assigned 111,684 monetary releases, and only 61,306 non-financial releases last year. This portion of monetary release to pretrial service release is much higher than the significant majority of pretrial releases that occur under non-financial conditions in the DCPSA and the prospective NJPSU.[55]

The KPS would not be an accurate cost model, as it does not fulfill the goals of the NJPSU. The cost difference between these programs is further justified by the difference in cost of living of between the locations. To assess this difference, the cost of living calculations were first indexed against a $50,000 salary in Kentucky. A Kentucky salary of $50,000 adjusted for cost of living in New Jersey is an average of $72,824, similar to that of that of D.C., which is

[54] Personal communication with Manager at Pretrial Services, Kentucky (Budget); Uniform Crime Reports, "Crime in the United States 2012," Table 69. (Arrests)
[55] Kentucky Statistical Analysis Center, "2010 Sourcebook of Criminal Justice Statistics in the Commonwealth," 72, accessed May 14, 2014, http://justice.ky.gov/departments/gmb/2010+Sourcebook.htm.

adjusted to an average of $79,502. The Kentucky cost of living is approximately 31 percent lower on average than New Jersey and 37 percent lower than D.C. These differences in salary caused by cost-of-living adjustments makes a significant impact on spending levels; in both the DCPSA and the KPS, personnel costs constitute more than 75 percent of the budget.[56] [57]

Using the DCPSA spending levels can be further substantiated through comparison with California's Santa Clara County Office of Pretrial Services (SCOPS). With the limited amount of pretrial service spending data, one of the few in depth budgets provided was from the SCOPS. The SCOPS spent $5,059,184 during FY 2011, facilitating the counties 7,540 arrests in CY 2012.[58] Additionally, the SCOPS spent about $4,400,000 on personnel expenses for its 37 employees, resulting in average per employee cost of about $119,000, resembling the average DCSPA employee cost of $122,385.[59]

If a less intensive program is used as a model for the NJPSU, additional costs for FTA and recidivism should also be taken into account. The level of service provided by a pretrial release agency has a substantial impact on the outcome of a pretrial release. When a released defendant is not supervised during release, they are approximately 36 to 42 percent more likely to fail to appear, and up to 16 percent more likely to recidivate.[60] It is apparent that the intensity of a pretrial program has a significant impact on the effectiveness of its pretrial misconduct prevention. If the assumed spending levels – and likewise supervision level – of the NJPSU is reduced, the indirect costs that the state would incur from FTA and recidivism could increase dramatically, above what was projected in Section 3.4.

4.2 Reductions in Pretrial Populations

The NJPSU has the potential to save New Jersey money by reducing the pretrial populations being held in jails. In March 2014 the New Jersey Joint Committee on Criminal Justice released a

---

[56] "Cost of Living: How far will my salary go in another city?," CNN Money, accessed May 14, 2014, http://money.cnn.com/calculator/pf/cost-of-living/.
[57] These projections come from a calculator provided by CNN that utilizes data provided by the Council for Community and Economic Research.
[58] This results in the spending of approximately $671 per arrest. This figure is about half the DCPSA spending of $1402 per defendant. However, it is not indicated in the SCOPS audit that they are responsible for financing medical or drug rehab treatment, which represent a large portion of D.C. Budget.
[59] Management Audit of the Office of Pretrial Services, "Structure, Staffing and Budget of the Office of Pretrial Services," accessed May 14, 2014, http://www.sccgov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf.
[60] Christoper T. Lowenkamp and Marie VanNostrand, "Exploring the Impact of Supervision on Pretrial Outcomes," Laura and John Arnold Foundation (November 2013): 12, accessed May 27, 2014, http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_Supervision_FNL.pdf.

report estimating the number of pretrial detainees who could be released under a reformed pretrial system.[61]

The report finds that there are approximately 9,000 pretrial defendants jailed in New Jersey on any given day. The report states that, "conservatively," approximately 50 percent of these defendants are being held on low levels of bail and should, under a non-bail based system, be released pretrial.[62] According to these figures, there are approximately 4,500 unnecessary pretrial detainees each day. The report estimates that it costs jails an average of $100 to jail a detainee for a day. This results in approximately $450 ,000 spent each day to detain defendants who could potentially be released into the community. If the NJPSU were able to achieve these additional release levels, it would save the state approximately $164,250,000 a year. However, this figure is still less than half of the projected operating cost of $379,589,599 and would still leave a net fiscal cost of $215,339,599.[63]

As a result of the additional releases projected by the New Jersey Joint Committee on Criminal Justice, there would also be additional costs for FTA and recidivism of the released defendants. According to the study, the pretrial detainees are jailed, on average, between 60 and 90 days. Applying this to the previous data outlined, this range means there would be approximately 18,250 to 27,375 additional releases each year. Even at low rates of recidivism and FTA, this will still result in a substantial amount of cost incurred by pretrial release misconduct.[64]

There is no evidence to support that pretrial detainment will decrease as a result of the NJPSU and the associated legislative provisions, however, as the as the exact parameters of the risk assessment tool that the NJPSU will utilize are unknown. In contrast to the analysis made by the New Jersey Joint Committee on Criminal Justice report, it is possible that the NJPSU will find there are a greater number of high-risk defendants who are currently being detained, and therefore the cost of pretrial detainments will increase. For example, at the federal judicial

---

[61] New Jersey Judiciary, "Report of the Joint Committee on Criminal Justice," accessed May 12, 2014, http://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf.
[62] The assumption from the New Jersey Joint Committee on Criminal Justice of a 50 percent pretrial detainee reduction does not sound "conservative." This figure seems to be based on the commonplace figure of 50 percent of defendants being released pretrial in total. New Jersey already releases a large portion of its pretrial population. However, of those defendants who remain jailed, a significant portion of whom have likely remained jailed for other reasons (bail has purposefully been set high as the defendant is a risk to self/community, the family/individual are unwilling to pay because of reoccurring destructive behavior, the individual finds remaining in jail to be preferred to financial sacrifice required to post bail). Applying the 50 percent release rate to this population would not yield an accurate result, as this population is already dense with high risk defendants - a distilled section of the pool of pretrial defendants.
[63] New Jersey Judiciary, "Report to the Joint Committee on Criminal Justice," 12.
[64] Ibid.

level, approximately 64 percent of pretrial defendants are detained, even though the system only uses monetary release conditions for 27 percent of defendants. This illustrates a non-financial release dominated system that still experiences a high level of pretrial detention.[65]

4.3 Time-to-trial

The NJPSU and associated legislation was developed with the goal to shorten the average time-to-trial and, as a result, reduce the length of time that defendants will remain detained or supervised before trial. As was mentioned in Section 4.2 of this report, pretrial detainment incurs a cost to the state. Reducing the time it takes to process defendants through the criminal trial process will reduce the total cost.

Reductions in time-to-trial will purportedly stem from a streamlining of the pretrial processes. Specifically, the rapid assessments and recommendations that the NJPSU will make to judges during the initial appearance phase are aimed to increase the courts' ability to make quick decisions regarding pretrial detention and release. However, the bills also provide other alterations to the pretrial process that are likely to increase the time required by the court to process defendants through their pretrial hearings.

The bill establishes that, at the initial appearance, the defendant will have the right to council as well as the opportunity to "testify, to present witnesses, to cross examine witnesses who appear at the hearing, and to present information by proffer or otherwise."[66] As was stated in previously in this report, changing what has traditionally been a non-adversarial judgment into a trial-like adversarial hearing will increase the time that these court proceedings will take. Additionally, the judicial decisions made in this stage can be appealed, further increasing the demand for court time.

Monetary release was also found to also decrease a defendant's time to pretrial release, and thereby decreases the amount of time that a defendant must stay detained as a fiscal burden to the State. In a study conducted on the Kentucky pretrial population, it was found that defendants who posted a monetary bond stayed detained pretrial for an average of 4 hours, while those assigned to a monetary bond were detained for 35 hours. Those defendants released through pretrial services were detained for more than 100 hours on average. Though monetary bails reduced time to release is not a direct decrease in time to trial, it achieves the same effect of reducing pretrial detention time and thereby lowering cost.

---

[65] U.S. Department of Justice, "Pretrial Release and Misconduct in Federal District Courts, 2008-2010," 5, accessed May 14, 2014, http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf.
[66] New Jersey Senate No. 946/Assembly No. 1910 (2014), 3.

A shortage of judges in New Jersey compounds the issues of time-to-trial as it creates a virtual bottle-neck behind which cases become backed up. With the potential for time demanding pretrial hearings and appeals, the time-to-trial could increase even more. According to Assemblyman Gordan Johnson there are approximately 49 judicial vacancies statewide.[67] The report by the Joint Committee on Criminal Justice compared the caseload of judges in Washington D.C. to the caseload in New Jersey and found that in D.C. there was an average of 46.5 cases per applicable criminal judge compared to Essex County, New Jersey which had approximately 217 cases-per-judge.[68] Ultimately, from 2009 to 2013 there was a net increase of 1 percent in backlogged cases even though the total number of filings fell by 9%.[69] Again, the longer duration that cases are pending pretrial, the more costs that will be incurred by pretrial detention and pretrial supervisions.

It is difficult to accurately project the potential time demands on the New Jersey courts, as the exact in court actions and appeal rates will not be known unless the bills are put into practice. However, the additional time demands stated above indicate that there is a reasonable likelihood that time demand may increase. Adding to the issues caused by an increase in demand for court time, there already exists a shortage of judges in many jurisdictions. As these factors push time-to-trial longer, the costs to the state will increase as well.

4.4 21st Century Justice Improvement Fund

The New Jersey bills also establish a means by which the NJPSU and other programs will be funded. They permit the Supreme Court the power to increase filing fees and other statutory fees payable to the court by up to $50 dollars per instance. All of the money collected through these increases will then be collected into the 21st Century Justice Improvement Fund. The disposition of these funds is also dictated by this bill as follows:

- The first $15 million appropriated will contribute to funding the operation of the NJPSU.
- Any remaining funds up to $17 million will fund the development of an e-court filing system.
- After that, any remaining funds go to Legal Services of New Jersey, up to $10.1 million.
- The rest of the funds then go to the New Jersey General Fund, up to $10 million.
- All remaining funds at the end would then return to the court for the further development, maintenance, and administration of court information technology.[70]

---

[67] New Jersey Budget Committee, Budget Hearing, recorded April 30, 2014 2:00 PM, http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=ABUB&SESSION=2014.
[68] New Jersey Judiciary, "Report of the Joint Committee on Criminal Justice," 43 (footnote 179).
[69] New Jersey Budget Committee, Budget Hearing, recorded April 30, 2014 2:00 PM.
[70] New Jersey Senate No. 946/Assembly No. 1910 (2014), 5.

For funding from the 21st Century Justice Improvement Fund to meet the NJSPU $15 million funding cap, it would require approximately 300,000 instances of applicable fees to be collected. For perspective it is important to consider that there were approximately 315,000 arrests in New Jersey in 2012. Further, for the Fund to meet the e-court system funding cap and begin to contribute to Legal Services of New Jersey there would have to be at least 640,000 instances of applicable fees collected. As the Supreme Court has not yet assigned additional amounts to specific fees, RESI cannot estimate the potential collections of the 21st Century Justice Improvement Fund.[71]

5.0 Economic Impact Analysis

When New Jersey instates the NJPSU it will divert pretrial release traffic to non-financial conditional release, and away from commercial bondsman. The resulting loss in commercial bail usage will be manifested in the loss of commercial bail employees and eventually the closing of commercial bonding firms. The level of commercial bail employment and firm closure cannot be quantified without a full understanding of the future release rates, therefore RESI elected to model the loss of employment on a per-ten-employee basis. RESI conducted an economic and fiscal impact analysis for every 10 employees who are lost from the New Jersey's bail bonds industry. RESI used the IMPLAN input/output model. For more information regarding IMPLAN and RESI's methodology, please refer to Appendix A of this report. A glossary of terms can be found in Appendix B of this report.[72]

5.1 Findings

According to RESI's analysis, a loss of 10 employees in New Jersey's bail bonds industry would result in a loss of approximately 17 employees, nearly $2.5 million in output, and nearly $0.6 million in wages. This loss is a compilation of the effects of direct, indirect, and induced impacts. A summary of the total economic impacts can be found in

[71] It is important to note, however, that wherever the court finds appropriate to add these additional fees, there are instances in which indigent defendants will be unable to pay. And as one of the goals of the bills is to eliminate the holding of indigent defends on small bonds, RESI assumes that the court will not be able to collect some portion of the fees that they assess.

[72] This impact does not account for any positions created by the NJPSU. This is strictly the net impacts from 10 employees from the bail bond industry

Figure **15** below. For detailed economic impacts, please refer to Appendix B of this report.

Figure 15: Total Economic Impacts

Impact Type	Direct	Indirect	Induced	Total
Employment	10.0	4.1	3.3	17.4
Output	$1,028,672	$544,071	$486,940	$2,059,684
Wages	$242,698	$190,089	$155,051	$587,837

Sources: IMPLAN, RESI

RESI also estimated the fiscal impacts associated with a change of 10 employees in New Jersey's bail bonds industry. The fiscal impacts of 10 employees can be found in Figure 15.

Figure 16: Total Fiscal Impacts

Impact Type	Total
Property	$47,813
Income	$18,078
Sales	$24,282
Payroll	$872
Other	$12,037
Total	**$103,082**

Sources: IMPLAN, RESI

5.2 Conclusion

For a loss of every 10 employees in the bail bonds industry, New Jersey would lose 17 jobs, nearly $2.1 million in output, and nearly $0.6 million in wages. A loss of 10 employees in New Jersey's bail bonds industry would also result in the loss of approximately $103,000 in tax revenues. These losses could be offset by the effects of employment gains in the NJPSU; however, the resulting wages would come from the budget of the state government, rather than from the private sector. Spending and employment by commercial bonding firms create a positive net fiscal impact. However, when the private employment changes to public employment, the net fiscal impact on the state government will be substantially negative. Though the tax income from the employment may remain the same, the government will incur an extra $242,698, assuming that the wages paid are similar.

6.0 Legislation Review

Beyond the previous justifications for using the DCPSA as a model for the NJPSU costs, the language of the New Jersey bills when compared to the legislation of other pretrial programs

further supports the assumption that the DCPSA is an accurate cost model.[73] An analysis of the D.C. Code, wherein it establishes the functions of the DCPSA, shows that the legislation establishing the NJPSU is nearly identical. Moreover, where the jurisdictions differ in their provision, it is the NJPSU that seems to call for more intensive pretrial services. RESI also examined the legislation that governs the KPS to illustrate how this program is not codified to be as intensive as the NJPSU and the DCPSA.

6.1 The District of Columbia Pretrial Service Agency

The powers and responsibilities of the DCPSA stem from Title 23, Chapter 13 of the D.C. Code. The important difference between the pretrial release process of the DCPSA and that of the NJPSU is found just prior to their respective release conditions. The D.C. legislation states that a non-financial release condition will only be used after it cannot reasonably assure reappearance and the safety of the community through release on personal recognizance *or* an unsecured appearance bond.[74] However, the New Jersey bills provide that release conditions be imposed after only personal recognizance if found inadequate, further stating that "monetary bail shall be set when it is determined that no other conditions of release will reasonable assure the defendants appearance in court and that the defendant does not present a danger to any person or the community."[75] This difference is substantial considering that most of the rest of the legislation of the two jurisdictions remains the same. This establishes that though the DCPSA would first consider using a monetary condition of release thereby deferring the cost away from its pretrial programs, the NJPSU will instead have to seek non-financial release conditions first without considering monetary options. This potentially means the NJPSU will be responsible for higher levels of supervision, and more cost, than the DCPSA.

The release conditions at the disposal of the DCPSA are largely similar to that of the NJPSU. It has the power to limit where the defendant may travel, which in practice has evolved into the use of electronic monitoring. It also can require that a defendant remain under the direct supervision of an individual or organization. It can assign the defendant to check in with a pretrial officer at prescribed times, or return to custody for specified hours following release for school or work. Similar to the NJPSU, the DCPSA also has the power to require a defendant to "undergo medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency."[76] The sections of the legislation from both D.C. and New Jersey pertaining to conditions of release can be found in Appendix D of this report, wherein all other release

---

[73] *Previous justifications* include those pertaining solely to the provisions of the NJPSU legislation in relation to the actually practices of the DCPSA, as well as the importance of instituting intensive programs to avoid indirect costs
[74] District of Columbia Code § 23-1321 (b).
[75] New Jersey Senate No. 946/Assembly No. 1910 (2014), 1.
[76] District of Columbia Code, § 23-1321 (c).

conditions are also enumerated. These conditions of release are important as they represent the similar potential program cost between the DCPSA and the NJPSU.

The D.C. and prospective New Jersey legislation also provide a similar pretrial procedure regarding how the courts are to assess whether a defendant should be detained indefinitely before his or her trial. In both jurisdictions, upon motion from the prosecutor the court will conduct a hearing on whether the defendant can be released pretrial. These motions are restricted to defendants who meet any of several factors that indicate that the defendant may pose an increased risk of obstruction of justice, danger to individuals or the community, or failure to appear. In these hearings, the burden of proof rests on the defendant, as the legislation states that the assumption of the court will be that "no condition or combination of conditions will reasonably assure" the defendants good behavior upon release.[77] In both D.C. and New Jersey, judgments can be appealed for reassessment. In both jurisdictions, this hearing is adversarial, meaning that the defendant is allowed to call witnesses, cross-examine witnesses for the defense, and present evidence. Further similarities between the legislation of these hearings can be found in the excerpts of the bills found in Appendix E of this report. These similarities in the hearing process of higher risk defendants are significant as, among other factors, it likely indicates a similar rate of release of high risk defendants, and therefore a similar level of associated costs.

Finally, it is important that the D.C. legislation also establishes a framework for the salary of its employees. In § 23-1306, it states that "all employees other than the chief assistant shall receive compensation that is comparable to levels of compensation established for Federal pretrial services agencies."[78] This aids in substantiating the employee expenditures of the DCPSA because it links the personnel costs to the salaries of Federal pretrial service employees who work in numerous jurisdictions across the country. This fact is important when using the DCPSA as a model for the NJPSU cost analysis as personnel costs naturally constitute a significant portion of the cost projections.

6.2 Kentucky Pretrial Services

Chapter 431 of the Kentucky Revised Statutes (KRS) establishes the pretrial processes for Kentucky defendants. It is first important to note that § 431.510 of the KRS states that all for-profit bail bonding is illegal in the state.[79] With a lack of traditional commercial bail options, this necessitates Kentucky to provide alternate pretrial release processes. RESI examined and highlighted some of the key factors that indicate that the Kentucky legislation calls for a less

[77] District of Columbia Code, § 23-1322 (b)
[78] Ibid, § 23-1306.
[79] Kentucky Revised Statutes, § 431.510.

intensive and therefore less costly pretrial service program than does the legislation of New Jersey or D.C.

The most substantial difference between the NJPSU is that, similar to the DCPSA, the KPS is required to first consider release on the personal recognizance and unsecured bail bonds. Only defendants who are found to still pose a risk of FTA and danger to the community are then assessed for non-financial release conditions.[80] As stated previously, the NJPSU is only to consider monetary conditions as a last alternative, which can be reasonably assumed to result in the management of additional defendants on conditional releases. This speculation is substantiated, in part, by the large number of financial releases that are still assigned by the Kentucky courts, as discussed in Section 4.1 of this report.

The KPS is also limited in its options of pretrial release conditions. Outside the execution of a non-commercial bail bond, the KPS can utilize the following non-financial release conditions:

- Place the defendant in the custody of a person or organization who has agreed to supervise them;
- Place restrictions on travel, association and places of abode;
- Require the defendant to submit to drug testing;
- Require the defendant to participate in a faith-based drug or alcohol treatment or recovery program;
- Place the defendant in an electronic monitoring program which may include house arrest; and/or
- Require the defendant to return to custody after specified hours.

Kentucky requires any defendants participating in the drug testing or electronic monitoring to bear the costs of their participation if they are able. Additionally, the remaining cost of the electronic monitoring program is explicitly assigned to fall to the county or counties that have assigned the defendant to it. There is no provision for medical, psychological, or psychiatric treatment. The KPS is also authorized to "to impose any other condition deemed reasonably necessary to assure appearance as required."[81] RESI could not discern the extent of the use of this open-ended provision. These limited release options result in a program of lesser intensity and cost then what is expected from the NJPSU and what is experienced by the DCPSA.

6.3 Conclusion

A comparison of the D.C. and Kentucky legislation against that of New Jersey is useful in determining what the likely structure and intensity of the NJPSU program will be. RESI did not

[80] Kentucky Revised Statutes, § 431.520.
[81] Ibid, § 431.520.

include many administrative details in this review as they were similar across all of the programs and were insignificant in assessing the potential cost of the NJPSU.

Of the programs studied, RESI found the NJPSU is most similar to the DCPSA in its legislative parameters. Neither of the jurisdictions' legislation illegalizes commercial bonds as the Kentucky legislation does; however the goal of the legislation is to provide as many tools to the pretrial service programs as possible so that they may divert the maximum number of defendants away from commercial bond release conditions.

The similarity in provisions between the D.C. Code and New Jersey legislation, in conjunction with the statements made by the New Jersey committee, seem to indicate that the NJPSU is aimed to resemble the services and structure of the DCPSA.

7.0 Literature Review

7.1 "Exploring the Impact of Supervision on Pretrial Outcomes"

A study funded by the Arnold Foundation titled "Exploring the Impact of Supervisions on Pretrial Outcomes" found that very little empirical evidence exists regarding the effectiveness of pretrial supervisory programs on failure to appear (FTA) rates and new criminal activity (NCA) or recidivism. The objective of the study was to measure the impact of pretrial supervision on two different factors, FTA and NCA, using empirical evidence.

The study group included 3,925 defendants who were released from jail to wait out their case dispositions. The analysis group included 2,437 who were released with some type of pretrial supervision and 1,488 who were released without any supervision. It is important to note that the study did not differentiate between different terms of release (i.e., random drug testing, electronic monitoring, etc.). The terms of the release were left up to each jurisdiction that submitted data to define. As a result, terms of release could vary significantly. To test the possible outcomes of pretrial supervision, the researchers developed a series of bivariate and multivariate models.[82] Findings included the following:

- Pretrial supervision of any length makes FTA less likely.
- The multivariate models that controlled a defendant's gender, race, time in the community, and defendant risk level indicated that supervision significantly reduced the likelihood of FTA.
- Those defendants who were supervised for longer than 180 days were 12 to 36 percent less likely to commit new criminal activity. [83]

[82] Bivariate models analyze the relationship between two variables while multivariate has more than one dependent variable.
[83] Lowenkamp and VanNostrand, "Exploring the Impact of Supervision on Pretrial Outcomes."

In regard to the last finding, it is important to note that only some of the models that tried to determine the impact of pretrial supervision were statistically significant. The findings highlight the importance of pretrial agency supervision in pretrial release, and inform the assumption that there will be a direct correlation between the level of supervision and the likelihood of pretrial misconduct. This assumption is of pivotal importance when considering the balance that the NJPSU will have to seek between up-front program costs and the indirect costs caused by pretrial failure.

7.2 "The Hidden Costs of Pretrial Detention"

This study examined the effect that a period of pretrial detention has on a released defendant. The study was divided into two parts. The first considers the effect that pretrial detention has on FTA and recidivism of a defendant who is eventually released pretrial. The second portion examines the effect of pretrial detention on defendant recidivism after all trial proceedings had concluded and they had been released (post-disposition). The observed FTA and recidivism rates were then analyzed against factors including the length of pretrial detention, the risk level of the defendant, and the original crime of the defendant.

The study found that there was a slight correlation between the detention lengths and the likelihood of FTA. With all other variable controls considered, it was found that defendants who are detained two to three days are 1.09 times more likely to FTA than defendants detained for only one day. More significant, the study found that low-risk defendants who were held for two to seven days were 1.22 times more likely to FTA, and those held 15 to 30 days were 1.41 times more likely to FTA, compared to their counterparts who are held for one day or less.[84]

Pretrial recidivism was also found to correspond with the length of pretrial detention. In general, the longer the defendant is detained pretrial, the more likely they are to recidivate; this is especially true for low-risk defendants, who are up to 1.74 times more likely to recidivate when held for 31 days or more. However, this trend is not as true for moderate- to high-risk defendants. Moderate-risk defendants saw the highest levels of recidivism focused in the pretrial detention periods from two to fourteen days. There was no discernable trend in high-risk defendant recidivism.[85]

Pretrial detention was also positively correlated with post-disposition recidivism. Each increasing detention duration category showed an increased likelihood of pretrial recidivism,

---

[84] Christoper T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "The Hidden Costs of Pretrial Detention," Laura and John Arnold Foundation (November 2013): 10, accessed May 26, 2014, http://www.arnoldfoundation.org/sites/default/files/pdf/ LJAF_Report_hidden-costs_FNL.pdf.
[85] Ibid, 11.

with defendants "1.16 times more likely to recidivate if detained 2 to 3 days, increasing to 1.43 times if detained 15 to 30 days." Overall, there was a 1.3 times greater likelihood for a defendant to recidivate if he or she was held pre-trial.[86]

This raises questions on the efficacy and implementation of the proposed bills. The New Jersey courts already experience case back up, and this leads to long pretrial durations.[87] If the NJPSU and the associated legislation are not enacted in a way that can assure a rapid processing of pretrial defendants, the state could potentially experience a significant increase in FTA and recidivism. In a separate study based on defendants from Kentucky, the Kentucky Bar Association found that defendants who were release through pretrial services were held for approximately 100 hours, while the defendants who posted a monetary bond were released after an average of just four hours. Based on the findings of the original report, this disparity in detention time cause by the pretrial services system could be very harmful.[88]

However, it is important to note that the study does not show that the relationship between pretrial detainment and FTA or recidivism is necessarily a causal one. It only shows that a correlation exists, stating that the "association [between pretrial detention and FTA/recidivism] could indicate that there are unknown factors that cause both detention and recidivism, but it is an association worthy of further exploration."[89]

7.3 "Investigating the Impact of Pretrial Detention on Sentencing Outcomes"

In another pretrial detention study by Arnold Foundation, researchers analyzed the effects of pretrial detention on the defendants' sentencing outcomes. The study found a significant correlation between pretrial detention and sentencing. In total, they found that defendants detained until case disposition were 4.44 times more like to be sentenced to jail and 3.32 times more likely to be sentenced to prison. They also found that the length of a jail sentence for a detainee is approximately 2.78 times longer, and 2.36 times longer for a prison sentence.[90]

---

[86] Lowenkamp, VanNostrand, and Holsinger, "The Hidden Costs of Pretrial Detention," 19.
[87] New Jersey Judiciary, "Report of the Joint Committee on Criminal Justice," 43 (footnote 179). States the overload of cases on New Jersey judiciary: "In the District of Columbia these [pretrial] cases are heard by one of the six "Felony One" judges. In July 2013, the active caseloads of these judges ranged from thirty-three (33) to fifty-six (56) defendants with an average of 46.5. In New Jersey these types of cases would be heard by Superior Court judges assigned to the Criminal Part. During July 2013, there were ten (10) judges assigned to Essex County. The active caseloads for these judges ranged from 169 to 263 with an average of 217. Essex is one of New Jersey's twenty-one counties."
[88] Kentucky Bar Association, "Amended Executive Summary, Uniform Schedule of Bail Pilot Project for 2010 Year End Report," 1, accessed June 2, 2014, http://www.kybar.org/documents/cle/ac_material/ac2011_17.pdf.
[89] Lowenkamp, VanNostrand, and Holsinger, "The Hidden Costs of Pretrial Detention," 20.
[90] Christoper T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "The Effect of

Low-risk defendants were found to have the highest sentencing difference, with pretrial detainees being 5.41 times more likely to be sentenced to jail then than the released counterparts, and 3.76 times more like to be sentenced to prison. Moderate-risk detainees were four times more likely to see jail time then there released counterparts and three times more likely to be sentenced to prison. High-risk detained defendants were approximately three times more likely to be sentenced to jail or prison then their released counterparts. [91]

The Arnold Foundation noted, in a research summary about the report, that the disparity in equality between released and detained defendants is representative of a failure of pretrial detainment, stating the findings "shed new light on the impact that a defendant's release or detention before trial can have on the eventual sentence in the case." [92] There is an implied argument made by the Arnold Foundation that pretrial detention causes a greater likelihood of jail and prison sentences. However, this is not necessarily accurate. First, it is important not to confuse the existence of correlation for causation. The presence of a defendant in pretrial detention is not the cause of a jail or prison sentence, but rather those who are sentenced to correctional detention tend to also be those who are detained pretrial. Alternatively, the correlation can be easily be explained by an efficiently functioning judiciary that detains many of the defendants who it foresees to be guilty, or assess the overall situation to be one that is indicative a likely guilty verdict. The argument that pretrial detainment leads to a greater likelihood of jail and prison sentencing, and increases the length of sentencing, is likely over-exaggerated because of the lack of consideration for the aforementioned factors.

Pretrial Detention on Sentencing," Laura and John Arnold Foundation (November 2013): 10, accessed May 26, 2014. http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_Supervision_FNL.pdf.

[91] Lowenkamp, VanNostrand, and Holsinger, "The Effect of Pretrial Detention on Sentencing," 11.

[92] Laura and John Arnold Foundation, "Pretrial Criminal Justice Research," November 2013, 3, accessed May 27, 2014, http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

8.0 References

8.0 References

Allsteel. "Square Footage Budgeting Tool." Last modified 2012. Accessed April 14, 2014. http://squarefootbudgeting.allsteeloffice.com/Pages/Home.aspx.

Barnes, Senator Peter J., Senator Norcross, Senator Scutari, and Senator Stack. "Senate No. 946." State of New Jersey. January 27, 2014. Accessed April 16, 2014. http://www.njleg.state.nj.us/2014/Bills/S1000/946_I1.pdf.

Board of Supervisors Management Audit Division. "Management Audit of the Office of Pretrial Services." Board of Supervisors of the County of Santa Clara (February 17, 2012):6–8. Accessed May 14, 2014. http://www.sccgov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf.

Boushey, Heather, and Sarah J. Glynn. "There Are Significant Business Costs to Replacing Employees." Center for American Progress, November 16, 2012. Accessed April 15, 2014. http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.

Business Furniture, Inc. "Government." Accessed April 14, 2014. http://www.bfionline.com/government-workplace-furniture.html.

Business Furniture, Inc. "What Does Furniture Cost?" Presentation. Accessed April 14, 2014. http://www.slideshare.net/fullscreen/rbrandeisky/what-does-furniture-cost/1.

Cassidy Turley Commercial Real Estate Services. "Office Market Snapshot: Central New Jersey Third Quarter 2013." Accessed April 11, 2014. http://www.cassidyturley.com/DesktopModules/CassidyTurley/Download/Download.ashx?contentId=2901&fileName=Central+NJ+Office+Q3+2013_FINAL.pdf.

Cohen, Thomas H. "Pretrial Release and Misconduct in Federal District Courts, 2008-2010." *Special Report*, U.S. Department of Justice, Bureau of Justice Statistics. November 2012. Accessed May 14, 2014. http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf.

Cohen, Thomas H. and Brian A. Reaves. "State Court Processing Statistics, 1990-2004: Pretrial Release of Felony Defendants in State Courts." *Special Report*, U.S. Department of Justice, Bureau of Justice Statistics. November 2007. Accessed April 18, 2014. http://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

"Cost of Living: How far will my salary go in another city?" *CNN Money.* Accessed May 14, 2014. http://money.cnn.com/calculator/pf/cost-of-living/.

Dell. "Shop for Work: New Inspiron Desktop 3000 Series." Accessed April 15, 2014. http://configure.us.dell.com/dellstore/config.aspx?c=us&cs=04&fb=1&l=en&model_id=inspiron-3847-desktop&oc=smi3847mtw7p13573d&s=bsd&vw=classic.

Graef, Michelle I., and Erick L. Hill. "Costing Child Protective Services Staff Turnover." *Child Welfare* 79, no. 5 (September/October 2000): 517-533. Accessed April 15, 2014 through EBSCOhost.

Hewlett-Packard Company. "HP Pavilion 500-205t Desktop PC with Windows 7." Accessed April 15, 2014. http://www.shopping.hp.com/en_US/home-office/-/products/Desktops/HP-Pavilion/F9A61AV?HP-Pavilion-500-205t-Desktop-PC-with-Windows-7.

Intuit TurboTax. "Depreciation of Business Assets." Last Modified 2014. Accessed April 18, 2014. https://turbotax.intuit.com/tax-tools/tax-tips/Small-Business-Taxes/Depreciation-of-Business-Assets/INF12091.html.

Kentucky Bar Association. "Amended Executive Summary, Uniform Schedule of Bail Pilot Project for 2010 Year End Report Findings and Reccomendations." Paper presented at Kentucky Bar Association 2011 Convention, Lexington, Kentucky, June 15, 2011. http://www.kybar.org/documents/cle/ac_material/ac2011_17.pdf.

Kentucky Statistical Analysis Center. "Sourcebook of Criminal Justice Statistics in the Commonwealth." Last modified 2010. Accessed May 14, 2014. http://justice.ky.gov/departments/gmb/2010+Sourcebook.htm

Laura and John Arnold Foundation. "Pretrial Criminal Justice Research." Last modified November 2013. Accessed May 27, 2014. http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

Lenovo. "Lenovo H500." Accessed April 15, 2014. http://shop.lenovo.com/us/en/desktops/essential/h-series/h500/#customize.

Loryx Systems. "Monitor Pretrial Services." Last modified 2013. Accessed April 11, 2014. http://www.loryxsystems.com/solutions/pretrial_services.html.

Lowenkamp, Christoper T., and Marie VanNostrand. "Exploring the Impact of Supervision on Pretrial Outcomes." Laura and John Arnold Foundation (November 2013). Accessed May 27, 2014. http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_Supervision_FNL.pdf.

Lowenkamp, Christoper T., Marie VanNostrand, and Alexander Holsinger. "The Effect of Pretrial Detention on Sentencing." Laura and John Arnold Foundation (November 2013). Accessed May 26, 2014. http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_Supervision_FNL.pdf.

Lowenkamp, Christoper T., Marie VanNostrand, and Alexander Holsinger. "The Hidden Costs of Pretrial Detention." Laura and John Arnold Foundation (November 2013). Accessed May 26, 2014. http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_hidden-costs_FNL.pdf.

Maryland Department of Legislative Services. "Criminal Procedure – Task Force on Pretrial Risk Assessment – Detainee Electronic Information System—Fiscal and Policy Note: House Bill 1232" Maryland General Assembly (2014). Accessed April 18, 2014. http://mgaleg.maryland.gov/2014RS/fnotes/bil_0002/hb1232.pdf.

McCollister, Kathryn E., Michael T. French, and Hai Fang. "The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation." *Drug and Alcohol Dependence* 108 (2010): 98–109. Accessed April 14, 2014. doi: 10.1016/j.drugalcdep.2009.12.002. http://www.sciencedirect.com/science/article/pii/S0376871609004220.

Metropolitan Police Department. "Annual Report." 2012. Accessed April 18, 2014. http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/2012_AR_1.pdf.

Morris, Robert G. "Pretrial Release Mechanisms in Dallas County, Texas: Differences in Failure to Appear (FTA), Recidivism/Pretrial Misconduct, and Associated Costs of FTA." The University of Texas at Dallas, Center for Crime and Justice Studies (January 2013). Accessed April 17, 2014. http://www.utdallas.edu/epps/ccjs/dl/Dallas%20Pretrial%20Release%20Report%20-FINAL%20Jan%202013c.pdf.

New Dawn Technologies. "Transaction-Based Pricing." Accessed April 11, 2014. http://newdawn.com/solutions/purchasing-options/transaction-based-pricing/.

New Jersey Courts. "RULE 3:4. Proceedings Before the Committing Judge." Accessed April 15. 2014. http://www.judiciary.state.nj.us/rules/r3-4.htm.

New Jersey Judiciary. "Report of the Joint Committee on Criminal Justice." March 10, 2014. Accessed May 12, 2014. http://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf.

Northeast Real Estate Business. "Northeast Snapshot, March 2011: New Jersey Office Market." (March 2011). Accessed April 11, 2014. http://northeastrebusiness.com/articles/MAR11/snapshot1.html.

Pretrial Services Agency for the District of Columbia. "Congressional Budget Justification and Performance Budget Request: Fiscal Year 2014." April 2013. Accessed April 14, 2014. http://www.csosa.gov/about/financial/budget/2014/FY14-PSA-Budget-Submission.pdf.

Rebusiness Online. "New Jersey Mirrors National Picture." March 9, 2012. Accessed April 11, 2014. http://www.rebusinessonline.com/main.cfm?id=22620.

RecoverySoftware.com. "What Is the Average Lifespan of a Computer?" Last modified 2012. Accessed April 17, 2014. http://www.recoverysoftware.com/what-is-the-average-lifespan-of-a-computer/.

Roman, John, and Aaron Chalfin. "Does It Pay To Invest In Reentry Programs For Jail Inmates?" The Urban Institute. Accessed April 22, 2012. http://www.urban.org/reentryroundtable/roman_chalfin.pdf.

State of New Jersey. Assembly No. 1910 (2014). http://www.njleg.state.nj.us/2012/Bills/A5000/1910_I1.pdf.

U.S. Department of Energy. "3.3: Commercial Sector Expenditures." Buildings Energy Data Book. Last modified March 2012. Accessed April 16, 2014. http://buildingsdatabook.eren.doe.gov/TableView.aspx?table=3.3.8.

Uniform Crime Reports. "Crime in the United States 2012." Table 69. Accessed April 21, 2014. http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/69tabledatadecpdf.

Appendix A—Methodology

A.1 IMPLAN Model Overview

To quantify the economic and fiscal impacts of an economic event on a region, RESI utilizes the IMPLAN input/output model. This model enumerates the employment and fiscal impact of each dollar earned and spent by the following: employees of the district, other supporting vendors (business services, retail, etc.), each dollar spent by these vendors on other firms and each dollar spent by the households of the event's employees, other vendors' employees, and other businesses' employees.

Economists measure three types of economic impacts: direct, indirect, and induced impacts. The direct economic effects are generated as the event creates jobs and hires workers to support the event's activities. The indirect economic impacts occur as the vendors purchase goods and services from other firms. In either case the increases in employment generate an increase in household income, as new job opportunities are created and income levels rise. This drives the induced economic impacts that result from households increasing their purchases at local businesses.

Consider the following example. A new firm opens in a region and directly employs 100 workers. The firm purchases supplies, both from outside the region as well as from local suppliers, which leads to increased business for local firms, thereby hypothetically creating jobs for another 100 workers. This is called the indirect effect. The workers at the firm and at suppliers spend their income mostly in the local area, hypothetically creating jobs for another 50 workers. This is the induced effect. The direct, indirect and induced effects add up to 250 jobs created from the original 100 jobs. Thus, in terms of employment, the total economic impact of the firm in our example is 250.[93]

A.2 Input Assumptions

RESI determined economic impacts based on the loss of ten commercial bail employees. RESI analyzed IMPLAN industry sectors based on the provided expenditures. RESI's analysis includes the following modeling assumptions:

- Economic impact multipliers are developed from IMPLAN input/output software.
- IMPLAN data are based on the North American Industrial Classification System (NAICS).
- IMPLAN employment multipliers are adjusted for inflation using the Bureau of Labor Statistic's CPI-U.
- Impacts were based on 2012 IMPLAN data for New Jersey, the most recent available.
- Impacts are represented in 2014 dollars.

[93] Total economic impact is defined as the sum of direct, indirect, and induced effects.

- Employment impacts include both full- and part-time employees. IMPLAN does not differentiate between full- and part-time employment.
- Impacts in this report are presented as a change of 10 employees. A change of 20 employees would result in impacts twice as high, while a change of 100 employees would result in impacts 10 times as high.
- RESI analyzed industry sectors based on NAICS code 812990, Other personal services.

Appendix B—Glossary

A glossary of economic and fiscal impact terminology frequently used throughout this report can be found in Figure 16.

Figure 17: Glossary of Terms

Term	Definition
Economic Impact	This term refers to the changes in the economy resulting from an event. RESI typically reports employment, output, and wage impacts.
Employment	This term refers to the number of new full-time equivalent (FTE) jobs created as a result of the event which has been modeled in IMPLAN.
Fiscal Impact	This term refers to the change in tax revenues resulting from an event. RESI typically reports state and local tax revenues, which are combined in IMPLAN.
IMPLAN	This term refers to the input/output modeling software used to model changes in the economy in a particular region. The user builds a model based on prepackaged economic data from IMPLAN (typically at the state or county level), then enters input figures—an industry change of employment or sales, a household change of income, and/or several other input types—for the industry sectors expected to be impacted as a "scenario." IMPLAN runs the scenario created in the model and produces the economic and fiscal outputs.
Output	This term refers to the economic activity created as a result of the event which has been modeled in IMPLAN. It is synonymous with "state GDP." In other words, it is the market value of all goods and services produced by the economy of the region being modeled.
State GDP	This term refers to the change in market value of all goods and services produced by the economy of the region which has been modeled in IMPLAN. It is synonymous with "output."
Wage Impact	This term refers to the change in employee compensation (including all salaries and wages) associated with the job and output creation resulting from the event which has been modeled in IMPLAN.

Source: RESI

Appendix C— Detailed Economic Impacts

Figure 18: Detailed Employment Impacts

Industry	Direct	Indirect	Induced	Total
Agriculture	0.0	0.0	0.0	0.0
Mining	0.0	0.0	0.0	0.0
Utilities	0.0	0.0	0.0	0.0
Construction	0.0	0.1	0.0	0.1
Manufacturing	0.0	0.0	0.0	0.1
Wholesale Trade	0.0	0.1	0.1	0.1
Retail Trade	0.0	0.0	0.6	0.6
Transportation and Warehousing	0.0	0.2	0.1	0.2
Information	0.0	0.2	0.1	0.3
Finance and Insurance	0.0	0.2	0.2	0.4
Real Estate and Rental and Leasing	0.0	0.3	0.2	0.5
Professional, Scientific and Technical Services	0.0	0.6	0.1	0.8
Management of Companies and Enterprises	0.0	0.0	0.0	0.0
Administrative and Support and Waste Management and Remediation Services	0.0	1.6	0.2	1.8
Educational Services	0.0	0.0	0.2	0.2
Health Care and Social Services	0.0	0.0	0.8	0.8
Arts, Entertainment and Recreation	0.0	0.3	0.1	0.4
Accommodation and Food Services	0.0	0.1	0.3	0.5
Other Services	10.0	0.2	0.3	10.5
Government	0.0	0.1	0.0	0.1
Total	**10.0**	**4.1**	**3.3**	**17.4**

Sources: IMPLAN, RESI

Figure 19: Detailed Output Impacts

Industry	Direct	Indirect	Induced	Total
Agriculture	$0	$28	$498	$525
Mining	$0	$199	$267	$466
Utilities	$0	$9,427	$10,708	$20,135
Construction	$0	$7,882	$3,889	$11,771
Manufacturing	$0	$16,983	$24,004	$40,987
Wholesale Trade	$0	$12,343	$24,123	$36,466
Retail Trade	$0	$2,090	$49,518	$51,608
Transportation and Warehousing	$0	$21,479	$12,108	$33,587
Information	$0	$89,043	$21,990	$111,033
Finance and Insurance	$0	$52,917	$61,449	$114,366
Real Estate and Rental and Leasing	$0	$64,328	$92,345	$156,672
Professional, Scientific and Technical Services	$0	$96,118	$22,020	$118,138
Management of Companies and Enterprises	$0	$8,816	$3,885	$12,701
Administrative and Support and Waste Management and Remediation Services	$0	$109,151	$12,921	$122,072
Educational Services	$0	$133	$10,098	$10,231
Health Care and Social Services	$0	$11	$83,693	$83,704
Arts, Entertainment and Recreation	$0	$20,079	$7,379	$27,458
Accommodation and Food Services	$0	$7,698	$21,527	$29,225
Other Services	$1,028,672	$17,831	$18,875	$1,065,378
Government	$0	$7,514	$5,645	$13,159
Total	**$1,028,672**	**$544,071**	**$486,940**	**$2,059,684**

Sources: IMPLAN, RESI

Figure 20: Detailed Wages Impacts

Industry	Direct	Indirect	Induced	Total
Agriculture	$0	$5	$95	$100
Mining	$0	$22	$20	$42
Utilities	$0	$1,319	$1,576	$2,895
Construction	$0	$2,913	$1,033	$3,945
Manufacturing	$0	$3,116	$2,886	$6,003
Wholesale Trade	$0	$4,691	$9,167	$13,858
Retail Trade	$0	$938	$20,961	$21,899
Transportation and Warehousing	$0	$7,335	$3,965	$11,299
Information	$0	$20,255	$4,929	$25,184
Finance and Insurance	$0	$17,391	$18,268	$35,659
Real Estate and Rental and Leasing	$0	$4,591	$2,284	$6,875
Professional, Scientific and Technical Services	$0	$38,738	$9,767	$48,506
Management of Companies and Enterprises	$0	$5,369	$2,366	$7,736
Administrative and Support and Waste Management and Remediation Services	$0	$61,488	$6,369	$67,857
Educational Services	$0	$71	$5,548	$5,618
Health Care and Social Services	$0	$5	$42,089	$42,094
Arts, Entertainment and Recreation	$0	$4,214	$3,062	$7,276
Accommodation and Food Services	$0	$2,974	$8,355	$11,329
Other Services	$242,698	$8,925	$8,828	$260,450
Government	$0	$5,730	$3,483	$9,213
Total	**$242,698**	**$190,089**	**$155,051**	**$587,837**

Sources: IMPLAN, RESI

Appendix D—Release Conditions Legislation

District of Columbia Code: § 23-1321. Release prior to trial

(a) Upon the appearance before a judicial officer of a person charged with an offense, other than murder in the first degree, murder in the second degree, or assault with intent to kill while armed, which shall be treated in accordance with the provisions of § 23-1325, the judicial officer shall issue an order that, pending trial, the person be:

(1) Released on personal recognizance or upon execution of an unsecured appearance bond under subsection (b) of this section;

(2) Released on a condition or combination of conditions under subsection (c) of this section;

(3) Temporarily detained to permit revocation of conditional release under § 23-1322; or

(4) Detained under § 23-1322(b).

(b) The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a local, state, or federal crime during the period of release, unless the judicial officer determines that the release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) (1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, the judicial officer shall order the pretrial release of the person subject to the:

(A) Condition that the person not commit a local, state, or federal crime during the period of release; and

(B) Least restrictive further condition, or combination of conditions, that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition or combination of conditions that the person during the period of release shall:

(i) Remain in the custody of a designated person or organization that agrees to assume supervision and to report any violation of a condition of release to the court, if the designated person or organization is able to reasonably assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) Maintain employment, or, if unemployed, actively seek employment;

(iii) Maintain or commence an educational program;

(iv) Abide by specified restrictions on personal associations, place of abode, or travel;

(v) Avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) Report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) Comply with a specified curfew;

(viii) Refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) Refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner; the terms "narcotic drug" and "controlled substance" shall have the same meaning as in section 102 of the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981, (D.C. Law 4-29; D.C. Official Code § 48-901.02);

(x) Undergo medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, if available, and remain in a specified institution if required for that purpose;

(xi) Return to custody for specified hours following release for employment, schooling, or other limited purposes, except that no person may be released directly from the District of Columbia Jail or the Correctional Treatment Facility for these purposes;

(xii) Execute an agreement to forfeit upon failing to appear as required, the designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court the indicia of ownership of the property, or a percentage of the money as the judicial officer may specify;

(xiii) Execute a bail bond with solvent sureties in whatever amount is reasonably necessary to assure the appearance of the person as required; or

(xiv) Satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

(2) In considering the conditions of release described in paragraph (1)(B)(xii) or (xiii) of this subsection, the judicial officer may upon his own motion, or shall upon the motion of the government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation or the use as collateral of property that, because of its source, will not reasonably assure the appearance of the person as required.

(3) A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection to assure the safety of any other person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in § 23-1322(b).

(4) A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition that requires that the person return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the

condition. Unless the requirement is removed and the person is released on another condition or conditions, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed the conditions of release is not available, any other judicial officer may review the conditions.
(5) The judicial officer may at any time amend the order to impose additional or different conditions of release.

New Jersey Senate No. 946/ Assembly No. 1910 (2014)
(Section 1. through Section 4.)
1. (New section) The provisions of P.L. , c. (C.) (pending before the Legislature as this bill) shall be liberally construed to effectuate the purpose of relying upon contempt of court proceedings or criminal sanctions instead of financial loss to ensure the appearance of the defendant, that the defendant will not pose a danger to any person or the community, and that the defendant will comply with all conditions of bail. Monetary bail shall be set when it is determined that no other conditions of release will reasonably assure the defendant's appearance in court and that the defendant does not present a danger to any person or the community.
2. (New section) Upon the appearance before a court of a defendant charged with an offense, the court shall issue an order that the defendant be:
a. released on conditions including the execution of a bail bond pursuant to subsection b. of section 3 of P.L. , c. (C.) (pending before the Legislature as this bill);
b. released on his own personal recognizance; or
c. detained pursuant to section 4 of P.L. , c. (C.) (pending before the Legislature as this bill).
3. (New section) a. Except as provided under section 4 of P.L. , c. (C.) (pending before the Legislature as this bill), a court shall order the pretrial release of a defendant on personal recognizance when, after considering all the circumstances, the court determines that a defendant will appear as required either before or after conviction and the defendant will not pose a danger to any person or the community, or obstruct or attempt to obstruct justice, and that the defendant will comply with all conditions of release.
b. Except as provided under section 4 of P.L. , c. (C.) (pending before the Legislature as this bill), if a court determines that the release described in subsection a. of this section will not reasonably ensure the appearance of the person as required or will endanger the safety of any other person or the community, or will not prevent the person from obstructing or attempting to obstruct the criminal justice process, the court may order the pretrial release of the person:
(1) subject to the condition that the person not commit any crime during the period of release and avoid all contact with an alleged victim of the crime and with potential witnesses who may testify concerning the offense; or
(2) subject to the least restrictive condition, or combination of conditions, that the court determines will reasonably ensure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person:

(a) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is reasonably able to ensure to the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(b) maintain employment, or, if unemployed, actively seek employment;

(c) maintain or commence an educational program;

(d) abide by specified restrictions on personal associations, place of abode, or travel;

(e) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(f) comply with a specified curfew;

(g) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(h) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

(i) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(j) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(k) satisfy any other condition that is reasonably necessary to ensure the appearance of the person as required and to ensure the safety of any other person and the community; or

(l) be placed in a pretrial home supervision capacity with or without the use of an approved electronic monitoring device. The costs attributable to the electronic monitoring of an offender shall be borne by the Pretrial Services Unit in the county in which the defendant resides.

c. Except as provided under section 4 of P.L. , c. (C.) (pending before the Legislature as this bill), if the court determines that the conditions under subsection b. will not reasonably ensure the appearance of the person as required or will endanger the safety of any other person or the community, or will not prevent the person from obstructing or attempting to obstruct the criminal justice process, the court may set bail for the offense charged in accordance with current statutory law and court rule.

d. The court may at any time amend an order made pursuant to this section to impose additional or different conditions of release. The court may not impose a financial condition that results in the pretrial detention of the person.

4. (New section) a. The court may order the detention of a defendant before trial if, after a hearing pursuant to the section 5 of P.L. , c. (C.) (pending before the Legislature as this bill), the court is clearly convinced that no amount of sureties, non-monetary conditions of pretrial release or combination of sureties and conditions would ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process.

b. Except where a defendant charged with a crime is subject to a hearing upon the motion of the prosecutor or upon the court's own motion as set forth under paragraphs (1) and (2) of subsection a. of section 5 of P.L. , c. (C.) (pending before the Legislature as this bill), there

shall be a rebuttable presumption that some amount of sureties, non-monetary conditions of pretrial release or combination of sureties and conditions would ensure the defendant's appearance as required, protect the safety of the community, and prevent the defendant from obstructing or attempting to obstruct the criminal justice process.

c. A defendant shall have the right to appeal an order of detention before trial to the Appellate Division of the Superior Court, which may make a determination as to whether an amount of sureties, non-monetary conditions of pretrial release or combination of sureties and conditions would assure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process. An appeal filed under this subsection shall be heard and decided no later than 30 days following the initial order of detention.

Appendix E—Release Hearing Legislation

New Jersey Senate No. 946/ Assembly No. 1910 (2014)

5. (New section) a. A court shall hold a hearing to determine whether any condition or combination of conditions set forth under subsection b. of section 3 of P.L. , c. (C.) (pending before the Legislature as this bill) will ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process:

(1) Upon motion of the prosecutor in a case that involves:

(a) a crime enumerated under subsection d. of section 2 of P.L.1997, c.117 (C.2C:43-7.2);

(b) an offense for which the maximum sentence is life imprisonment;

(c) any indictable offense if the defendant has been convicted of two or more offenses under paragraph (1) or (2) of this subsection.

(d) any indictable offense where the victim is a minor; or

(e) any indictable offense enumerated under subsection c. of N.J.S.2C:43-6.

(2) Upon motion of the prosecutor or upon the court's own motion, in a case that involves a serious risk:

(a) that the defendant will flee;

(b) that the defendant will pose a danger to any person or the community; or

(c) that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror.

b. The hearing shall be held immediately upon the defendant's first appearance unless the defendant, or the prosecutor, seeks a continuance. Except for good cause, a continuance on motion of the defendant may not exceed five days, not including any intermediate Saturday, Sunday, or legal holiday. Except for good cause, a continuance on motion of the prosecutor may not exceed three days, not including any intermediate Saturday, Sunday, or legal holiday.

During a continuance, the defendant shall be detained, and the court, on motion of the prosecutor or sua sponte, may order that, while in custody, a defendant who appears to be a drug dependent person receive an assessment to determine whether that defendant is drug dependent.

c. At the hearing, the defendant has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing. The facts the court uses to support a finding pursuant to section 4 of P.L. , c. (C.) (pending before the Legislature as this bill) that no condition or combination of conditions will reasonably ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process shall be supported by clear and convincing evidence. The defendant may be detained pending completion of the hearing.

d. The hearing may be reopened, before or after a determination by the court, at any time before trial, if the court finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process.

6. (New section) In determining whether no amount of sureties, non-monetary conditions of pretrial release, or combination of sureties and conditions would ensure the defendant's appearance as required, protect the safety of any person or of the community, or prevent the defendant from obstructing or attempting to obstruct the criminal justice process, the court shall take into account the available information concerning:

a. The nature and circumstance of the offense charged, including whether the offense is a crime enumerated under subsection d. of section 2 of P.L.1997, c.117 (C.2C:43-7.2), is an indictable offense where the victim is a minor, or involves a firearm, explosive, or destructive device;

b. The weight of the evidence against the defendant, except that the court may consider the admissibility of any evidence sought to be excluded;

c. The history and characteristics of the defendant, including:

(1) the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(2) whether, at the time of the current offense or arrest, the defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal or State law;

d. The nature and seriousness of the danger to any person or the community that would be posed by the person's release;

e. The release recommendation of the pretrial services agency obtained using a validated risk assessment instrument under section 9 of P.L. , c. (C.) (pending before the Legislature as this bill).

District of Columbia Code: § 23-1322. Release prior to trial

(a) The judicial officer shall order the detention of a person charged with an offense for a period of not more than 5 days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the government to notify the appropriate court, probation or parole official, or local or state law enforcement official, if the judicial officer determines that the person charged with an offense:

(1) Was at the time the offense was committed, on:

(A) Release pending trial for a felony or misdemeanor under local, state, or federal law;

(B) Release pending imposition or execution of sentence, appeal of sentence or conviction, or

completion of sentence, for any offense under local, state, or federal law; or
(C) Probation, parole or supervised release for an offense under local, state, or federal law; and
(2) May flee or pose a danger to any other person or the community or, when a hearing under § 23-1329(b) is requested, is likely to violate a condition of release. If the official fails or declines to take the person into custody during the 5-day period described in this subsection, the person shall be treated in accordance with other provisions of law governing release pending trial.
(b) (1) The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in § 23-1321(c) will reasonably assure the appearance of the person as required and the safety of any other person and the community, upon oral motion of the attorney for the government, in a case that involves:
(A) A crime of violence, or a dangerous crime, as these terms are defined in § 23-1331;
(B) An offense under section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Official Code § 22-722);
(C) A serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror; or
(D) A serious risk that the person will flee.
(2) If, after a hearing pursuant to the provision of subsection (d) of this section, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community, the judicial officer shall order that the person be detained before trial.
(c) There shall be a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community if the judicial officer finds by probable cause that the person:
(1) Committed a dangerous crime or a crime of violence, as these crimes are defined in § 23-1331, while armed with or having readily available a pistol, firearm, imitation firearm, or other deadly or dangerous weapon;
(2) Has threatened, injured, intimidated, or attempted to threaten, injure, or intimidate a law enforcement officer, an officer of the court, or a prospective witness or juror in any criminal investigation or judicial proceeding;
(3) Committed a dangerous crime or a crime of violence, as these terms are defined in § 23-1331, and has previously been convicted of a dangerous crime or a crime of violence which was committed while on release pending trial for a local, state, or federal offense;
(4) Committed a dangerous crime or a crime of violence while on release pending trial for a local, state, or federal offense;
(5) Committed 2 or more dangerous crimes or crimes of violence in separate incidents that are joined in the case before the judicial officer;
(6) Committed a robbery in which the victim sustained a physical injury;

(7) Violated § 22-4504(a) (carrying a pistol without a license), § 22-4504(a-1) (carrying a rifle or shotgun), § 22-4504(b) (possession of a firearm during the commission of a crime of violence or dangerous crime), or § 22-4503 (unlawful possession of a firearm); or

(8) Violated [subchapter VIII of Chapter 25 of Title 7, § 7-2508.01 et seq.], while on probation, parole, or supervised release for committing a dangerous crime or a crime of violence, as these crimes are defined in § 23-1331, and while armed with or having readily available a firearm, imitation firearm, or other deadly or dangerous weapon as described in § 22-4502(a).

(d) (1) The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the government, seeks a continuance. Except for good cause, a continuance on motion of the person shall not exceed 5 days, and a continuance on motion of the attorney for the government shall not exceed 3 days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the government or *sua sponte*, may order that, while in custody, a person who appears to be an addict receive a medical examination to determine whether the person is an addict, as defined in § 23-1331.

(2) At the hearing, the person has the right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed.

(3) The person shall be afforded an opportunity to testify. Testimony of the person given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in proceedings under §§ 23-1327, 23-1328, and 23-1329, in perjury proceedings, and for the purpose of impeachment in any subsequent proceedings.

(4) The person shall be afforded an opportunity to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.

(5) The person shall be detained pending completion of the hearing.

(6) The hearing may be reopened at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the appearance of the person as required or the safety of any other person or the community.

(7) When a person has been released pursuant to this section and it subsequently appears that the person may be subject to pretrial detention, the attorney for the government may initiate a pretrial detention hearing by ex parte written motion. Upon such motion, the judicial officer may issue a warrant for the arrest of the person and if the person is outside the District of Columbia, the person shall be brought before a judicial officer in the district where the person is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with this section.

(e) The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person

and the community, take into account information available concerning:
(1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or dangerous crime as these terms are defined in § 23-1331, or involves obstruction of justice as defined in § 22-722;
(2) The weight of the evidence against the person;
(3) The history and characteristics of the person, including:
(A) The person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
(B) Whether, at the time of the current offense or arrest, the person was on probation, on parole, on supervised release, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under local, state, or federal law; and
(4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release.
(f) In a release order issued under § 23-1321(b) or (c), the judicial officer shall:
(1) Include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and
(2) Advise the person of:
(A) The penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
(B) The consequences of violating a condition of release, including immediate arrest or issuance of a warrant for the person's arrest; and
(C) The provisions of § 22-722, relating to threats, force, or intimidation of witnesses, jurors, and officers of the court, obstruction of criminal investigations and retaliating against a witness, victim, or an informant.
(g) In a detention order issued under subsection (b) of this section, the judicial officer shall:
(1) Include written findings of fact and a written statement of the reasons for the detention;
(2) Direct that the person be committed to the custody of the Attorney General of the United States for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
(3) Direct that the person be afforded reasonable opportunity for private consultation with counsel; and
(4) Direct that, on order of a judicial officer or on request of an attorney for the government, the person in charge of the corrections facility in which the person is confined deliver the person to the United States Marshal or other appropriate person for the purpose of an appearance in connection with a court proceeding.
(h) (1) The case of the person detained pursuant to subsection (b) of this section shall be placed on an expedited calendar and, consistent with the sound administration of justice, the

person shall be indicted before the expiration of 90 days, and shall have trial of the case commence before the expiration of 100 days. However, the time within which the person shall be indicted or shall have the trial of the case commence may be extended for one or more additional periods not to exceed 20 days each on the basis of a petition submitted by the attorney for the government and approved by the judicial officer. The additional period or periods of detention may be granted only on the basis of good cause shown, including due diligence and materiality, and shall be granted only for the additional time required to prepare for the expedited indictment and trial of the person. Good cause may include, but is not limited to, the unavailability of an essential witness, the necessity for forensic analysis of evidence, the ability to conduct a joint trial with a co-defendant or co-defendants, severance of co-defendants which permits only one trial to commence within the time period, complex or major investigations, complex or difficult legal issues, scheduling conflicts which arise shortly before the scheduled trial date, the inability to proceed to trial because of action taken by or at the behest of the defendant, an agreement between the government and the defense to dispose of the case by a guilty plea on or after the scheduled trial date, or the breakdown of a plea on or immediately before the trial date, and allowing reasonable time to prepare for an expedited trial after the circumstance giving rise to a tolling or extension of the 100-day period no longer exists. If the time within which the person must be indicted or the trial must commence is tolled or extended, an indictment must be returned at least 10 days before the new trial date.

(2) For the purposes of determining the maximum period of detention under this section, the period shall begin on the latest of:

(A) The date the defendant is first detained under subsection (b) of this section by order of a judicial officer of the District of Columbia after arrest;

(B) The date the defendant is first detained under subsection (b) of this section by order of a judicial officer of the District of Columbia following a re-arrest or order of detention after having been conditionally released under § 23-1321 or after having escaped;

(C) The date on which the trial of a defendant detained under subsection (b) of this section ends in a mistrial;

(D) The date on which an order permitting the withdrawal of a guilty plea becomes final;

(E) The date on which the defendant reasserts his right to an expedited trial following a waiver of that right;

(F) The date on which the defendant, having previously been found incompetent to stand trial, is found competent to stand trial;

(G) The date on which an order granting a motion for a new trial becomes final; or

(H) The date on which the mandate is filed in the Superior Court after a case is reversed on appeal.

(3) After 100 days, as computed under paragraphs (2) and (4) of this section, or such period or periods of detention as extended under paragraph (1) of this section, the defendant shall be treated in accordance with § 23-1321(a) unless the trial is in progress, has been delayed by the timely filing of motions, excluding motions for continuance, or has been delayed at the request

of the defendant.

(4) In computing the 100 days, the following periods shall be excluded:

(A) Any period from the filing of the notice of appeal to the issuance of the mandate in an interlocutory appeal;

(B) Any period attributable to any examination to determine the defendant's sanity or lack thereof or his or her mental competency or physical capacity to stand trial;

(C) Any period attributable to the inability of the defendant to participate in his or her defense because of mental incompetency or physical incapacity; and

(D) Any period in which the defendant is otherwise unavailable for trial.

(i) Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

NLADA
National Legal Aid &
Defender Association
nlada.org

NLADA | American Council of Chief Defenders

Risk & Needs Assessments:
What Defenders and Chief Defenders Need to Know

July 2015

Risk & Needs Assessments: What Defenders and Chief Defenders Need to Know

I. Introduction

A significant movement in criminal justice is the use of actuarial risk assessments and needs assessments to make decisions about persons at various stages of the criminal justice system. This report provides basic information about these types of assessments and summarizes the potential challenges and opportunities that these assessments carry for defenders (both for individual attorneys and for chief defenders).

The risk and needs assessments employed at different decision points in the criminal process focus on different salient factors. A pretrial risk assessment seeks to measure the likelihood that a person will fail to appear for court or commit an offense while released.

Police officers may use a risk assessment to determine whether to arrest or issue a citation.

A presentence risk assessment addresses the likelihood that a person will reoffend or violate the condition of supervision. Prosecutors may rely on an assessment to guide filing charges or referring to an alternative court. Courts may rely on presentence assessments in declaring a prison sentence or alternative to incarceration. Post-sentence risk assessments, most frequently employed by corrections and parole officials, may inform classification, programming, release, and revocation decisions.

Needs assessments evaluate the characteristics of the person that, if properly addressed, will reduce the risk of future misconduct. Needs assessments can inform decision makers whether a person in the criminal justice system requires mental health care, drug treatment, et al.

II. Potential Benefits of Risk and Needs Assessments

The increased use of risk and needs assessments reflects a growing body of research showing that "[w]hen developed and used correctly, these risk/needs assessment tools can help criminal justice officials appropriately classify offenders and target interventions to reduce recidivism, improve public safety and cut costs."[1]

Assessments are the starting point for the Risk-Need-Responsivity model for the treatment of those involved.[2] The goals of this model are 1. to assess the risk of re-offending; 2. assess the person's needs in relation to risk factors for re-offending; and 3. provide treatment focused on "cognitive social learning" in a manner taking individual personality and demographics into account.[3] Research has shown that "adherence to all three principles is associated with greatest reduction . . . in the recidivism rate."[4]

Research has identified specific risk factors for future criminal conduct, some of which are static (permanent) and some of which are dynamic (subject to change). Examples of static factors are age at first arrest, history of missing court (if present), and number of prior convictions (the number could change, but is generally static while the person serves a sentence).[5] Dynamic factors are factors associated with criminal behavior that can be changed, at least for many, through effective programming.[6]

---

1 *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders*, p. 1 (Pew Center on the States 2011).

2 *See generally* James Bonta and D.A. Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation* (Public Safety Canada 2007); Pamela Casey, Roger Warren, & Jennifer Elek, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, pp. 4-6 (National Center for State Courts 2011).

3 Bonta and Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*, *see above* n. 2, p. 1.

4 Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, *see above* n. 2, p. 6. ; D.A. Andrews and James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 Psychology, Public Policy, and Law 39, 47-48 (American Psychological Association 2010) (reviewing numerous studies comparing outcomes of programs using the Risk-Needs-Responsivity model to other justice programs).

5 *Risk/Needs Assessment 101*, *see above* n. 1, p. 2 (citation omitted).

6 *Risk/Needs Assessment 101*, *see above* n. 1, p. 2 (citation omitted).

An effective assessment allows justice officials to make evidence-based, informed decisions regarding programming. For example, intensive treatment programs work significantly better for those evaluated as high risk than for those evaluated as low risk.[7] Therefore, if combined with the availability of effective community-based programming, risk and needs assessments may provide defense counsel with recidivism alternatives to prison for some high-risk people, while also supporting arguments to divert low-risk people without onerous conditions of supervision.

Another important component of successful treatment for those involved in the criminal justice system is the principle of responsivity, which calls for providing services in ways that match individual learning styles and personalities.[8] Defenders should have at least general familiarity with this principle, because an individualized approach to programming may significantly reduce the percentage of those people who face sentencing or revocation of supervision after being discharged from treatment.

III. Potential Harm to Clients from Risk and Needs Assessments

Despite the potential benefits summarized above, risk and needs assessments can have detrimental effects upon people involved in-cjsyst. This section outlines the following ways in which assessments can be harmful person:

- statements made during the assessment interview are used against the client;[9]
- assessment instrument is not valid for population in question;
- assessment instrument is not used for intended purpose;
- assessment instrument is not administered properly;
- assessment identifies needs for which community-based programming is not available;
- assessment instrument fails to consider how social factors (like racial discrimination) impact apparently neutral risk factors (like age at first arrest).
- assessments administered without safeguards against implicit bias, thus potentially increasing disproportionate minority confinement.

A. *Statements made during the assessment interview must not be used to prosecute or otherwise punish the the person.*

Absent an agreement approved by the court or otherwise carrying the force of law that statements made in connection with the assessment will not be used to support criminal charges, revocation of supervision, or other adverse government action, every defendant should be advised of the Fifth Amendment right against self-incrimination before answering questions.[10]

7 *Risk/Needs Assessment 101*, *see above* n. 1, p. 4. Without research demonstrating the value of providing treatment for a high-risk population, justice officials might logically assume that the best chance for success is with low-risk participants. Because the population is by definition low risk, most participants would not reoffend, thus reinforcing confidence in the program. However, the program might actually increase recidivism in a population that would do even better without treatment. Conversely, intensive treatment generally has the greatest positive impact on a high-risk population. *Risk/Needs Assessment 101*, *see above* n. 1, p. 4. *See also* Shelli Rossman and Janine Zweig, *The Multisite Adult Drug Court Evaluation*, p. 6 (National Association of Drug Court Professionals May 2012) (treatment courts "achieve higher reductions in recidivism and greater cost savings" when participants are high-risk individuals who would otherwise serve prison time).

8 *See* Bonta and Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation see above* n. 2, p. 1. A simple example of the responsivity principle is that if treatment participants are missing sessions because of work schedules or child care, the treatment provider might respond by finding a different time that is more convenient. *See* Bonta and Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*, p. 7. Similarly, if a client has difficulty understanding abstract concepts, the treatment sessions should consist of practicing the desired behaviors, rather than of discussing broad principles. *Id*.

9 The more advanced pretrial risk assessments, as employed in Kentucky and an increasing number of states, do not require interviews. *See* Marie VanNostrand and Chrisopher Lowenkamp, *Research Report: Assessing Pretrial Risk Without a Defendant Interview* (Laura and John Arnold Foundation, November 2013) .

10 The Constitutional privilege against self-incrimination applies to the use of risk assessment instruments because the privilege not only applies before or at a criminal trial, but also protects against self-incrimination "in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [the person] in future criminal proceedings." Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (citation omitted). The privilege against self-incrimination extends beyond answers that would in themselves support a conviction, applying also to those that would furnish a link in the chain of evidence needed to prosecute. Ohio v. Reiner, 532 U.S. 17, 19 (2001). However, these cases do not fully protect the defendant from harm, as they apply the exclusionary rule prohibiting introduction of statements in the criminal justice context. Statements captured by interview based risk assessments could gravely impact a person outside of the criminal case if used, for example, in immigration court. There is no obvious court rule or statute that protects statements made in a risk assessment interview from introduction in a civil or immigration court.

A risk assessment instrument may ask about a defendant's use of illegal drugs, knowledge of drug availability, or association with drug users.[11] Answers to such questions may reveal incriminating evidence that authorities may use in drug offense prosecution or in other adverse government action affecting child custody, immigration or other civil consequences.[12]

If the purpose of using the assessment is to facilitate informed and effective decision-making in the justice system, the parties involved should agree that statements made during assessment interviews will not be used in investigations of the defendant to initiate prosecutions or in criminal prosecutions to prove specific charges or acts.[13] Counsel must also be able to advise whether defendant's responses could be used to impose adverse civil consequences. The responses should be used solely to complete the pertinent assessment, which in turn should be considered in light of data validating the assessment instrument for a specific purpose, such as a pretrial release decision or admission into a diversion program.

Defense counsel must consult the law in their own jurisdiction to determine what steps are necessary to render such an agreement enforceable (e.g. court order), because the person performing the assessment likely lacks the authority to bind police and prosecutors.

B. *Assessment must be validated[14] for the population in question*

A major barrier to the effective use of actuarial assessments is the cost of development and implementation.[15] Therefore, some jurisdictions may seek to save time and expense by adopting an instrument already in use elsewhere. This practice may result in using an instrument that does not accurately predict outcomes for the population.[16] The assessment instrument should be validated[17] by testing it with the population in question before adoption for general use.[18] Use of an assessment instrument which has not been validated to make decisions impacting a defendant's liberty may violate due process or, if used at sentencing, the 8th amendment, see United States v. C.R., 792 F. Supp. 2d 343, 461 (E.D.N.Y. 2011).

Similarly, once an instrument has been implemented, data must be maintained on the impacts and outcomes of the use of the instrument. Periodic review or revalidation should be made to determine if the instrument is indeed having the intended impact, while at the same time avoiding increasing disproportionate minority confinement by virtue of the introduction of implicit bias in the creation, scoring or implementation of the instrument.

11 Note that questions about substance abuse should not refer to specific dates and times of usage. Structured risk assessment interviews (LS/CMI) do not include questions on place and time, since the goal is to identify where there is an on-going problem to address.

12 See *Commonwealth v. Leclair*, 469 Mass. 777, 783 (2014) (holding that witness properly asserted privilege against self-incrimination "in response to questions regarding illicit drug use" because witness's "anticipated testimony would have been an admission of violations of the drug laws").

13 Similarly, for persons on probation, parole, or other forms of formal supervision, the agreement should provide that statements made during assessment interviews may not be used to prove violations of conditions or to otherwise support revocation proceedings.

14 Validation refers to examining the predictive capability of a risk assessment. A validate tool is one that has been proven thru study to distinguish significantly between risk levels.

15 Christopher Lowenkamp et al., *The Development and Validation of a Pretrial Screening Tool*, p.3 (Federal Probation December 2008). *See also* Cynthia Mamalian, *State of the Science of Pretrial Risk Assessment* (U.S. Department of Justice, Bureau of Justice Assistance March 2011), pp. 34-35.(noting that although a risk assessment instrument should be validated for the specific population being served, the costs of validation may deter many jurisdictions from completing the work necessary to implement a locally-validated instrument).

16 Lowenkamp, *The Development and Validation of a Pretrial Screening Tool*, *see above* n. 9, p. 4

17 Validation of instruments for use in the cases of un-consenting criminal defendants is limited and may be prohibited by federal law. *See generally* National Institute of Justice, *Human Subjects Protection* (updated November 27, 2013), accessible at http://www.nij.gov/funding/humansubjects/pages/human-subjects.aspx. 28 CFR Part 46 requires federally funded projects administered through Department of Justice, Health and Human Services and other federal agencies doing research involving human subjects (research defined in 28 CFR 46.102) to obtain prior approval by an Institutional Review Board (28 CFR 46.109) and further requires human subjects to give informed consent (defined in 28 CFR 46.101). *See* Federal Policy for the Protection of Human Subjects ('Common Rule'), 45 CFR part 46, accessible at http://www.hhs.gov/ohrp/humansubjects/commonrule.

18 Lowenkamp, *The Development and Validation of a Pretrial Screening Tool*, *see above* n. 9, p. 4.

C. *Assessment must be used for intended purpose*

Even if an assessment instrument has been validated in the jurisdiction in question, the instrument's validity may be limited to a specific purpose. For example, data analysis might show that certain data items predict failure to appear in court.[19] However, although those items would logically constitute an assessment used for pretrial release decisions, the same items might not be helpful in predicting the risk of a future violent offense or sexual offense.

D. *Assessment instruments must be administered properly*

An assessment instrument that is theoretically valid may nonetheless be ineffective if not administered properly. The persons completing the assessments need to be trained so that consistency and objectivity are maximized in using the assessment instrument.[20] For example, prior criminal record is included as a prominent item in risk assessment instruments. However, if some evaluators include probation revocations as convictions and other evaluators do not, the assessment results will be inconsistent. Consistency may be even more problematic with assessing subjective items such as the person's family relationships, substance abuse, or work history.

E. *Community-based programming must be available to address identified needs*

If appropriate programming exists in the community to address risk factors such as antisocial behavior, attitudes, and peer group,[21] a risk and needs assessment can facilitate effective community supervision. However, if programming is not available in the community, a risk and needs assessment may influence judges to impose long prison sentences that fail to address criminogenic needs and that entail great expense to the correctional system. In such a community, the assessment may become a justification for harsh and expensive sentencing practices that make it difficult to find resources for expanded community programming.

Consistent with the responsivity principle, programming must not only address the criminogenic needs of the target population, but must be delivered in a manner that takes into account the participants' personal characteristics and learning styles. For example, research shows that gender-specific programming for women is more effective than programming developed from studies of a predominantly-male population.[22] Similarly, research strongly suggests that multi-cultural programming, demonstrating knowledge of and respect for the values of all cultures represented in the client population, is essential to maximize effectiveness for people from racial or ethnic minority populations.[23]

F. *Assessment must not introduce implicit bias into scoring or implementation, nor inadvertently increase disproportionate minority confinement.*

Consistent with the necessity to validate the instrument on the population in question, care should be taken to account for or exclude dynamic risk factors that are of low or no predictive value, such as homelessness

19 *See* Lowenkamp, *The Development and Validation of a Pretrial Screening Tool*, *see above* n. 9, pp. 4-6 (describing methodology used to identify items that accurately predict failure to appear and pretrial arrest for new offense).

20 *Risk/Needs Assessment 101*, *see above* n. 1, p. 5.

21 *See Risk/Needs Assessment 101*, *see above* n. 1, p. 3 (identifying "seven dynamic risk factors closely associated with criminal conduct." (Citation omitted)

22 *See generally Resource Brief: Achieving Successful Outcomes with Justice Involved Women* (National Resource Center on Justice Involved Women, September 1, 2011).

23 *See* Georgia Spiropoulos, *The Neglect of Racial Responsivity: An Examination of Why Race Matters in Correctional Treatment*, pp. 53-58 (Doctoral thesis, University of Cincinnati March 30, 2007), accessible at cech.uc.edu/content/dam/cech/programs/criminaljustice/docs/phd_dissertations/2007/Spiropoulos.pdf (discussing guidelines for multicultural counseling adopted by American Psychological Association and noting that a multicultural approach in correctional programs has lagged behind its incorporation into other counseling environments).

and unemployment,[24] and disproportionately impact those who are of minority and/or lower socioeconomic status. In considering factors such as prior convictions for drug possession, one must also account for the disproportionate drug arrests and prosecutions of blacks and Latinos[25] to avoid exacerbation of the injustice generated by racial profiling and other biased policies.

Knowledge of the responsivity principle may help a defense attorney explain why a client did not respond favorably to a previous treatment program. Rather than accept the inference that further community-based programming would be futile, the court may find persuasive the likelihood that a program presented in a different manner has a better probability of successfully addressing the client's needs.

IV. Considerations for Chief Defenders

Chief Defenders should be knowledgeable about current practices, policies, and opportunities in their jurisdictions regarding risk and needs assessments.[26] Such knowledge allows the Chief Defender to provide training to defense attorneys and advocate persuasively, with the justice system, regarding the use of particular risk and needs assessments.

A. *Training Defenders on Risk and Needs Assessments*

The Chief Defender should provide training and access to relevant materials regarding risk and needs assessments. The bibliography included in this report provides a starting point for training in this area. Training should be tailored to the instruments in use in a given jurisdiction. Training should also include information about how to use the results of risk and needs assessments to advocate for defendants' interests and how to minimize the risks posed by such assessments.[27]

B. *Advocacy Regarding the Use of Specific Risk and Needs Assessments*

A Chief Defender should be actively involved in developing and implementing policies to improve the justice system.[28] If the Chief Defender serves on a statewide or county justice coordinating council,[29] he or she may be able to advance policy goals by suggesting or objecting to use of a particular risk/needs assessment as part of a treatment court, pretrial release initiative, or other community-based program.[30]

With regard to assessment instruments in use in a jurisdiction, the Chief Defender should seek to avoid potential harm related either to the intrinsic characteristics of the instruments or the manner in which they are being used.[31] General knowledge of the topic of actuarial assessments will enable the Chief Defender to

24 Marie VanNostrand and Christopher Lowenkamp, *Research Report: Assessing Pretrial Risk Without a Defendant Interview* (Laura and John Arnold Foundation, November 2013), p.3, accessible at http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_no-interview_FNL.pdf.

25 *See* Saki Knafo, *When It Comes To Illegal Drug Use, White America Does The Crime, Black America Gets The Time* (The Huffington Post, Sept. 17, 2013), accessible at http://huff.to/1eVIH9E; Patrick Langan, *The Racial Disparity in Drug Arrests* (Bureau of Justice Statistics, U.S. Department of Justice, Oct. 1, 1995), accessible at http://www.bjs.gov/content/pub/pdf/rdusda.pdf; Dylan Matthews, *The black/white marijuana arrest gap, in nine charts* (The Washington Post, June, 4 2013), accessible at http://wapo.st/1datrYR; *See generally* Drug Policy Alliance: Race and the Drug War at http://www.drugpolicy.org/race-and-drug-war.

26 A chief may delegate to a staff member the task of keeping current with the pertinent research and practices. The organization's knowledge and ability to communicate effectively are critical to keep the defense bar informed and to advocate effectively for clients. Therefore, regardless of the individuals in a defender organization with the technical expertise, the chief's responsibility is to ensure that the organization's collective knowledge is readily accessible and is used strategically on behalf of clients.

27 For example, if a probation agent interviews clients to complete assessments, is the agent allowed to include client statements in a presentence report subsequently presented to the court? Or are the client statements used solely for the purpose of completing the assessment instrument? If an independent entity contracts with the court system to conduct the risk assessments, the contract may include a confidentiality provision that protects any statements or information other than the results of the assessment.

28 *See ABA Ten Principles of a Public Defense Delivery System*, Principle 8, Comment (American Bar Association February 2002) ("Public defense should participate as an equal partner in improving the justice system"). As part of an evidence-based approach to criminal justice, risk and needs assessments can promote community-based rehabilitation and can provide courts with effective alternatives to prison or jail.

29 *See ABA Ten Principles*, *see above* n. 20, Principle 8 (defense counsel included as an equal partner in the justice system).

30 For example, in Milwaukee County, Wisconsin, as part of the county's commitment to incorporating evidence-based practices into justice policy, a risk assessment is used to inform pretrial release decisions. Since the county justice coordinating council adopted the assessment instrument and associated policies, the number of defendants released pending trial has substantially increased.

31 *See above* section III., regarding common areas of potential harm to clients.

seek pertinent information about the development and implementation of specific assessment instruments. The following are examples of some practical questions or issues to raise regarding risk and needs assessments:

- Has the instrument been validated[32] for the population with which it is being used? If so, what documentation is available regarding the validation process? Defenders must familiarize themselves with this documentation in order to challenge the use of the instrument when necessary.
- Is the predictive ability of the instrument matched to the purpose for which it is being used? For example, is the assessment designed to predict compliance with pretrial release conditions, recidivism, violence, sexual assault, drug use, or some other occurrence?
- Who is administering the instrument and what training has been provided? What procedures are followed to ensure accuracy and consistency in completing the assessments?
- Is programming available (or are there plans in place to enhance availability) in the community to address needs identified through the assessment process?[33]

V. Practice Considerations for Defenders

Defenders should be knowledgeable about risk assessment instruments in use in their jurisdiction. To effectively advocate for the interests of individual clients, attorneys must possess basic knowledge regarding the type of information collected for the assessment, the potential evidentiary use of statements made during the assessment process, and the potential case-related decisions likely to flow from the assessment.

The following summary, focused on the role of defense counsel in providing information and advice, describes the major decision points within the justice system at which a person may be the subject of a risk or needs assessment.

A. *Pretrial Release Decision*

In 2011, a National Symposium on Pretrial Justice produced recommendations to improve pretrial release practices.[34] A major recommendation is to require completion of a risk assessment for all arrestees for consideration in setting release conditions.[35] Three states have passed legislation requiring such assessments, which can be used in conjunction with a presumption of release from custody for defendants within a certain scoring range.[36] By increasing reliance upon a validated risk assessment, a jurisdiction can shift from a primary focus on ability to post bail to a focus on objective measures of risk.[37]

Another 2011 report documents the use of risk assessments in some jurisdictions to inform pretrial release decisions.[38] Summarizing numerous earlier studies, the report sets forth six risk factors that have been most commonly verified as predictive of pretrial risk: prior failure to appear, prior convictions, nature

32 It is important to ensure that "validation" is defined. Validation results reveal whether an assessment instrument is able successfully to distinguish between risk levels. Revalidation studies, which are recommended practices in many instances, provide further information about the accuracy of the instrument's ability to predict risk by gathering data from assessments given in a real world setting. Proper training is essential to ensure validity of the tool "because the efficacy of every assessment is heavily dependent upon the person who conducts the interview and scores the risk assessment." Edward Latessa, et al., *The Creation and Validation of the Ohio Risk Assessment System* (Federal Probation, June 2010), p. 21.

33 To be effective, the programming needs to be appropriate for the population served. If programming is not effective, the justice system will not experience significant reduction in recidivism, and courts are likely to turn to incarceration as preferable to unsuccessful community-based alternatives. *See above* nn. 2-4, 8 and accompanying text, regarding importance of responsivity of programming to individual client circumstances.

34 *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, p. 1 (Pretrial Justice Institute January 2013).

35 *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, *see above* n. 25, p. 3. A related recommendation is that a pretrial services agency use validated instruments to assess the defendant's risk to the community and risk of non-appearance in court. *Id*., p. 6. The agency would use the information, according to the recommendations, to make recommendations to the court and to supervise defendants who are released before trial. *Id*.

36 *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, *see above* n. 25, p. 3. Kentucky's legislation contains a presumption that all defendants scored as low risk will be released without having to post cash bail. *See Id*.

37 *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, *see above* n. 25, p. 4 (citing studies concluding or implying that bond schedules put public safety at risk by relying on a defendant's financial resources to determine whether he or she is released from pretrial custody).

38 Mamalian, *State of the Science of Pretrial Risk Assessment*, *see above* n. 9.

of pending case (felony or misdemeanor), employment status, history of drug abuse, and existence of other pending charges.[39] The report suggests that jurisdictions that rely on objective factors are less likely to have overcrowded jails than jurisdictions that rely upon subjective criteria, such as the prosecutor's recommendation or the judge's professional experience.[40]

A risk assessment may be used either in the field or at the local jail. If police use an assessment in the field to inform arrest decisions,[41] defense attorneys are generally not able to consult with the persons detained before the officers complete the assessment. Nonetheless, attorneys should have at least a general familiarity with the assessment in question (and the decisions flowing from it) because clients may ask why the police asked certain questions or may ask whether it is smart to answer the questions used in the assessment.

Assessments at the local jail may in some instances be completed before defendants have the opportunity to consult with a defense attorney.[42] To be prepared to argue the issue of pretrial release, defense counsel should know the purpose of the assessment and enough about its contents to be able to respond to any adverse recommendations stemming from the assessment of a specific defendant.[43] Counsel should also be able to review pertinent information about the client to ascertain whether the assessment may have been completed or interpreted incorrectly.

A risk assessment may inform not only the decision whether to grant to pretrial release, but also the conditions of release. Although release programming ordered as an alternative to confinement may reduce pretrial misconduct (failures to appear or new violations), such programming may actually be counter-productive when required of low-risk defendants.[44]

B. *Decisions on Admission to Diversions Programs and Treatment Courts*

Risk assessments are widely used in admission decisions for diversion programs (either pre-charging or post-charging) and for treatment courts. Needs assessments are also used either in admission decisions or in determining treatment needs for participants (or for both of these purposes). To ensure that programs serve an appropriate population, thus maximizing the positive impact, defenders must be aware of the general research findings regarding these types of assessments.

A basic, yet counterintuitive, principle regarding treatment courts is that they are most successful serving a high-risk, high-need participants.[45] Therefore, defenders representing individual clients seeking admission to a treatment court can cite this research to advocate for the court accepting these participants. Defenders should also be aware of the importance of validation of a risk assessment instrument to ensure that it accurately predicts outcomes for the population in question, including for racial, ethnic, and gender sub-populations served by the court.

Risk assessment instruments ordinarily seek to measure the likelihood of a defendant failing on supervision and/or committing a new criminal offense.[46] Aside from specialized instruments, they do not predict the risk

39 Mamalian, *State of the Science of Pretrial Risk Assessment*, *see above* n. 9, p. 9.

40 Mamalian, *State of the Science of Pretrial Risk Assessment*, *see above* n. 9, p. 17, n. 44 (citing a 2003 study conducted by the Department of Justice, Bureau of Justice Assistance).

41 Police in Eau Claire County, Wisconsin, are using a "proxy risk assessment" to divert low-risk individuals whom they would otherwise arrest. *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, *see above* n. 25, p. 3. Instead of an arrest, booking, and possible criminal charges, the individual may be issued a citation and be referred to a pretrial diversion program. *See id.*

42 Depending on the procedures in place, the Chief Defender should advocate for the opportunity for attorneys to meet with arrestees before the assessment. *See generally* ABA Ten Principles, *see above* n. 20, Principle 3 (prompt assignment of counsel as soon as feasible after arrest); *see also above* section IV. If the Chief Defender perceives that defendants are being harmed by the timing of the assessment, he or she should seek a modification.

43 *See Risk/Needs Assessment 101*, *see above* n. 1, p. 5 (although risk/needs assessments can provide guidance, professional discretion remains an important aspect of decision making).

44 Mamalian, *State of the Science of Pretrial Risk Assessment*, *see above* n. 9, p. 9.

45 *See* Douglas Marlowe, *Targeting the Right Participants for Adult Drug Courts*, p. 2 (National Drug Court Institute February 2012). Conversely, low-risk offenders by definition will not re-offend in large numbers; therefore, the benefits of intensive treatment are much smaller. *See id.*, p. 3 (noting that low-risk offenders are likely to be "predisposed to improve their conduct following a run-in with the law").

46 Marlowe, *Targeting the Right Participants for Adult Drug Courts*, *see above* n. 36, p. 3.

of a violent offense.[47] Therefore, treatment courts should not assume a finding of high-risk means that the individual poses an abnormal risk of assaultive behavior.

A needs assessment is an evaluation to determine a person's "criminogenic" needs: disorders or behaviors that, if successfully treated, reduce the risk of recidivism.[48] Defenders should be aware that because screening instruments for substance abuse may be overly inclusive, a structured interview may be advisable to confirm the need for intensive treatment.[49]

With knowledge of risk and needs assessments, defenders can provide guidance to other justice professionals regarding successful treatment courts and other diversion programs. For example, a defender can explain that an intensive treatment-court program is inappropriate for low-risk offenders.[50] He or she can also advocate for effective treatment programs and other services that meet the stated wishes of a person seeking treatment.[51]

C. *Sentencing Decisions*

Risk and needs assessments can be major components of an evidence-based approach to sentencing. Several states have expanded the use of these types of assessments in an effort to provide sentencing judges with information to assist in reducing recidivism.[52] Defender clients can benefit from the trend toward consideration of assessments because research shows that evidence-based treatment and supervision in the community can be at least as effective as incarceration in reducing recidivism.[53] Furthermore, community-based programming can be particularly effective for medium- and high-risk defendants.[54]

When judges increase their focus on reducing recidivism, they may rely less upon other sentencing principles, such as punishment and deterrence, which are commonly used as reasons for long prison sentences. Despite circumstances that could support a prison sentence, a judge may be convinced to impose a community-based sentence when the presentence assessment has identified risk factors to address, the probation department has capacity for effective supervision (including options for intermediate sanctions), and services are available to address the defendant's criminogenic risk factors.[55]

However, if the judge lacks confidence in either the probation department or the available community services, an assessment instrument may adversely affect clients by identifying risks and needs that cannot (in the judge's estimation) be effectively addressed. Therefore, defenders should not consider the potential impact of assessment instruments in isolation, but rather should also consider the importance of advocating for effective services.

---

47 Marlowe, *Targeting the Right Participants for Adult Drug Courts*, *see above* n. 36, p. 3.

48 *See* Marlowe, *Targeting the Right Participants for Adult Drug Courts*, *see above* n. 36, pp.3-5.

49 *See* Marlowe, *Targeting the Right Participants for Adult Drug Courts*, *see above* n. 36, p. 5 (noting the risk that without such follow-up clinical evaluations, individuals with dependency may be placed in the same program with others who have episodes of abuse, but do not have true substance dependency).

50 *See* Marlowe, *Targeting the Right Participants for Adult Drug Courts*, *see above* n. 36, p. 7 (recognizing that some jurisdictions may lack the numbers of participants to develop distinct diversion programs for drug-involved defendants). If practical limitations require serving low-risk and high-risk individuals within the same treatment court, the court can provide different services (for example, separate tracks) that take into account the varying needs of the participants. *Id.*; *see also* Douglas Marlowe, *Alternative Tracks in Adult Drug Courts: Matching Your program to the Needs of Your Clients*, pp. 3-8 (National Drug Court Institute March 2012) (describing four separate potential treatment-court tracks to take into account the participants' varying levels of risk and need).

51 For a client with higher risk and more criminogenic needs to address, a defender can advocate persuasively for admission to an intensive treatment-court program in lieu of a prison sentence. See *Marlowe, Alternative Tracks in Adult Drug Courts: Matching Your program to the Needs of Your Clients*, *see above* n. 41, p. 1 (drug courts that focus on high-risk/high-need participants "reduce crime approximately twice as much as those serving less serious offenders and return approximately 50 percent greater cost-benefits to their communities"). For a client with lower risk and fewer criminogenic needs, a defender can advocate persuasively for diversion (either outside of a treatment court or as an alternative track in such a court) of the case without the intensive treatment and supervision components appropriate for high-risk/high-needs individuals. *See Marlowe, Alternative Tracks in Adult Drug Courts: Matching Your program to the Needs of Your Clients*, *see above* n. 41, pp. 7-8 (stating that diversion may be the best course of action and that "the intensive requirements of a drug court" may be counter-productive).

52 *See* Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, *see above* n. 2, pp. 39-41 (National Center for State Courts 2011) (describing initiatives in nine states).

53 Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, *see above* n. 2, p. 15. *See also State Efforts in Sentencing and Corrections Reform*, pp. 4-8 (National Governors Association October 2011) (summarizing initiatives in many states to reduce prison populations, including several initiatives that incorporate risk assessments into sentencing and/or correctional policies).

54 Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, *see above* n. 2, p. 15.

55 Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, *see above* n. 2, p. 14.

Knowledge of the Risk-Needs-Responsivity model[56] will help defenders assess community-based resources and advocate for improvements that are likely to reduce recidivism. Defenders can cite research showing the effectiveness of intensive community-based services for those who are higher-risk,[57] many of whom would otherwise be likely candidates for prison sentences on the basis of (for example) the prior criminal records that often correlate with the higher-risk categories. Also, when representing lower-risk people, defenders can show that intensive supervision and treatment requirements are counter-productive.[58]

As in other contexts, defenders need to understand the use of risk and needs assessments in sentencing so that they can advise clients properly. Statements made in the course of an assessment may be reported in a presentence report (or in another manner), unless there is an agreement limiting the use of any such statements. Clients should understand the potential impact of their statements. Conversely, the failure to cooperate with the administration of a risk assessment might have adverse effects: the presentence report might characterize the client as uncooperative, and/or the lack of a completed assessment might reduce the likelihood of the client receiving probation or another community-based disposition.

Knowledge of the assessments in use will not by itself lead to the best advice in each case, but such knowledge will allow defenders and their clients to weigh potential advantages and disadvantages of cooperation with assessment interviews. Also, a knowledgeable defender will be able to incorporate the results of an assessment into sentencing advocacy. This advocacy may consist of recommending effective alternatives to incarceration that are suggested by the assessment instrument(s). If the judge in question is inclined to equate high risk to a need for incarceration, effective advocacy may consist of challenging the results and/or the validity of the assessment(s).

VI. Conclusion

This paper provides basic information regarding the use of risk and needs assessments in the justice system. The use of these assessments is increasing as state and local justice systems focus on evidence-based approaches to reducing crime. Risk and needs assessments can benefit defender clients by matching those clients who seek them with appropriate services in their communities. Defenders can best serve them if they understand the rationale of the Risk-Needs-Responsivity model and can argue the effectiveness of risks and needs assessments.

As discussed in Section III., there are a number of potential ways in which assessments can be detrimental to clients. However, many clients may benefit if courts focus less on punishment for past conduct than on strategies to shape future conduct.

56 *See generally* Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, *see above* n. 2, pp. 4-8.

57 Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, *see above* n. 2, pp. 5-6 (citing large-scale studies showing that behavioral approaches to treatment can substantially reduce recidivism, in contrast to incarceration, boot camp, or other sanctions not supplemented with behavioral treatment).

58 *See* Casey, Warren, & Elek, *Using Offender Risk and Needs A*ssessment Information at Sentencing, see above n. 2, p. 4. Intensive programming can actually increase recidivism for low-risk clients, probably because these clients may be mixed with higher-risk individuals and because the programming requirements may disrupt the prosocial aspects of life (such as employment and family support). See id. (citing a 2004 study).

Defenders may face push-back from judges, prosecutors, and treatment providers regarding the concept that community resources should be focused on higher-risk clients. The desire to maximize successful outcomes in any program is natural, and (by definition) a low-risk individual is less likely to re-offend than is a high-risk individual. However, the Risk-Needs-Responsivity model is based on research showing that positive results for a low-risk population are probable *despite* intensive programming, not because of such programming. *See* Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, *see above* n. 2, p. 17 (conditions of probation are counter-productive when not targeted at the individual's critical risk factors; therefore, excessive structure, intensity, and conditions of supervision for low-risk individuals are actually harmful and hinder achieving success; over-supervision also wastes precious justice-system resources).

APPENDICES

Appendix I: Bibliography of Resources Available Online

Risk and Needs Assessments

Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders (Pew Center on the States, 2011), accessible at http://bit.ly/1HULNL8

D.A. Andrews and James Bonta, Rehabilitating Criminal Justice Policy and Practice, 16 Psychology, Public Policy, and Law 39 (American Psychological Association 2010), accessible at http://bit.ly/1L5SOKM

James Bonta and D.A. Andrews, Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation (Public Safety Canada, 2007), accessible at http://bit.ly/1EvsSUK

Edward Latessa, at al., The Creation and Validation of the Ohio Risk Assessment System (Federal Probation, June 2010), accessible at http://bit.ly/1EUwxyR

James Austin, How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections (Federal Probation, Vol. 70, No. 2, p. 97, September 2006), accessible for download at http://bit.ly/1Ljvkmx

Pretrial Risk Assessments

Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants (Pretrial Justice Institute, 2012), accessible at http://bit.ly/1Bo6D5s

Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report (Pretrial Justice Institute, 2013), accessible at http://bit.ly/1bYQBDC

Cynthia Mamalian, State of the Science of Pretrial Risk Assessment (U.S. Department of Justice, Bureau of Justice Assistance, March 2011), accessible at http://bit.ly/1GzlQwu

Kristin Bechtel, et al., Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research (Pretrial Justice Institute, 2012), accessible at http://bit.ly/1bYRiNh

Arthur Pepin, Evidence-Based Pretrial Release (Conference of State Court Administrators, 2013), accessible at http://1.usa.gov/1bilGAV

Marie VanNostrand and Christopher Lowenkamp, Research Report: Assessing Pretrial Risk Without a Defendant Interview (Laura and John Arnold Foundation, November 2013) , accessible at http://bit.ly/1J7QN1q

Christopher Lowenkamp et al., The Development and Validation of a Pretrial Screening Tool, (Federal Probation, December 2008), accessible at http://bit.ly/1GKIBTE

Risk Assessments and Treatment Courts

Shelli Rossman and Janine Zweig, The Multisite Adult Drug Court Evaluation (National Association of Drug Court Professionals, May 2012), accessible at http://bit.ly/1OJ7S4P

Douglas Marlowe, Research Update on Adult Drug Courts (National Association of Drug Court Professionals, December 2010), accessible at http://bit.ly/1JbZB2v

Douglas Marlowe, Targeting the Right Participants for Adult Drug Courts (National Drug Court Institute, February 2012), accessible at http://bit.ly/1QPhj13

Douglas Marlowe, Alternative Tracks in Adult Drug Courts: Matching Your Program to the Needs of Your Clients (National Drug Court Institute, March 2012), accessible at http://bit.ly/1HUPjoA

Instruments for Screening and Assessment of Drug Court Participants to Determine Risk, Need, and Level of Care (BJA Drug Court Technical Assistance/Clearinghouse Project, updated May 15, 2015), accessible at http://www.american.edu/spa/jpo/initiatives/drug-court/faq.cfm

Risk Assessments and Sentencing

Pamela Casey, Roger Warren, and Jennifer Elek, Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group (National Center for State Courts, 2011), accessible at http://bit.ly/1DZ9Lip

State Efforts in Sentencing and Corrections Reform (National Governors Association, October 2011), accessible at http://bit.ly/1OJ91Jz

Appendix II: How to Argue the Risk Assessment Instrument in Your Case[1]

Though the issues addressed below are not universal in application, here are some helpful tips for effective defender advocacy regarding risk assessments.

- Get a copy of the risk assessment user guide. Learn proper administration of the risk assessment scoring system.
  - Assess complexity
    - Generally, the more simplistic the risk assessment (10-12 items), the easier to administer properly. The more complex the risk assessment, (the LS/CMI has 43 questions with many sub-questions) the more room there is for error.
    - Complex instruments are not likely to be minimally reliable or valid without a staff "highly skilled in the application of psychometric assessment forms. Unless the agency has such a staff, the use of these instruments is not recommended."[2]
  - Argue individual facts
    - Zealous advocacy still demands arguing facts unique to the client that bear on risk factors but may not have been included in the assessment. (e.g. for risk assessments that take into account prior arrests, where applicable, argue statistics on race and the likelihood of arrest as bearing on the outcome of the risk score)
  - Find out the scoring range
    - Reference the limit of scoring and use the numbers, avoiding the words, "low," "moderate," or "high" when the category is negative for your client. In the alternative, argue that your client is, for example, only a 15 out of 34.
    - If the risk assessment has a minimum score other than zero, ensure the judge does not assume that getting a zero is possible and argue that if a person starts at, say 2, then the risk score should be treated as zero, with corresponding adjustments for persons with higher scores.
- Argue that no risk assessment can predict or claim to predict behavior in any individual instance. The assessment of risk is statistical, and it is always appropriate and encouraged to remind the court that the risk instrument is an evidence-based tool to assist justice stakeholders in assessing each case individually. The assessment is intended to inform, not replace, the court's discretion.
- Risk assessments should weigh dynamic factors more heavily than static factors because they are more predictive statistically. If the risk assessment puts too much weight on the static factors, argue that assessment is being used to punish status.
  - For example, more men commit crimes than women -- Should gender be a basis for assessing risk with regard to the criminal justice system? (despite the significant role gender plays in actuarial risk models for car insurance)

1 Special thanks to Ed Monahan, B. Scott West, and the entire Kentucky Department of Public Advocacy for their groundbreaking work on pretrial reform and for their contribution of this appendix, which may serve as a tool for defenders seeking to employ zealous advocacy and due diligence with respect to risk assessment instruments.

2 James Austin, *How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections* (Federal Probation, September 2006), p.2

- Determine whether the relevant risk assessment literature includes recommended dispositions by risk-category.
  - Low and moderate risk clients will generally benefit from the recommended dispositions. In a validated risk assessment model, only the highest risk should garner intensive supervision either pretrial or post-sentencing.
- Gather information that will assist you in challenging the fidelity of use of the risk assessment instrument in your jurisdiction and possibly cross-examining the person who conducted the risk assessment.
  - For interview-based assessments:
    - Determine whether questions should be asked in a certain manner. Deviation from protocol underlying the risk assessment undermines its validity.
    - Ask whether the assessment tool provides for immediate recording of the answers or whether the assessors note the responses and score after the interview.
    - Inquire about the length of the interview. Assessment tools typically proscribe the appropriate interview length.
    - Find out if the interviewer took any steps to confirm independently the information gathered in the assessment interview. Most current risk assessment user guides recommend this.
    - Find out how the assessment is scored.
      - What kind of answers indicate low-risk vs. high risk? What differentiates a low-risk answer from a moderate-risk or high-risk answer? Who makes that determination?
  - Seek a standing court order that makes assessor training materials, validation studies, and user manuals available to defense counsel in every criminal case, including those in which a risk assessment is not used. (If there is not uniformity in the use of risk assessments in your jurisdiction, there may be cases in which you want to argue for the use of an assessment).
- Educate the court and other stakeholders that the most accurate risk assessments continue to be refined and periodically revalidated.
  - Continue to educate yourself and your colleagues on the development and improvement of risk assessments.
  - For your jurisdiction, determine whether the current risk assessment has been refined for changing population demographics and whether the current risk assessment was developed with researchers or purchased commercially. (With risk assessments purchased commercially, buyers are not able to make refinements.)

Appendix III: Lessons Learned from Juvenile Detention Risk Assessments[3]

Miami-Dade County does not utilize a pretrial risk assessment tool in their adult criminal court, but the Public Defenders offer some of their lessons learned from working with the Defender Risk Assessment Instrument (DRAI) used to screen youth for juvenile detention determinations.

- Defenders need to be well-trained on the assessment tool and scoring.

Issues with the DRAI arise when the assessment is completed by probation officers who are undertrained in scoring. Defenders must be well-trained in the DRAI and the scoring in order to identify errors in the scoring and establish credibility in arguing for the score to be adjusted, thus enabling the best chance for a client's release.

- Those conducting risk assessments must be objective parties.

Errors may occur if the risk assessment official improperly influences the score based on an experience with a defendant at processing. Factors such as personality and implicit bias can incorrectly influence the risk assessment and thus the detention determination. Given the critical importance of objectivity, those conducting the risk assessment should not have an enforcement approach, but rather a neutral position in completing the risk assessment.

- Early entry of counsel, prior to completion of risk assessment, is essential.

Without counsel to ensure the risk assessment is conducted properly and to ensure that a client is informed of his or her rights, clients are exposed to an ultimately unfair detention determination that may also be difficult to argue for changing at a later phase. Early entry of counsel is a check on the other powers that influence detention determination. Without meaningful counsel at the initial detention determination, there is no one specifically advocating for release, and thus the scales of justice are unbalanced.

3 Special thanks to Carlos Martinez, Miami-Dade County Public Defender, and his Assistant Public Defenders, Michelle Rosengarten and Christopher Brochyus, for sharing their valuable insights.

Appendix IV: Pre-Adjudication Risk-Needs Assessment – An Overview of Early Implementation[4]

As part of the criminal justice reforms enacted upon Oregon's participation in the Justice Reinvestment Initiative[5] completed in 2013, Multnomah County, Oregon (Portland) now employs a risk and needs analysis pre-adjudication to help determine which defendants, presumptively slated to receive prison sentences, may be safely diverted to an incarceration alternative. It is still early in the implementation project, but initial impressions of the use and impact of the risk-needs assessment are mixed.

One key point from the public defender perspective: justice stakeholders have agreed to prevent use of interview answers outside the scope of the risk-needs assessment. Additionally, the defender perspective includes the following:

- One potential downside of the tool is in recommending programs that do not exist or to which defendants do not have access. In Oregon, there is a focus on documenting what programs are needed and sharing that information with local and state policy makers. On the individual client level, defenders are able to identify for the court instances in which lack of resources, and not willful criminality, lead to failure on probation.
- All practitioners involved with use of the risk-needs tool need to become conversant on the science. For instance, the LSCMI tool, which is the risk-needs assessment instrument used in Multnomah County, is not validated for prison sentence length of Stay. Thus, under the LSCMI, a determination of high risk does not correspond with a long prison sentence, if probation is not given.

4 Thank you to Lane Borg, Executive Director of the Metropolitan Public Defender, Portland, OR. Please see Multnomah County Justice Reinvestment Project page, including data reports, https://multco.us/lpscc/mcjrp

5 Justice Reinvestment Initiative - Background (Bureau of Justice Assistance), accessible at https://www.bja.gov/programs/justicereinvestment/background.html. Justice Reinvestment Initiative – Oregon (Bureau of Justice Assistance), accessible at https://www.bja.gov/programs/justicereinvestment/oregon.html.

1901 Pennsylvania Ave. NW, Suite 500, Washington, DC 20006
202.452.0620 | www.nlada.org

AMERICAN BAIL COALITION

Presentation to the Ad Hoc Committee on Bail and Pretrial Services of the Ohio Criminal Sentencing Committee

July 22, 2016

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

Who Are We, What Do We Do?

- American Bail Coalition, Surety Bail Insurance Companies
- Approximately 600 Licensed Bail Agents in Ohio
- ABC works on bail and pretrial release issues in numerous jurisdictions throughout the country
- Advocate for best practices in bail setting and regulation of bail agents and insurance companies to protect the public
- Jeff Clayton—background

Evidence-Based Practices and the "Scientific" Justice System

A philosophy shift from punishment to rehabilitation

"Using stuff that works?"

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

Current National Picture

- Various activist groups are advocating to eliminate all financial conditions of bail and replace it with a release/no-release system like the D.C. and federal systems
- This is a major decision-point
- These release/no-release policies were a major legislative topic of conversation this year (example: NM, NJ)
- Reform in NJ is a model of the end-the near elimination of financial conditions in favor of release, release on supervision, or preventative detention

Current National Picture

- Increased use of risk assessments, which if used properly, may assist judges in being better informed prior to making a decision on bail
- Most jurisdictions have not taken the step of eliminating financial conditions or surety bonds
- Kentucky still has financial bail—just no surety bonds—majority of people who were released from jail posted cash up until a couple of years ago—now the number is about 1/3 of all defendants posting a financial bail bond

False Assumptions in "Pretrial Justice"

- Monetary bail is unconstitutional—due process and equal protection challenges from *Clanton* to *Houston*
- Former U.S. Solicitor Paul D. Clement (see materials):

  "Bail is a liberty-promoting institution as old as the Republic."

  "Plaintiff would have this Court effectively abolish monetary bail on the theory that any defendant is entitled to immediate release based on an unverified assertion of indigency. Nothing in the Constitution supports that extreme position. Instead, the text and history of our founding charter conclusively confirm that monetary bail is constitutional."

False Assumptions in “Pretrial Justice”

- 70% of people in jail nationally are there “pretrial” and are “innocent,” “have been convicted of no crime,” and “cannot afford their bail”—Connecticut example (78% had three or more prior convictions, and 60% had 1 or more prior felony convictions)
- ABC has identified at least ten administrative or other legal reasons other than “affordability” of bail that keep people in jail
- Only a real localized jail study can isolate the magnitude of the problem and what factors, financial or not, drive it

False Assumptions in “Pretrial Justice”

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

False Assumptions in "Pretrial Justice"

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

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

TOTAL ELIGIBLE FOR BAIL

1,349

(or 12% … NOT 70%)

ABC Has Proposed Solutions

- The Kaleif Browder case renewed conversation but focused only on money and not other bail issues like his hold for a probation violation—look at other holds
- Set meaningful bail--$1 bail? $100 bail?
- Better review procedures to make sure review process from a bond schedule or initial setting is expedited—*City of Riverside*
- Public-private partnerships—state pay or state contracted surety bail as an insurance product—lift the indigent up, not drag everyone else down
- Diversion programs
- Accountable drug and alcohol treatment efforts

Reject the Money/No Money Dichotomy

- It is easy to say we don't want a "wealth-based" bail system
- Ability to pay is one of a basket of factors, and is a consideration as to whether bail is excessive
- The cost of bail is marginal compared to all of the other fines, fees, costs, restitution, surcharges, attorney fees, and supervision fees that offenders will be expected to pay
- Typically, third-parties are providing a surety (financial guarantee) to the Courts and the defendant at their own expense—you would be cutting off a private benefit provided to a defendant and the Courts

Reject the Money/No Money Dichotomy

- Financial conditions should have a role in the system—this option should fit within the framework and not be excluded simply because the proponents of some risk instruments designed them to eliminate financial conditions
- Eliminating financial conditions means preventative detention will be used—clear and convincing evidence, court time, due process, heightened speedy trial requirements—New Jersey
- Preventative detention in the federal system keeps 64% of all defendants arrested detained with no bail (see materials)
- D.C. incarcerates 15% of all arrestees—what is Ohio's number? New York's is around 10%.

Reject the Money/No Money Dichotomy

- Too costly to go to a system with no financial conditions
- D.C. $61 million to handle pretrial services supervision and evaluation in a city with a population of 660,000
- Ohio's population is 17.6 times larger—on per capita basis that is a $1.073 billion price tag for Ohio
- New Jersey--$50 million first year, low-end estimates (materials)—Chris Christie ordered new study
- Economic negative impact estimate of New Jersey reforms in the materials

Least Restrictive Form of Release

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

Least Restrictive Form of Release

- The on-going cost of “non-financial” conditions should be considered
- Electronic monitoring companies are publicly-traded on Wall Street—they attempt, according to one article in the materials, to persuade public officials that defendants and convicted criminals will pay the charges (see materials)
- **All types of bond and conditions of release should be on a level-playing field for judges to impose when appropriate**

Reject the Bail is Too High/Too Low Analysis

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

Reject the Bail is Too High/Too Low Analysis

- Taking a percentage of cases and saying these people cannot “afford” their bail ignores the decisions of judges in setting the initial bail and reviewing that bail with a factor of financial resources as a consideration
- The only truly effective evidence-based system would be no bail at all—100% effective—not reasonable
- There are costs to the system of a failure to appear to the courts, victims, witnesses, police, prosecutor, defense attorney, etc.—one study says $1,775 for each FTA (materials)

Risk Assessments – What They Do

- They tell us how likely someone is to “fail”
- Many don’t tell us what the “failure” is—i.e., a risk score does not tell you which risk we are talking about, i.e., new crime and/or FTA
- The new Arnold tool attempts to predict new crimes and FTAs separately—new within last 6 months
- They give judges another tool to assess risk
- They can inform bail decisions to a certain extent

Risk Assessments – Limitations

- There is no "evidence-based" or scientifically validated way to *set bail or conditions of release*.
- Risk assessments only help identify who is risky, they do not help decide what conditions will obviate that risk
- The risk assessment does not help address criminogenic factors that lead to failure—in other words, what is the scientific basis to say that setting greater conditions based on a numerical risk score will obviate risk? Risk of crime or risk of flight?

Risk Assessments – Limitations

- Over-supervision is detrimental to low level offenders
- How does a financial condition mitigate risk?
- How does supervision mitigate risk?
- How does electronic monitoring or uranalysis mitigate risk?
- Seven issues with Risk Assessments from defense perspective (see NLADA report in materials)
- Validation issues are real—Delaware example (materials)

Risk Assessments – Judges Haven't Been Blind

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

Risk Assessments – Judges Haven't Been Blind

- Risk assessments INGORE STATUTORY FACTORS. What happens when judges consider the factors?
- Does the risk assessment validity break down—unresolved issue at this time.
- Trust the tool or trust the information—the Nevada issue
- What if the risk assessment shows that too many people are getting out of jail—then what?
- Are we confident that risk assessments will stand up to scrutiny when used as a basis to preventatively detain?

Risk Assessments – Demographic Factors

- The use of demographic factors for sentencing or setting of bail in the criminal justice system has been called into question by a prominent law professor (see materials).
- One recent study, "Machine Bias," found that risk assessments discriminate based on race (see materials)
- Yale Law Journal Forum cited other issues—bills of attainder
- Many risk assessments use demographic or economic factors—e.g., age at first arrest, own or rent a home, income, etc.
- Eric Holder also questioned the use of these "tools" when he was Attorney General

Risk Assessments – Resource Considerations

- Unless risk assessments are computerized, staff will have to be hired to assess people—Albuquerque—14 FTE
- Because we know risk assessments are intuitive, and we know which factors we need to focus on, we know what information we need to get so Judges have it
- It may be that creating new programs to do the assessments will stall out due to human resource issues—yet, making sure all of the underlying information we know matters is readily available to judges would go a long way
- Judges can weight the factors with better information

Risk Assessments – Validation

- Not validated to set bail
- Will never be validated to set bail, because it's a probability of failure based on certain factors but it doesn't validate the conditions that will obviate the risk
- Should it be treated differently than other scientific or expert testimony evidence?
- Should Courts approve an instrument?
- Who validates, and what is validation? See NLADA report in materials.

Evidenced Based Bail Setting – Advocacy Efforts

- We are advocating for research among national organizations to move forward to have a more evidence-based approach in terms of what conditions of release and type of bond will mitigate the risk presented
- This research has not been done—John Jay College symposium recently concluded there are 30+ areas of necessary research that has not been done (see materials)
- Anne Milgram: We were "stunned by the lack of information"
- We have also been advocating for system-wide benefit cost-analyses

Effectiveness of Surety Bonds

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

Bureau of Justice Statistics
Special Report

State Court Processing Statistics, 1990-2004

Pretrial Release of Felony Defendants in State Courts

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

RESEARCH REPORT

PRETRIAL RELEASE MECHANISMS IN DALLAS COUNTY, TEXAS:

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

Effectiveness of Surety Bonds

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

THE UNIVERSITY OF CHICAGO THE LAW SCHOOL

The Journal of LAW & ECONOMICS

Eric Helland, Claremont-McKenna College

Alexander Tabarrok, George Mason University

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

Effectiveness of Surety Bonds

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

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

Effectiveness of Surety Bonds

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

U.S. DEPARTMENT OF JUSTICE

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

Bail Systems—Get Local

- Do not reform Ohio's bail system based on national talking points
- Get to your file-level data and analyze it
- Example—in jail in Contra Costa, California 30% of all defendants are awaiting trial facing homicide charges
- Costs at the local level must be considered—the D.C. system may be a fine system, but in light of what other needs there may be in the criminal justice system is it worth it to spend the type of funds necessary in light of other needs and will it actually be more "fair"

Bond Schedules

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

Bond Schedules

- Best practices—setting bail in all cases 24 hours a day upon a full hearing. Not cheap, so keeping schedules around is typically needed in most jurisdictions. Judges smooth out the edges.
- Schedules were created to allow for releases when court is not in session.

What do the Reforms Tell Us

- **The cost of eliminating the use of monetary conditions of bail is borne directly by local governments, the judiciary, and defendants**
- In New Jersey, the cost is going to be at least $50 million annually and probably more like $100 million annually.
- Throwing out the entire system due to a new philosophy that monetary bail is “unfair” is bad public policy—discovering the real issues and solving them with all partners at the table achieves accountability and progress

Jefferson County, CO – Where it all Began

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

Cost of Supervision and Monitoring

- It is not free—someone must pay
- Monthly tabs in many jurisdictions can be as high as $500 (see IBT Article re: Antonio Green case)
- Even a $100 a month tab will add up to $1,000 over 10 months—that is a financial condition of bail, to be borne by a county government or a defendant
- Continuous payments can ensnare defendants—miss a payment, what happens? Re-arrest?
- Who will pay for the indigent? Someone must pay

Costs of Supervision and Monitoring

"You go to the National Association of Pretrial Services Conference, or the American Parole and Probation Association, and in the vendor room is all this technology for tracking," says Cherise Burdeen. "They portray it as a great technology, and they tell all these county folks, "**This doesn't cost you anything; the defendant pays for it all**!"

Don’t Use Bail as a Collection Mechanism

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

We Support Judicial Discretion

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

AMERICAN BAIL COALITION

We are here to help

Thank you for your time

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics
Special Report

November 2007, NCJ 214994

State Court Processing Statistics, 1990-2004

Pretrial Release of Felony Defendants in State Courts

By Thomas H. Cohen, Ph.D.
and Brian A. Reaves, Ph.D.
BJS Statisticians

Between 1990 and 2004, 62% of felony defendants in State courts in the 75 largest counties were released prior to the disposition of their case. Beginning in 1998, financial pretrial releases, requiring the posting of bail, were more prevalent than non-financial releases. This increase in the use of financial releases was mostly the result of a decrease in the use of release on recognizance (ROR), coupled with an increase in the use of commercial surety bonds. These findings are from a multi-year analysis of felony cases from the biennial State Court Processing Statistics (SCPS) program, sponsored by the Bureau of Justice Statistics.

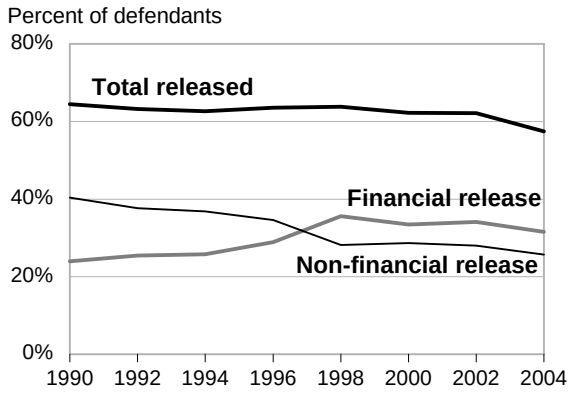
Among defendants detained until case disposition, 1 in 6 had been denied bail and 5 in 6 had bail set with financial conditions required for release that were not met. The higher the bail amount set, the lower the probability of release. About 7 in 10 defendants secured release when bail was set at less than $5,000, but this proportion dropped to 1 in 10 when bail was set at $100,000 or more.

Murder defendants were the least likely to be released pretrial. Defendants charged with rape, robbery, burglary, and motor vehicle theft also had release rates lower than the overall average. The highest release rate was for defendants charged with fraud.

Defendants were less likely to be released if they had a prior arrest or conviction or an active criminal justice status at the time of arrest (such as those on probation or parole). A history of missed court appearances also reduced the likelihood that a defendant would be released.

About a third of released defendants were charged with one or more types of pretrial misconduct. Nearly a fourth had a bench warrant issued for failing to appear in court, and about a sixth were arrested for a new offense. More than half of these new arrests were for felonies.

Since 1998, most pretrial releases of State court felony defendants in the 75 largest counties have been under financial conditions requiring the posting of bail



Logistic regression analyses that controlled for factors such as offense and criminal history found that Hispanics were less likely than non-Hispanic defendants to be released, and males were less likely than females to be released.

Logistic regression was also used to calculate the probability of pretrial misconduct for defendants with a given characteristic, independent of other factors. Characteristics associated with a greater probability of being rearrested while on pretrial release included being under age 21, having a prior arrest record, having a prior felony conviction, being released on an unsecured bond, or being part of an emergency release to relieve jail crowding.

Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances. Defendants released on an unsecured bond or as part of an emergency release were most likely to have a bench warrant issued because they failed to appear in court. The probability of failing to appear in court was higher among defendants who were black or Hispanic, had an active criminal justice status at the time of arrest, or had a prior failure to appear.

About 3 in 5 felony defendants in the 75 largest counties were released prior to case disposition

From 1990 to 2004, an estimated 62% of State court felony defendants in the 75 largest counties were released prior to the disposition of their case (table 1). Defendants were about as likely to be released on financial conditions requiring the posting of bail (30%) as to be granted a non-financial release (32%). Among the 38% of defendants detained until case disposition, about 5 in 6 had a bail amount set but did not post the financial bond required for release.

Table 1. Type of pretrial release or detention for State court felony defendants in the 75 largest counties, 1990-2004

Detention-release outcome	State court felony defendants in the 75 largest counties	
	Number	Percent
Total	424,252	100%
Released before case disposition	264,604	62%
Financial conditions	125,650	30%
Surety bond	86,107	20
Deposit bond	23,168	6
Full cash bond	12,348	3
Property bond	4,027	1
Non-financial conditions	136,153	32%
Personal recognizance	85,330	20
Conditional release	32,882	8
Unsecured bond	17,941	4
Emergency release	2,801	1%
Detained until case disposition	159,647	38%
Held on bail	132,572	32
Denied bail	27,075	6

Note: Counts based on weighted data representing 8 months (the month of May from each even-numbered year). Detail may not add to total because of rounding.

From 1990 to 2004, surety bond (33%) and release on recognizance (32%) each accounted for about a third of all releases. Other release types that accounted for at least 5% of releases during this period were conditional release (12%), deposit bond (9%), unsecured bond (7%), and full cash bond (5%). (See box on page 3 for definitions of release types.)

Type of pretrial release	Percent of all releases, 1990-2004
Financial conditions	48%
Surety bond	33
Deposit bond	9
Full cash bond	5
Property bond	2
Non-financial conditions	51%
Recognizance	32
Conditional	12
Unsecured bond	7
Emergency release	1%
Number of releases	264,604

Since 1998 a majority of pretrial releases have included financial conditions

Except for a decline to 57% in 2004, the percentage of defendants released each year varied only slightly, from 62% to 64%. A more pronounced trend was observed in the type of release used (figure 1). From 1990 to 1998, the percentage of released defendants under financial conditions rose from 24% to 36%, while non-financial releases dropped from 40% to 28%.

Detention-release outcomes for State court felony defendants in the 75 largest counties, 1990-2004

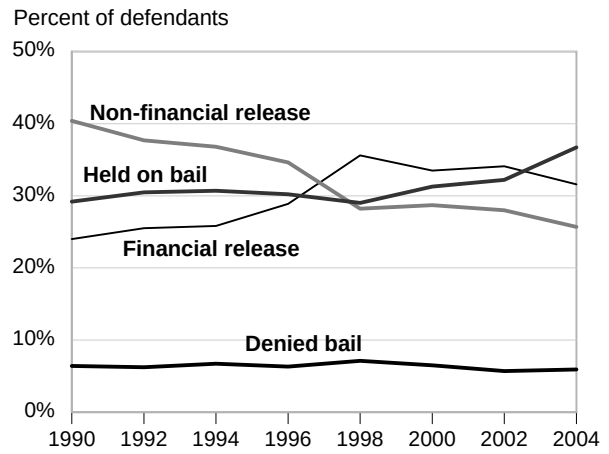


Figure 1

Surety bond surpassed release on recognizance in 1998 as the most common type of pretrial release

The trend away from non-financial releases to financial releases was accompanied by an increase in the use of surety bonds and a decrease in the use of release on recognizance (ROR) (figure 2). From 1990 through 1994, ROR accounted for 41% of releases, compared to 24% for surety bond. In 2002 and 2004, surety bonds were used for 42% of releases, compared to 23% for ROR.

Type of pretrial release of State court felony defendants in the 75 largest counties, 1990-2004

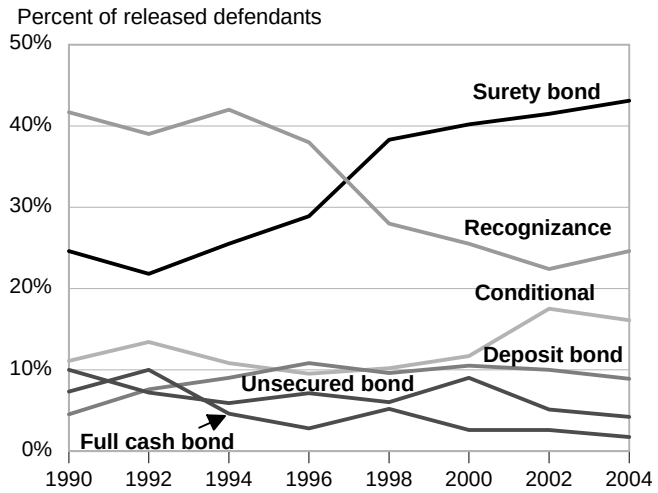


Figure 2

Types of pretrial release used in State courts

Type of release	Defendant	Financial liability for failure to appear	Liable party
Financial			
Surety bond	Pays fee (usually 10% of bail amount) plus collateral if required, to commercial bail agent.	Full bail amount	Bail agent
Deposit bond	Posts deposit (usually 10% of bail amount) with court, which is usually refunded at successful completion of case.	Full bail amount	Defendant
Full cash bond	Posts full bail amount with court.	Full bail amount	Defendant
Property bond	Posts property title as collateral with court.	Full bail amount	Defendant
Non-financial			
Release on recognizance (ROR)	Signs written agreement to appear in court (includes citation releases by law enforcement).	None	N/A
Conditional (supervised) release	Agrees to comply with specific conditions such as regular reporting or drug use monitoring.	None	N/A
Unsecured bond	Has a bail amount set, but no payment is required to secure release.	Full bail amount	Defendant
Emergency release	Released as part of a court order to relieve jail crowding.	None	N/A

Two-thirds of defendants had financial conditions required for release in 2004, compared to half in 1990

Including both released and detained defendants, the percentage required to post bond to secure release rose from 53% in 1990 to 68% in 2004 (not shown in table). Overall, about half (48%) of defendants required to post bail for release did so. From 1998 through 2004, 51% posted bail, compared to 45% in prior years.

The higher the bail amount the lower the probability of pretrial release

The median bail amount for detained defendants ($15,000) was 3 times that of released defendants ($5,000); the mean amount was about 5 times higher ($58,400 versus $11,600) (not shown in table). For all defendants with a bail amount set, the median bail amount was $9,000 and the mean was $35,800.

There was a direct relationship between the bail amount and the probability of release. When the bail was under $10,000, most defendants secured release, including 7 in 10 defendants with bail under $5,000 (figure 3). The proportion released declined as the bail amount increased, dropping to 1 in 10 when bail was $100,000 or higher.

Bail amount and release rates for State court felony defendants in the 75 largest counties, 1990-2004

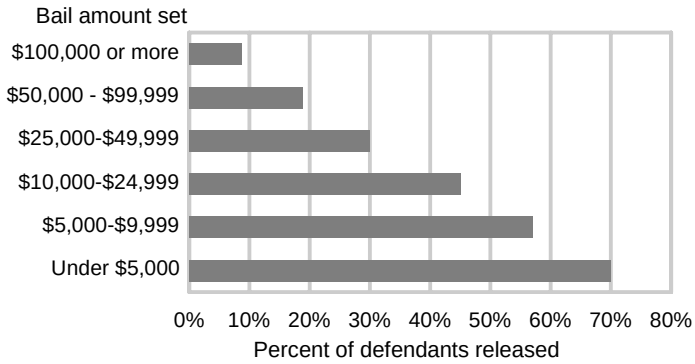


Figure 3

Defendants arrested for violent offenses or who had a criminal record were most likely to have a high bail amount or be denied bail

Courts typically use an offense-based schedule when setting bail. After assessing the likelihood that a defendant, if released, will not appear in court and assessing any danger the defendant may present to the community, the court may adjust the bail higher or lower. In the most serious cases, the court may deny bail altogether. The use of a high bail amount or the denial of bail was most evident in cases involving serious violent offenses. Eighty percent of defendants charged with murder had one of these conditions; with rape, 34%; and with robbery, 30% (table 2).

Table 2. State court felony defendants in the 75 largest counties with bail set at $50,000 or more or denied bail, 1990-2004

Characteristic	Percent of defendants: Bail $50,000 or more	Percent of defendants: Denied bail
Most serious arrest charge		
Murder	35%	45%
Rape	25	9
Robbery	20	10
Assault	13	7
Non-violent offenses	7	6
Criminal justice status at arrest		
Active	13%	13%
None	8	3
Prior felony conviction		
Yes	13%	10%
No	7	4

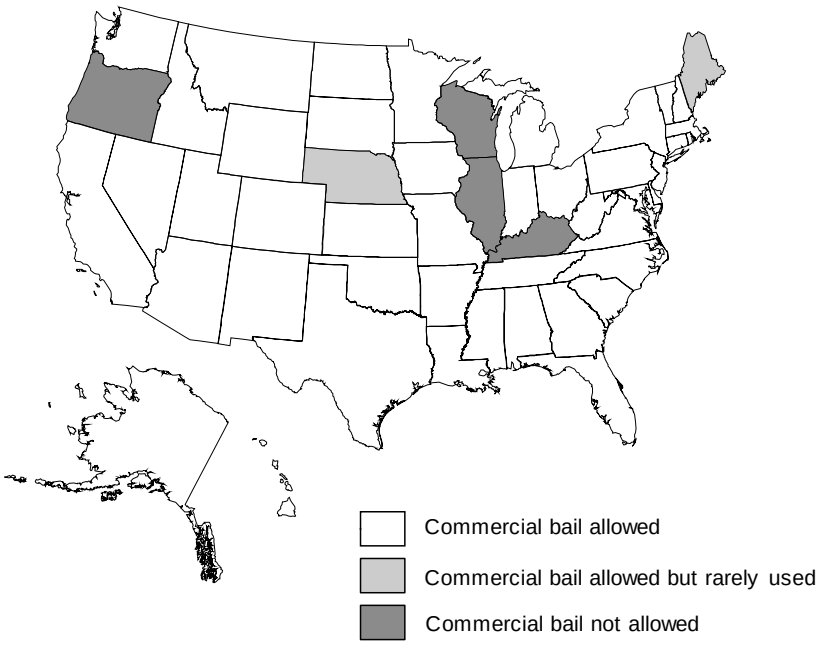
Defendants who had an active criminal justice status (13%) were about 4 times as likely as other defendants (3%) to have bail denied. Defendants with 1 or more prior felony convictions (10%) were more than twice as likely as those without such a conviction (4%) to have bail denied.

Commercial bail and pretrial release

An estimated 14,000 commercial bail agents nationwide secure the release of more than 2 million defendants annually, according to the *Professional Bail Agents of the United States.* (See *Methodology* for other sources on bail and pretrial release.) Bond forfeiture regulations and procedures vary by jurisdiction, but most States regulate commercial bail and license bail agents through their departments of insurance. Four States do not allow commercial bail: Illinois, Kentucky, Oregon, and Wisconsin. Also, the District of Columbia, Maine, and Nebraska have little commercial bail activity.

Bail agents generally operate as independent contractors using credentials of a surety company when posting appearance bond for their client. For a fee, the surety company allows the bail agent to use its financial standing and credit as security on bonds. In turn, the bail agent charges the defendant a fee (usually 10% of the bail amount) for services. In addition, the bail agent often requires collateral from the defendant.

Commercial bail agents are active in almost every State



A bail agent usually has an opportunity to recover a defendant if they fail to appear. If the defendant is not returned, the agent is liable to the court for the full bail amount. Most jurisdictions permit revocation of the bond, which allows the agent to return the defendant to custody before the court date, freeing the agent from liability. The agent may be required to refund the defendant's fee in such cases. Courts can also set aside forfeiture judgments if good cause is shown as to why a defendant did not appear.

Commercial bail has been a target of critics since the 1960s. Some organizations, such as the American Bar Association and the National District Attorney's Association, have recommended its abolishment. Some critics have succeeded in obtaining reforms in the release process, beginning with the Manhattan Bail Project in 1961.

This project showed that defendants could be successfully released pretrial without the financial guarantee of a surety bail agent if verified information concerning their stability and community ties were presented to the court.

The success of the Manhattan Bail Project resulted in a wide range of pretrial reforms in the Federal system, culminating in the Bail Reform Act of 1966. This Act created a presumption in favor of release for most non-capital defendants and led to the creation of non-surety release options, such as refundable deposit bail and conditional release. Many States followed the Federal system and created such release options. The Bail Reform Act of 1984 set forth new procedures which allowed the pretrial detention of defendants believed to be a danger to the community in addition to a flight risk.

Pros and cons of commercial bail

Issue	Proponents:	Critics:
Jail crowding	Reduces jail population by providing a means for defendants to obtain pretrial release.	Increases jail population because indigent defendants can't afford commercial bail services. Others are passed over because they are seen as a flight risk.
Private enterprise	Provides pretrial release and monitoring services at no cost to taxpayers.	A private, for-profit entity should not be involved in the detention-release decision process.
Performance incentives	Creates an incentive that results in the majority of defendants being returned to court because the bail agent is liable for defendants who fail to appear.	Bail agents don't always have their bonds forfeited or actively pursue absconders.
Value of service	Provides the opportunity for many defendants to secure their freedom while awaiting disposition of their case.	The fee and collateral are typically more than indigent defendants can afford. Defendants who have the money would be better off spending it on legal representation.

Financial releases took longer on average than non-financial releases

About half of all pretrial releases occurred within 1 day of arrest, and about three-fourths within 1 week. Non-financial releases (59%) were more likely to occur within a day of arrest than financial releases (45%). For all release types, more than 90% occurred within 1 month of arrest. Among defendants released under financial conditions, the amount of time from arrest to release increased with bail amounts, ranging from a mean of 8 days for those with a bail amount of less than $5,000 to 22 days for bail amounts of $50,000 or more (not shown in table).

	Cumlative percent of releases occurring within —		
	1 day	1 week	1 month
All releases	52%	78%	92%
Financial	45	76	92
Non-financial	59	80	93

About a quarter of released defendants had failed to appear in court during a prior case

A majority (61%) of the defendants released into the community to await disposition of their case had been arrested previously (table 3). This included 27% who had failed to appear in court during a prior case. About half had 1 or more prior convictions (48%), and nearly a third (30%) had at least one prior felony conviction. About 1 in 4 released defendants had an active criminal justice status from a prior case at the time of their arrest.

Table 3. Criminal history of released and detained State court felony defendants in 75 largest counties, 1990-2004

Criminal history	Released defendants	Detained defendants
Prior arrest	61%	83%
With at least 1 failure-to-appear	27	44
Prior conviction	48%	75%
Felony	30	57
Violent felony	7	15
Active criminal justice status	27%	51%

The role of pretrial services programs in the release process

According to a BJA nationwide study, about 300 pretrial services programs were operating in the U.S. during 2001.* More than two-thirds of the programs had begun since 1980 and nearly half since 1990. The programs operated in a variety of administrative settings, including probation offices, courts, sheriffs' offices, independent agencies, and private non-profit organizations.

Pretrial programs play an important role in the release process. Standards published by the American Bar Association and the National Association of Pretrial Services Agencies have specified core functions a model pretrial program should provide.

Information gathering and assessment

An important function of a pretrial program is to conduct a pretrial investigation to assist judicial officers in making release decisions. Prior to the initial court appearance, the pretrial program gathers information about the defendant, primarily through voluntary interviews and records checks. Some defendants may not be eligible for pretrial release because of the severity of the charged offense or an existing criminal justice status such as parole, probation, or an outstanding warrant.

*John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs,* Washington D.C.: Bureau of Justice Assistance, July 2003 (NCJ 199773).

Information collected from the pretrial investigation typically includes:

- residency
- employment status
- community ties
- criminal record
- court appearance record
- criminal justice status
- mental health status
- indications of substance abuse

Often a risk assessment tool is used to incorporate the information from the pretrial investigation into a score that guides the release decision. Periodic validation of the instrument ensures that it provides an accurate, unbiased measure of a defendant's potential for misconduct if released.

Supervision and follow-up

Pretrial services programs provide supervision and monitoring of a defendant's compliance with release conditions, such as testing for drug or alcohol use and electronic monitoring of defendants confined to a restricted area. These programs also assist with locating and returning defendants who fail to appear in court. Such assistance may include providing information to law enforcement officials or working directly with defendants to persuade them to return.

Pretrial programs may regularly review the status of detained defendants for changes in their eligibility for release and facilitate their release where appropriate.

Prior criminal activity was more prevalent among pretrial detainees. About half had a criminal justice status at the time of arrest. A large majority had prior arrests (83%) and convictions (75%). More than half (57%) had a prior felony conviction, including 15% with a conviction for a violent felony. Nearly half (44%) had a prior failure to appear.

Many factors influence the pretrial release decision

SCPS collects information on some of the factors courts consider when making pretrial release decisions, such as arrest offenses, criminal justice status, prior arrests, prior court appearance record, and prior convictions. It does not collect data on residency, employment status, community ties, mental health status, or substance abuse history.

The unique contribution of the factors collected in SCPS to the release decision can be assessed using logistic regression techniques. Logistic regression produces nonlinear estimations for each independent variable which can be transformed into predicted probabilities (table 4). In the case of pretrial release, the logistic regression analyses yielded patterns similar to that of the bivariate results. (See *Methodology* for more information on the logistic regression techniques).

Murder defendants (19%) had the lowest probability of being released, followed by those charged with robbery (44%), burglary (49%), motor vehicle theft (49%), or rape (53%). Defendants charged with fraud (82%) were the most likely to be released.

Male and Hispanic defendants less likely to be released than females and whites

Female defendants (74%) were more likely than males (60%) to be released pretrial. By race and Hispanic origin, non-Hispanic whites (68%) had a higher probability of release than Hispanics (55%). Pretrial detention rates for Hispanics may have been influenced by the use of immigration holds to detain those illegally in the U.S.

Defendants with a prior criminal record less likely to be released than those without a prior arrest

Defendants on parole (26%) or probation (43%) at the time of their arrest for the current offense were less likely to be released than those without an active criminal justice status (70%). Defendants who had a prior arrest, whether they had previously failed to appear in court (50%) or not (59%), had a lower probability of release than those without a prior arrest (79%).

Defendants with a prior conviction (51%, not shown in table) had a lower probability of being released than those without a conviction (77%). This was true even if the prior convictions were for misdemeanors only (63%). The effect of a conviction record on release was more pronounced if the defendant had at least one prior felony conviction (46%).

Table 4. State court felony defendants in the 75 largest counties released prior to case disposition, 1990-2004

Variable	Percent released	Predicted probability of release
Most serious arrest charge		
Murder	19%	11%**
Rape	53	44**
Robbery	44	36**
Assault	64	59*
Burglary	49	49**
Motor vehicle theft	49	50**
Larceny/theft	68	66
Forgery	72	67
Fraud	82	76**
Drug sales (reference)	63	63
Other drug (non-sales)	68	70*
Weapons	67	65
Driving-related	73	76**
Age at arrest		
Under 21 (reference)	68%	64%
21-29	62	63
30-39	59	60**
40 or older	62	60**
Gender		
Male (reference)	60%	60%
Female	74	69**
Race/Hispanic origin		
White non-Hispanic (reference)	68%	66%
Black non-Hispanic	62	64
Other non-Hispanic	65	63*
Hispanic, any race	55	51**
Criminal justice status at arrest		
No active status (reference)	70%	67%
Released on pending case	61	63
On probation	43	49**
On parole	26	37**
Prior arrest and court appearance		
No prior arrests (reference)	79%	65%
Prior arrest record without FTA	59	62*
Prior arrest record with FTA	50	58*
Most serious prior conviction		
No prior convictions (reference)	77%	70%
Misdemeanor	63	64**
Felony	46	51**

Note: Logistic regression (predicted probability) results exclude the year 1990 because of missing data. Asterisks indicate category differed from the reference category at one of the following significance levels: *<=.05, **<=.01. Not all variables in the model are shown. See Methodology on page 11 for more information.

About 1 in 5 detained defendants eventually had their case dismissed or were acquitted

Sixty percent of released defendants were eventually convicted — 46% of a felony and 14% of a misdemeanor (table 5). Conviction rates were higher for detained defendants, with 78% convicted, including 69% of a felony.

On average, released defendants waited nearly 3 times longer than detainees for case adjudication

Released defendants waited a median of 127 days from time of arrest until adjudication, nearly 3 times as long as those who were detained (45 days). For those released, the average time from release to adjudication was nearly 1 month longer for those on financial release (125 days) than for those released under non-financial conditions (101 days) (table 6). By specific release type, defendants released on recognizance had the shortest wait (98 days), while those released on property bond had the longest (140 days).

Table 5. Adjudication outcomes for released and detained State court felony defendants in the 75 largest counties, 1990-2004

	Released defendants	Detained defendants
Adjudication outcome		
Convicted	60%	78%
Felony	46	69
Misdemeanor	14	9
Not convicted	40%	22%
Dismissal/acquittal	31	19
Other outcome	9	2
Median number of days from arrest to adjudication	127 days	45 days

Note: Detail may not add to total because of rounding.

Table 6. Time from pretrial release until adjudication of State court felony defendants in the 75 largest counties, 1990-2004

	Average time	
Type of release	Mean	Median
All types	112 days	90 days
Financial releases	125 days	106 days
Surety bond	125	106
Full cash bond	122	100
Deposit bond	126	108
Property bond	140	120
Non-financial releases	101 days	75 days
Recognizance	98	72
Conditional	103	75
Unsecured bond	110	86

Incidents of pretrial misconduct increased with length of time in release status

The number of defendants charged with pretrial misconduct increased with the length of time spent in a release status. About a third (32%) of failure-to-appear bench warrants were issued within a month of release and about two-thirds (68%) within 3 months. The pattern was similar for rearrests, with 29% occurring within 1 month of release and 62% within 3 months.

	Cumulative percent of pretrial misconduct occurring within —			
	1 week	1 month	3 months	6 months
Any type	9%	32%	67%	88%
Failure to appear	9	32	68	89
Rearrest	8	29	62	85

A third of released defendants were charged with pretrial misconduct within 1 year after release

From 1990 through 2004, 33% of defendants were charged with committing one or more types of misconduct after being released but prior to the disposition of their case (figure 4). A bench warrant for failure to appear in court was issued for 23% of released defendants. An estimated 17% were arrested for a new offense, including 11% for a felony.

Pretrial misconduct rates for State court felony defendants in the 75 largest counties, 1990-2004

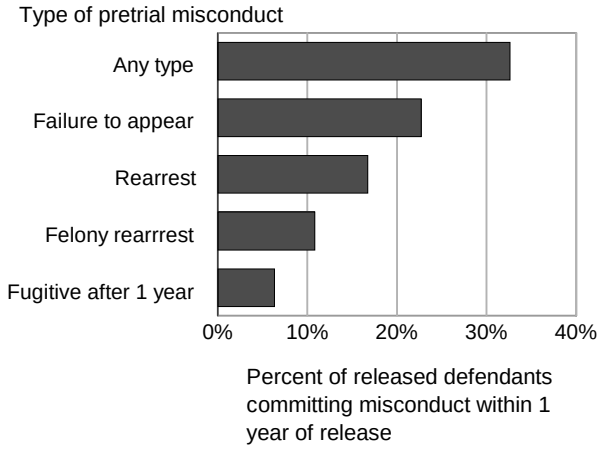


Figure 4

Pretrial misconduct rates stable from 1990-2004

Overall misconduct rates varied only slightly from 1990 through 2004, ranging from a high of 35% to a low of 31% (figure 5). For failure to appear, the range was from 21% to 24%, and the fugitive rate ranged from 5% to 8%. Overall rearrest rates ranged from 13% to 21%, and felony rearrest rates from 10% to 13%.

Pretrial misconduct rates for State court felony defendants in the 75 largest counties, 1990-2004

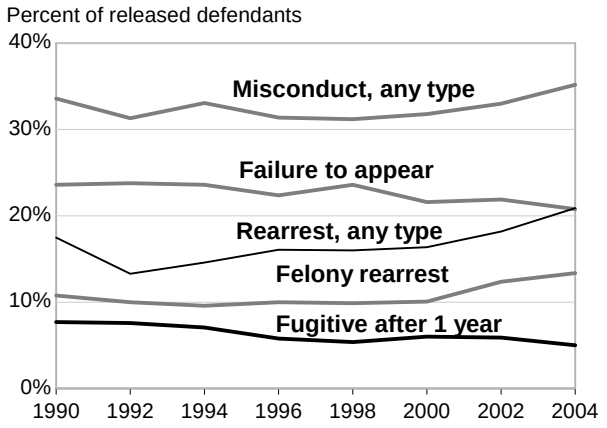


Figure 5

Pretrial misconduct rates highest for emergency releases

About half (52%) of the 1% of defendants released under an emergency order to relieve jail crowding were charged with some type of misconduct (table 7). Pretrial misconduct rates for other types of releases ranged from 27% to 36%.

After emergency release (45%), the highest failure-to-appear rate was for defendants released on unsecured bond (30%). Property bond (14%), which also accounted for just 1% of releases, had the lowest failure-to-appear rate followed by surety bond (18%).

About 1 in 4 defendants who failed to appear in court were fugitives at end of a 1-year study period

By type of release, the percent of the defendants who were fugitives after 1 year ranged from 10% for unsecured bond releases to 3% of those released on surety bond.

Overall, 28% of the defendants who failed to appear in court and had a bench warrant issued for their arrest were still fugitives at the end of a 1-year study period. This was 6% of all defendants released pretrial (not shown in table).

Compared to the overall average, the percentage of absconded defendants who remained a fugitive was lower for surety bond releases (19%).

Type of release	Number of defendants failing to appear	Percent still a fugitive after 1 year
All types	54,485	28%
Surety bond	13,411	19%
Emergency	1,168	22
Conditional	6,788	27
Property bond	490	30
Recognizance	20,883	30
Deposit	4,548	31
Unsecured bond	5,018	33
Full cash bond	2,179	36

Likelihood of pretrial misconduct lower for defendants released after being charged with murder or rape

Defendants released after being charged with murder (19%) or rape (18%) had misconduct rates that were about half that for defendants charged with motor vehicle theft (39%), drug trafficking (39%), or burglary (37%).

Younger, male, black, and Hispanic defendants more likely to be charged with pretrial misconduct

Released defendants age 20 or younger (33%) had higher misconduct rates than those age 40 or older (28%). This pattern also existed for rearrest and failure-to-appear rates. Male defendants (34%) had a higher misconduct rate than females (28%). Black (36%) and Hispanic (34%) defendants had a higher misconduct rate than whites (28%).

Prior criminal activity associated with greater probability of pretrial misconduct

Defendants who had an active criminal justice status at the time of arrest — such as pretrial release (48%), parole (47%), or probation (44%) — had a higher misconduct rate than those who were not on a criminal justice status (27%). This difference was observed for both failure to appear and rearrest.

Defendants with a prior failure to appear (49%) had a higher misconduct rate than defendants who had previously made all court appearances (30%) or had never been arrested (23%). Defendants with a prior failure to appear (35%) were about twice as likely to have a bench warrant issued for failing to appear during the current case than other defendants (18%).

Defendants with at least one prior felony conviction (43%) had a higher rate of pretrial misconduct than defendants with misdemeanor convictions only (34%) or no prior convictions (27%).

Table 7. State court felony defendants in the 75 largest counties charged with pretrial misconduct, 1990-2004

Variable	Number of defendants	Percent of released defendants charged with pretrial misconduct			
		Any type	Rearrest	Failure to appear	Fugitive
Type of pretrial release					
Release on recognizance	80,865	34%	17%	26%	8%
Surety bond	78,023	29	16	18	3
Conditional release	31,162	32	15	22	6
Deposit bond	20,993	30	14	22	7
Unsecured bond	17,001	36	14	30	10
Full cash bond	11,190	30	15	20	7
Property bond	3,649	27	17	14	4
Emergency release	2,656	52	17	45	10
Most serious arrest charge					
Murder	741	19%	12%	9%	1%
Rape	3,481	18	9	10	2
Robbery	12,947	35	21	21	6
Assault	32,931	23	12	14	4
Burglary	18,377	37	19	25	6
Larceny/theft	26,667	33	16	25	7
Motor vehicle theft	6,415	39	20	29	7
Forgery	8,374	33	15	24	7
Fraud	9,094	21	8	15	5
Drug trafficking	47,182	39	21	27	8
Other drug	50,547	37	18	29	8
Weapons	8,574	27	13	17	5
Driving-related	8,148	28	14	18	5
Age at arrest					
20 or younger	55,505	33%	20%	21%	5%
21-29	90,768	34	17	24	7
30-39	71,049	33	16	24	7
40 or older	44,701	28	13	20	6
Gender					
Male	211,396	34%	18%	23%	6%
Female	52,291	28	12	21	6
Race/Hispanic origin					
Black, non-Hispanic	96,348	36%	19%	25%	7%
White, non-Hispanic	64,571	28	14	19	4
Hispanic, any race	49,544	34	17	25	8
Other, non-Hispanic	5,165	23	13	14	3
Criminal justice status at arrest					
On parole	6,012	47%	25%	32%	7%
On probation	25,765	44	26	30	6
Released pending prior case	25,955	48	30	30	7
No active status	167,227	27	12	19	6
Prior arrests and FTA history					
Prior arrest record with FTA	59,468	49%	27%	35%	8%
Prior arrest record, no FTA	75,806	30	17	18	5
No prior arrests	85,366	23	8	18	7
Most serious prior conviction					
Felony	75,187	43%	25%	28%	6%
Misdemeanor	44,989	34	19	23	5
No prior convictions	129,975	27	12	19	7

Logistic regression analysis of pretrial misconduct

Logistic regression was used to assess the impact of given characteristics independent of other factors on the probability of a released defendant being charged with pretrial misconduct. The predicted probabilities generated from these analyses are presented in the adjacent table. (See *Methodology* for more information on logistic regression).

Type of release

Predicted overall misconduct rates were higher for unsecured bond (42%) and emergency (56%) releases. This was also the case for rearrest and failure to appear rates. Property (17%), surety (20%), deposit (20%), and full cash (20%) bonds all had lower predicted failure-to-appear rates than recognizance (24%). The percent of released defendants predicted to be fugitives after 1 year was lowest for property (3%) and surety bonds (4%). Emergency release and property bonds each accounted for 1% of all releases, compared to about 30% each for surety bonds and recognizance. (See table 7 for the number of defendants accounted for by each type of pretrial release).

Arrest offense

Drug trafficking defendants (38%) had higher predicted rates of overall misconduct, rearrest and failure-to-appear than defendants charged with murder (19%), rape (21%), assault (26%), fraud (29%), or a weapons offense (31%).

Demographic characteristics

Defendants age 20 or younger (39%) had a higher predicted misconduct rate than those ages 21 to 39 (35%) or age 40 or older (30%). This pattern held for rearrest, but for court appearance record only defendants age 40 or older were predicted to perform better than those under age 21.

Male defendants (35%) were predicted to have a higher misconduct rate than females (32%). Hispanic (37%) and black (36%) defendants were predicted to be charged with misconduct more often than whites (32%). This difference also existed for failure to appear, but not rearrest.

Criminal history

Defendants with an active criminal justice status at the time of arrest, such as parole (42%), probation (39%), or pretrial release (42%), had higher predicted misconduct rates than those without such a status (33%). This difference was observed for both failure to appear and rearrest.

Compared to those without prior arrests (29%), defendants with an arrest record were predicted to be charged with misconduct more often, especially if they had previously failed to appear in court (47%). This pattern was observed for both failure to appear and rearrest. Defendants with prior felony convictions (39%) had a higher predicted misconduct rate than other defendants (33%). This pattern also existed for rearrest, but not failure to appear.

	Predicted probability of being charged with pretrial misconduct			
Variable	Any type	Rearrest	Failure to appear	Fugitive
Type of pretrial release				
Recognizance (reference)	34%	17%	24%	6%
Surety bond	33	19	20**	4**
Conditional release	37	18	24	6
Deposit bond	32	18	20*	5
Unsecured bond	42**	21*	28*	8
Full cash bond	34	19	20*	6
Property bond	31	18	17**	3**
Emergency release	56**	26**	39*	8
Most serious arrest charge				
Drug trafficking (reference)	38%	20%	24%	6%
Murder	19**	11*	8**	/
Rape	21**	11**	10**	2**
Robbery	32**	18	19**	5
Assault	26**	15**	14**	3**
Burglary	37	19	23	5*
Larceny/theft	37	19	25	6
Motor Vehicle theft	39	20	27*	5
Forgery	38	19	27	6
Fraud	29**	15**	18**	4**
Other drug	42**	21	29**	7
Weapons	31**	16**	19**	4**
Driving-related	33**	16**	22	6
Age at arrest				
20 or younger (reference)	39%	24%	22%	4%
21-29	35**	19**	23	5**
30-39	35**	17**	23	6**
40 or older	30**	14**	20**	5**
Gender				
Male (reference)	35%	19%	22%	5%
Female	32**	16**	22	5
Race/Hispanic origin				
White, non-Hispanic (reference)	32%	18%	20%	4%
Black, non-Hispanic	36**	19	23**	5**
Other, non-Hispanic	27*	16	16*	3
Hispanic, any race	37**	19	25**	7**
Criminal justice status at arrest				
No active status (reference)	33%	17%	21%	5%
Released pending prior case	42**	24**	26**	5
On probation	39**	22**	25**	5
On parole	42**	20	29**	6
Prior arrests and FTA history				
No prior arrests (reference)	29%	13%	20%	5%
Prior arrest record with FTA	47**	26**	31**	6*
Prior arrest record, no FTA	33**	20**	19	4**
Most serious prior conviction				
No prior convictions (reference)	33%	17%	22%	6%
Misdemeanor	33	17	21	4**
Felony	39**	22**	23	4**

Note: Asterisks indicate category differed from reference category at one of the following significance levels: *<=.05, **<=.01. Not all variables in model are shown. See Methodology on page 11 for more information. /Murder defendants were excluded from the fugitive analysis.

Methodology

Data utilized

This report analyzed data from the State Court Processing Statistics (SCPS) series, covering felony cases filed in May of even-numbered years from 1990 through 2004. SCPS is a biennial data collection series that examines felony cases processed in a sample of 40 of the Nation's 75 most populous counties. The counties included in the sample have varied over time to account for changing national population patterns. For a year-by-year summary of the counties participating in SCPS, see Appendix table 1. For more information on the SCPS methodology see the BJS report *Felony Defendants in Large Urban Counties, 2002* at http://www.ojp.usdoj.gov/bjs/abstract/fdluc02.htm>.

Each SCPS data collection tracks approximately 15,000 felony cases for up to one year, with the exception of murder defendants who are followed for up to two years. In addition to defendant demographic characteristics and criminal history, SCPS also obtains data on a variety of felony case processing factors, including the types of arrest charges filed, conditions of pretrial release such as bail amount and type of release, and instances of pretrial misconduct including failure to appear in court, rearrest while on pretrial release, and other violations that resulted in the revocation of release. Adjudication and sentencing outcomes are also recorded.

Using multivariate statistical techniques

This report analyzes pretrial release and misconduct through both bivariate and multivariate statistical techniques. While the bivariate statistics provide a descriptive overview of pretrial release and misconduct among felony defendants in the 75 most populous counties, multivariate analysis can help disentangle the impacts that independent variables such as demographic characteristics, prior criminal history, severity of arrest charges, and release type have on dependent variables such as the probability of pretrial release and misconduct. Logistic regression models were used to estimate the probability of pretrial release and misconduct. This is one widely accepted method for analyzing the effects of multiple independent factors on dichotomous or binomial outcomes.

The regression analyses excluded data from 1990 because of the large number of cases missing data on race or Hispanic origin. The regression models also excluded cases that had missing data on either the independent or dependent variables. This resulted in reductions in the number of cases analyzed. From 1992 through 2004, 99,899 felony defendants were either released or detained, but when missing data were excluded from the regression models, the number of cases analyzed declined to 71,027.

To determine the impact of missing data, logistic regression models excluded certain independent factors to increase the number of analyzed cases. Since the results from these analyses did not differ appreciably from the full model, missing data did not affect the results.

SCPS data are drawn from a sample and weighted to represent cases processed in the 75 most populous counties during the month of May. When the regressions used these weighted data, the large number of weighted cases resulted in statistical significance for nearly all the variables in the model. Effect weighting was employed to address this issue. Through effect weighting, the SCPS data were weighted to the number of cases actually sampled rather than the number of cases in the universe represented by the sample.

Generalized estimating equation techniques

One primary assumption of binary logistic regression is that all observations in the dataset are independent. This assumption is not necessarily appropriate for the SCPS series because the data are collected on a county basis. The county-based nature of SCPS creates a presumption of clustered data. In clustered datasets, "the data can be grouped into natural or imposed clusters with observations in the same clusters tending to be more alike than observations in different clusters."* The clustered nature of the SCPS data was handled by utilizing generalized estimating equation (GEE) techniques. Logistic regression modeling with generalized estimating equation (GEE) techniques provides for more efficient computation of regression coefficients and more robust standard error estimates.

Interpreting logistic regression probabilities

Logistic regression produces nonlinear estimations for each independent variable that can be difficult to interpret. In this report, the logistic regression coefficients are made interpretable by transforming them into predicted probabilities (see table 4 and box on page 10). The predicted probabilities were calculated by setting all independent variables to their mean levels, setting the independent variable of interest to a value of one, multiplying the means of each independent variable by their respective logistic regression parameter estimates, taking the exponential function of the summed product of means and parameter estimates, and then calculating the probability of that exponential function.

Limitations of models

The logistic regression analyses were limited and intended to reflect the effects of only selected factors that were available in the SCPS data. Other factors could potentially be related to pretrial release and misconduct. Examples of these include: defendants' residence, employment status, community ties, mental health status, and substance abuse. If data on these variables were available, the logistic regression results could be altered.

*Paul D. Allison, 2001. *Logistic Regression Using the SAS System: Theory and Application*, Cary, N.C.: SAS Institute Inc., page 179.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

Washington, DC 20531

Official Business
Penalty for Private Use $300

PRESORTED STANDARD
POSTAGE & FEES PAID
DOJ/BJS
Permit No. G-91

Additional sources on bail and pretrial release include:

Demuth, Stephen, "Racial and Ethnic Differences in Pretrial Release Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees." *Criminology*: 41(3): 873 (2003).

Feeley, Malcolm M., "Bail Reform," chap. 2 in *Court Reform on Trial: Why Simple Solutions Fail (*New York, NY: Basic Books, Inc., 1983, pp. 40-79).

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

Helland, Eric and Alexander Tabarrok, "Public versus Private Law Enforcement: Evidence from Bail Jumping." *Journal of Law and Economics*: (47): pp. 93-122 (2004).

Kennedy, Spurgeon and D. Alan Henry. *Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision* <http://www.pretrial.org/publications.html> (1996).

Watson, Jerry W. and L. Jay Labe, "Bail Bonds," chap. 8 in *The Law of Miscellaneous and Commercial Surety Bonds*, Chicago, IL: American Bar Association, 2001, pp. 127-142.

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Jeffrey L. Sedgwick is the director.

This Special Report was written by Thomas H. Cohen, Ph.D., and Brian A. Reaves, Ph.D. William J. Sabol, Ph.D. provided technical assistance. Tracey Kyckelhahn provided verification. Tina Dorsey produced and edited the report, under the supervision of Doris J. James. Jayne Robinson prepared the report for final printing.

November 2007, NCJ 214994

This report in portable document format and in ASCII and its related statistical data and tables are available at the BJS World Wide Web Internet site: <http://www.ojp.usdoj.gov/bjs/abstract/prfdsc.htm>.

Office of Justice Programs

Innovation • Partnerships • Safer Neighborhoods
http://www.ojp.usdoj.gov

Appendix table 1. State Court Processing Statistics, participating jurisdictions, 1990-2004

County or equivalent	Number of cases		Year of participation							
	Unweighted	Weighted	1990	1992	1994	1996	1998	2000	2002	2004
Jefferson (AL)	1,517	6,612			■	■	■	■	■	■
Maricopa (AZ)	4,245	13,848	■	■	■	■	■	■	■	■
Pima (AZ)	2,655	7,588			■	■	■	■	■	■
Alameda (CA)	1,941	8,471			■	■	■	■	■	■
Contra Costa (CA)	817	2,043			■	■	■	■	■	■
Los Angeles (CA)	10,419	41,676	■	■	■	■	■	■	■	■
Orange (CA)	2,984	9,964	■			■	■	■	■	■
Riverside (CA)	1,646	5,926						■	■	■
Sacramento (CA)	1,898	6,786	■	■	■	■	■			
San Bernardino (CA)	3,061	9,909	■	■	■	■	■	■	■	■
San Diego (CA)	1,529	6,604	■	■				■	■	■
San Francisco (CA)	1,327	5,675		■	■	■	■			
San Mateo (CA)	526	1,315						■	■	■
Santa Clara (CA)	2,840	9,552	■	■	■	■	■	■	■	■
Ventura (CA)	576	1,901			■	■	■			
New Haven (CT)	238	1,047						■		
Washington (DC)	263	1,315	■	■						
Broward (FL)	2,155	7,095	■	■	■	■	■	■	■	■
Duval (FL)	387	1,935	■	■				■	■	■
Miami-Dade (FL)	4,355	17,420	■	■	■	■	■			
Hillsborough (FL)	1,415	4,515	■	■	■	■	■			
Orange (FL)	1,367	5,938			■	■	■			
Palm Beach (FL)	1,154	4,255	■	■				■	■	■
Pinellas (FL)	1,687	6,290	■	■				■	■	■
Fulton (GA)	1,748	6,992	■	■		■		■	■	■
Honolulu (HI)	890	2,692	■		■	■		■	■	■
Cook (IL)	5,738	22,952	■	■	■	■	■	■	■	■
DuPage (IL)	463	1,528			■	■	■			
Marion (IN)	2,878	9,908				■	■	■	■	■
Jefferson (KY)	310	1,240			■	■	■			
Essex (MA)	546	2,004	■	■						
Middlesex (MA)	657	2,168			■					
Suffolk (MA)	1,546	5,753	■	■	■	■	■			
Baltimore (MD)	1,006	2,515						■	■	■
Baltimore (city) (MD)	1,542	4,108			■	■	■			
Montgomery (MD)	1,216	3,494		■			■	■	■	■
Macomb (MI)	644	1,610						■	■	■
Wayne (MI)	2,030	8,120	■	■	■	■	■	■	■	■
Jackson (MO)	999	3,297			■	■	■			
St. Louis (MO)	1,582	5,447	■	■	■	■	■			
Essex (NJ)	2,636	11,947	■	■	■			■	■	■
Bronx (NY)	3,713	15,404	■	■	■	■	■	■	■	■
Erie (NY)	1,048	4,134	■	■	■	■	■			
Kings (NY)	3,893	15,988	■	■	■	■	■	■	■	■
Monroe (NY)	1,124	3,874	■	■	■	■	■			
Nassau (NY)	772	1,930						■	■	■
New York (NY)	2,801	11,204	■	■	■	■	■			
Queens (NY)	2,058	7,943	■	■	■	■	■			■
Suffolk (NY)	778	2,567			■	■	■			
Westchester (NY)	980	2,450						■	■	■
Franklin (OH)	618	2,719						■	■	■
Hamilton (OH)	1,188	4,970	■	■	■	■	■			
Allegheny (PA)	502	1,516	■	■	■	■	■			
Montgomery (PA)	567	2,225	■	■					■	■
Philadelphia (PA)	4,043	15,952	■	■	■	■	■	■	■	■
Shelby (TN)	2,837	11,332	■	■	■	■	■	■	■	■
Dallas (TX)	2,169	8,676	■	■	■	■	■	■	■	■
El Paso (TX)	949	2,373						■	■	■
Harris (TX)	3,661	14,644	■	■	■	■	■	■	■	■
Tarrant (TX)	1,526	6,941	■	■				■	■	■
Travis (TX)	660	2,904						■	■	■
Salt Lake (UT)	1,212	4,981	■	■				■	■	■
Fairfax (VA)	1,158	4,670	■	■				■	■	■
King (WA)	1,324	5,591	■	■	■	■	■			
Milwaukee (WI)	1,542	5,161		■	■	■	■			

Appendix table 2. Logistic regression analysis of pretrial release decision

Variable	Mean	Estimate	Standard error
Most serious arrest charge			
Murder	0.0084	-2.6575**	0.2412
Rape	0.0142	-0.7846**	0.1173
Robbery	0.0588	-1.1088**	0.1004
Assault	0.1222	-0.1821*	0.0785
Other violent	0.0401	-0.1755	0.1173
Burglary	0.0870	-0.5562**	0.0817
Larceny	0.0888	0.1313	0.0805
Motor vehicle theft	0.0342	-0.5281**	0.0997
Forgery	0.0279	0.1781	0.1052
Fraud	0.0274	0.6323**	0.1660
Other property	0.0411	0.3007	0.1655
Other drug	0.1995	0.3023*	0.1384
Weapons	0.0272	0.1001	0.1074
Driving-related	0.0276	0.6147**	0.1306
Other public order	0.0294	0.0926	0.1332
Age at arrest			
21-29	0.3423	-0.0544	0.0357
30-39	0.2871	-0.1700**	0.0451
40 or older	0.1884	-0.1713**	0.0456
Gender			
Female	0.1735	0.4031**	0.0393
Race/Hispanic origin			
Black, non-Hispanic	0.4456	-0.1274	0.0690
Other, non-Hispanic	0.0229	-0.1592*	0.0734
Hispanic, any race	0.2432	-0.6488**	0.1122
Criminal justice status at arrest			
Other status	0.0283	-0.9417**	0.1509
Released pending prior case	0.1057	-0.1758	0.1325
On probation	0.1605	-0.7471**	0.0686
On parole	0.0610	-1.2450**	0.1671
Prior arrest and FTA history			
Prior arrest record with FTA	0.3050	-0.3144*	0.1468
Prior arrest record, no FTA	0.4205	-0.1597*	0.0749
Most serious prior conviction			
Felony	0.4156	-0.8396**	0.0756
Misdemeanor	0.1746	-0.2886**	0.0847
Study year			
1992	0.0940	0.2602	0.1513
1994	0.1212	0.1664	0.1515
1996	0.1332	0.3148*	0.1512
1998	0.1276	0.1924	0.1475
2000	0.1731	0.1250	0.1190
2002	0.1795	0.1576	0.1069
Intercept	1.0000	1.4226	0.1652
Number of observations	71,027		
Log likelihood	-41377.1132		

Note: Logistic regression figures derived from generalized estimating equation (GEE) methods. GEE logistic regression procedures were an appropriate technique because of the clustered nature of the felony case processing data. The regression estimates were transformed into predicted probabilities in the report by setting all independent variables at their mean levels, setting the independent variable of interest to a value of one, and then calculating the probability of the dependent measure outcome for that particular independent variable. Asterisks indicate category difference from the reference category at one of the following significance levels:*>=.05, **>=.01.

Appendix table 3. Logistic regression analysis of pretrial misconduct

Variable	Mean	Estimate	Standard error
Most serious arrest charge			
Murder	0.0019	-0.9339**	0.2569
Rape	0.0118	-0.8203**	0.1123
Robbery	0.0329	-0.2552**	0.0930
Assault	0.1212	-0.5577**	0.0584
Other violent	0.0414	-0.5564**	0.0829
Burglary	0.0684	-0.0368	0.0745
Larceny	0.0985	-0.0148	0.0585
Motor vehicle theft	0.0270	0.0616	0.0888
Forgery	0.0318	0.0264	0.0884
Fraud	0.0373	-0.3690**	0.1076
Other property	0.0472	-0.1442*	0.0624
Other drug	0.2255	0.1666**	0.0544
Weapons	0.0273	-0.2932**	0.0635
Driving-related	0.0327	-0.1878**	0.0694
Other public order	0.0290	-0.4768**	0.1095
Age at arrest			
21-29	0.3403	-0.1352**	0.0251
30-39	0.2737	-0.1736**	0.0428
40 or older	0.1865	-0.3842**	0.0399
Gender			
Female	0.2148	-0.1258**	0.0390
Race/Hispanic origin			
Black, non-Hispanic	0.4449	0.1695**	0.0317
Other, non-Hispanic	0.0238	-0.2248*	0.0897
Hispanic, any race	0.2021	0.2163**	0.0334
Criminal justice status at arrest			
Other status	0.0177	0.1061	0.1047
Released pending prior case	0.0943	0.4042**	0.0561
On probation	0.1105	0.2764**	0.0475
On parole	0.0239	0.3778**	0.1046
Prior arrest and FTA history			
Prior arrest record with FTA	0.2371	0.7565**	0.0540
Prior arrest record, no FTA	0.4111	0.1756**	0.0438
Most serious prior conviction			
Felony	0.3034	0.2417**	0.0496
Misdemeanor	0.1807	-0.0071	0.0482
Type of pretrial release			
Surety bond	0.3714	-0.0570	0.0682
Full cash bond	0.0352	-0.0408	0.1078
Deposit bond	0.0957	-0.0963	0.1114
Property bond	0.0118	-0.1435	0.1249
Conditional release	0.1443	0.1107	0.0850
Unsecured bond	0.0647	0.3188**	0.1036
Emergency release	0.0105	0.8663**	0.1830
Study year			
1992	0.1007	-0.2136	0.1483
1994	0.1199	-0.1810	0.1237
1996	0.1378	-0.2908	0.1746
1998	0.1171	-0.3394*	0.1588
2000	0.1797	-0.2050	0.1332
2002	0.1828	-0.1417	0.1146
Intercept	1.0000	-0.6608	0.1264
Number of observations	40,179		
Log likelihood	-23469.1617		

Note. See note on appendix table 2. Asterisks indicate category difference from the reference category at one of the following significance levels:*>=.05, **>=.01.

Appendix table 4. Logistic regression analysis of pretrial rearrest for new offense

Variable	Mean	Estimate	Standard error
Most serious arrest charge			
Murder	0.0018	-0.7451*	0.3078
Rape	0.0119	-0.7720**	0.1070
Robbery	0.0329	-0.1737	0.0987
Assault	0.1215	-0.3368**	0.0670
Other violent	0.0415	-0.3810**	0.0955
Burglary	0.0685	-0.0593	0.0708
Larceny	0.0986	-0.0569	0.0584
Motor vehicle theft	0.0270	-0.0229	0.0790
Forgery	0.0320	-0.1010	0.0875
Fraud	0.0377	-0.3578**	0.1238
Other property	0.0471	-0.1260	0.0752
Other drug	0.2233	0.0585	0.0604
Weapons	0.0275	-0.3018**	0.1159
Driving-related	0.0329	-0.3122**	0.0842
Other public order	0.0292	-0.3861**	0.0949
Age at arrest			
21-29	0.3407	-0.3505**	0.0338
30-39	0.2731	-0.4504**	0.0399
40 or older	0.1870	-0.6585**	0.0472
Gender			
Female	0.2155	-0.2279**	0.0344
Race/Hispanic origin			
Black, non-Hispanic	0.4468	0.0653	0.0430
Other, non-Hispanic	0.0238	-0.1297	0.1010
Hispanic, any race	0.1999	0.0705	0.0468
Criminal justice status at arrest			
Other status	0.0177	0.2058*	0.0979
Released pending prior case	0.0953	0.4476**	0.0485
On probation	0.1099	0.3147**	0.0501
On parole	0.0240	0.1713	0.1054
Prior arrest and FTA history			
Prior arrest record with FTA	0.2370	0.8455**	0.0701
Prior arrest record, no FTA	0.4136	0.4895**	0.0578
Most serious prior conviction			
Felony	0.3049	0.3581**	0.0617
Misdemeanor	0.1807	0.0471	0.0552
Type of pretrial release			
Surety bond	0.3747	0.1077	0.0611
Full cash bond	0.0350	0.0991	0.1273
Deposit bond	0.0969	0.0600	0.1089
Property bond	0.0119	0.0404	0.1462
Conditional release	0.1453	0.0640	0.0842
Unsecured bond	0.0655	0.2473*	0.1160
Emergency release	0.0104	0.5156**	0.1371
Study year			
1992	0.0981	-0.5280**	0.1859
1994	0.1145	-0.3974	0.2419
1996	0.1378	-0.4183	0.2615
1998	0.1152	-0.4412*	0.1998
2000	0.1836	-0.3840**	0.1466
2002	0.1866	-0.2230	0.1244
Intercept	1.0000	-1.3631	0.1478
Number of observations	39,209		
Log Likelihood	-15735.4776		

Note. See not on appendix table 2. Asterisks indicate category difference from the reference category at one of the following significance levels:*>=.05, **>=.01.

Appendix table 5. Logistic regression analysis of pretrial failure to appear

Variable	Mean	Estimate	Standard error
Most serious arrest charge			
Murder	0.0019	-1.3123**	0.3566
Rape	0.0118	-1.0242**	0.1934
Robbery	0.0329	-0.2917**	0.0810
Assault	0.1212	-0.6787**	0.0599
Other violent	0.0413	-0.7196**	0.0721
Burglary	0.0683	-0.0595	0.0690
Larceny	0.0987	0.0527	0.0667
Motor vehicle theft	0.0271	0.1741*	0.0895
Forgery	0.0319	0.1358	0.0897
Fraud	0.0374	-0.3719**	0.1115
Other property	0.0471	-0.0572	0.0756
Other drug	0.2245	0.2330**	0.0586
Weapons	0.0275	-0.2747**	0.0660
Driving-related	0.0328	-0.0964	0.0710
Other public order	0.0289	-0.4888**	0.1249
Age at arrest			
21-29	0.3404	0.0299	0.0296
30-39	0.2737	0.0363	0.0471
40 or older	0.1869	-0.1253**	0.0415
Gender			
Female	0.2150	-0.0300	0.0380
Race/Hispanic origin			
Black, non-Hispanic	0.4450	0.2006**	0.0377
Other, non-Hispanic	0.0238	-0.2509*	0.1023
Hispanic, any race	0.2019	0.2970**	0.0459
Criminal justice status at arrest			
Other status	0.0177	0.0778	0.1026
Released pending prior case	0.0947	0.2711**	0.0570
On probation	0.1103	0.2347**	0.0556
On parole	0.0238	0.4306**	0.1076
Prior arrest and FTA history			
Prior arrest record with FTA	0.2376	0.5902**	0.0646
Prior arrest record, no FTA	0.4106	-0.0505	0.0458
Most serious prior conviction			
Felony	0.3036	0.0494	0.0603
Misdemeanor	0.1805	-0.0439	0.0414
Type of pretrial release			
Surety bond	0.3712	-0.2713**	0.0890
Full cash bond	0.0353	-0.2444*	0.1047
Deposit bond	0.0962	-0.2307*	0.1193
Property bond	0.0117	-0.4271**	0.1499
Conditional release	0.1447	-0.0119	0.0958
Unsecured bond	0.0650	0.2051*	0.1063
Emergency release	0.0106	0.6762*	0.2823
Study year			
1992	0.1003	0.0228	0.0958
1994	0.1202	-0.0754	0.0906
1996	0.1356	-0.0846	0.0849
1998	0.1180	-0.0251	0.0864
2000	0.1801	-0.0041	0.0903
2002	0.1836	0.0413	0.1050
Intercept	1.0000	-1.3378	0.1278
Number of observations	39,838		
Log likelihood	-19756.0265		

Note. See not on appendix table 2. Asterisks indicate category difference from the reference category at one of the following significance levels:*>=.05, **>=.01.

Appendix table 6. Logistic regression analysis of pretrial fugitive status

Variable	Mean	Estimate	Standard error
Most serious arrest charge			
Rape	0.0118	-1.2836**	0.2824
Robbery	0.0330	-0.3058	0.1690
Assault	0.1215	-0.8666**	0.1170
Other violent	0.0414	-0.8022**	0.1352
Burglary	0.0684	-0.2789*	0.1133
Larceny	0.0988	0.0044	0.0817
Motor vehicle theft	0.0271	-0.2829	0.1506
Forgery	0.0320	-0.1446	0.1210
Fraud	0.0375	-0.5742**	0.2041
Other property	0.0471	-0.2003	0.1418
Other drug	0.2250	0.0861	0.1021
Weapons	0.0275	-0.3852**	0.1358
Driving - related	0.0329	-0.0587	0.1268
Other public order	0.0289	-0.6688**	0.1355
Age at arrest			
21-29	0.3404	0.3634**	0.0685
30-39	0.2739	0.3892**	0.0556
40 or older	0.1870	0.2437**	0.0700
Gender			
Female	0.2153	-0.1027	0.0717
Race/Hispanic origin			
Black, non-Hispanic	0.4449	0.2836**	0.0767
Other, non-Hispanic	0.0238	-0.1648	0.1917
Hispanic, any race	0.2020	0.6593**	0.0905
Criminal justice status at arrest			
Other status	0.0177	0.0222	0.1925
Released pending prior case	0.0949	0.0150	0.0744
On probation	0.1103	0.0332	0.0738
On parole	0.0236	0.2334	0.1520
Prior arrest and FTA history			
Prior arrest record with FTA	0.2379	0.1558*	0.0732
Prior arrest record, no FTA	0.4104	-0.3075**	0.0742
Most serious prior conviction			
Felony	0.3037	-0.2730**	0.1049
Misdemeanor	0.1806	-0.2527**	0.0663
Type of pretrial release			
Surety bond	0.3710	-0.6047**	0.1126
Full cash bond	0.0353	-0.0503	0.1600
Deposit bond	0.0962	-0.3515	0.3069
Property bond	0.0116	-0.7676**	0.2294
Conditional release	0.1448	-0.0633	0.1156
Unsecured bond	0.0650	0.1997	0.1726
Emergency release	0.0106	0.2469	0.2407
Study year			
1992	0.1002	0.3370**	0.1208
1994	0.1201	0.1748	0.1116
1996	0.1357	0.1633	0.0965
1998	0.1180	0.2129	0.1388
2000	0.1802	0.2684**	0.0908
2002	0.1835	0.1906	0.1112
Intercept	1.0000	-2.9223	0.1845
Number of observations	39,752		
Log Likelihood	-8391.7631		

Note. See not on appendix table 2. Asterisks indicate category difference from the reference category at one of the following significance levels:*>=.05, **>=.01.

CRIME AND JUSTICE INSTITUTE

Delaware Pretrial Risk Assessment Validation & Lessons Learned

Presented at NCJA Baltimore Regional Meeting

June 2016

Presentation Overview

- Pretrial Risk Assessment Implementation & Validation
- Delaware Pretrial Risk Assessment
- Validation Questions
- Study Design & Analytic Strategy
- Validation Sample
- Validation Results
- Summary & Limitations
- Next Steps

Implementation & Validation

- Why is pretrial risk assessment implementation and validation important?
  - Pretrial risk tools can either be developed for a target population or an existing tool can be adopted
  - Need to ensure adopted or developed tool predicts pretrial failure for target population and properly classifies risk
- Implementation planning is essential for this process to be successful and to prepare for a future validation of the tool

Implementation & Validation

- Implementation plans include
  - Training of staff and stakeholders
  - Fidelity monitoring and coaching to increase scoring proficiency
  - Quality assurance process for data collection and reporting
  - Planning for future validation (e.g., collect pretrial failure data)
  - Sustainability practices to support ongoing scoring proficiency, reliable data, and release recommendations

Delaware Pretrial Risk Assessment

- Delaware's pretrial risk assessment was developed for the state
- Primary risk factors included in the tool were identified from existing pretrial tools
- Many of the risk factors are pre-populated using existing data sources
- Following roll out of the pretrial tool, Delaware prepared for future validation

Delaware Pretrial Risk Assessment

- Current age (32 and under)
- FTA capiases in last 5 years (3 or more)
- FTA capiases for felony charges (1 or more)
- Current case has 1 or more felonies
- Criminal history includes felony convictions (0, 1, 2 or more)
- Criminal history includes Title 11, 16, and/or DUI misdemeanor convictions (1 or more)
- Criminal history includes drug and/or DUI convictions (3 or more)
- Currently on probation/parole
- Has open bail on other pending case
- Unemployed at time of arrest
- Lived at current residence for less than 12 months

Validation Questions

1. Is the Delaware pretrial risk assessment a valid instrument for predicting pretrial failure?
2. Does the Delaware pretrial risk assessment classify risk levels appropriately by distinguishing between low, moderate, and high risk defendants based on increasing pretrial failure rates?
3. Does the Delaware pretrial risk assessment appropriately predict risk of pretrial failure for various subgroups (e.g., by gender, race)?

Study Design & Analytic Strategy

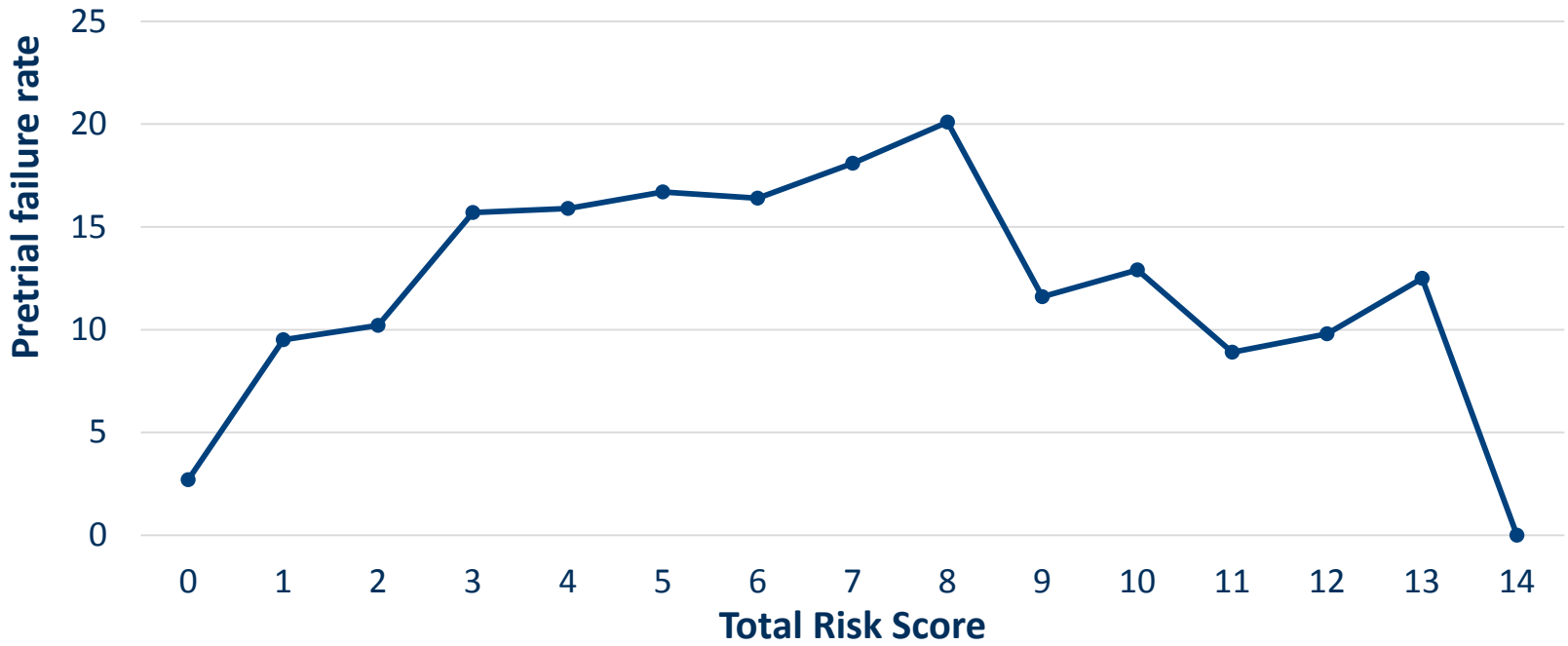
- Univariate and bivariate statistics
  - Describes the demographics, charge severity & type, pretrial risk factor items, total score, and risk levels
  - Examines pretrial failure rates, pretrial failure rates by total score, and pretrial failure rates by risk level
- Multivariate statistics
  - Examines if the total score was significantly related to pretrial failure while controlling for other measures
  - Examines if the risk factor items were significantly related to pretrial failure while controlling for other measures
  - Identifies the odds of pretrial failure with each one point increase on the pretrial risk assessment

Validation Sample

- Random sample of 2,561 cases
  - Assessment was completed between 4/1/2014 and 12/31/2015
  - 70% male, 50% white, mean age of 33 years old
  - 53% had 1 or 2 charges, 69% had only misdemeanors
  - 59% low risk, 36% medium risk, 5% high risk
  - 3% failure to appear, 12% new criminal activity, 14% any pretrial failure

Validation Results

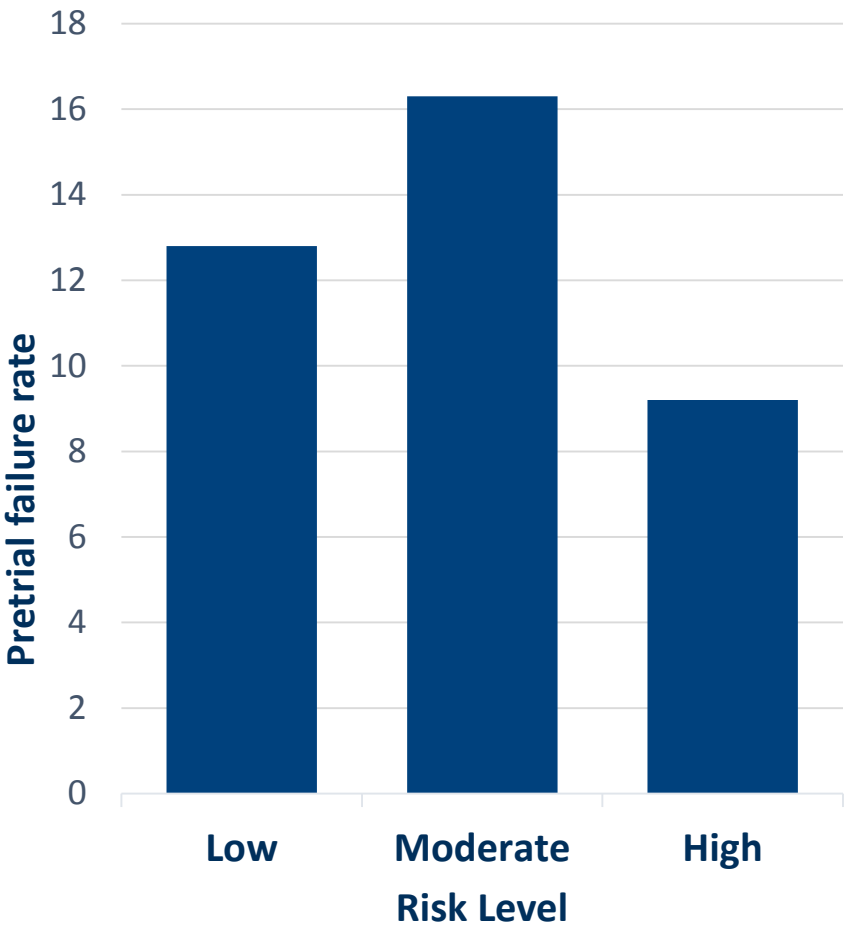
- Is the Delaware pretrial risk assessment a valid instrument for predicting pretrial failure?
  - No, pretrial failure did not consistently increase with total score



Validation Results

- Is the Delaware pretrial risk assessment a valid instrument for predicting pretrial failure?
  - No, overall tool had poor predictive validity
  - Seven of the 11 risk factor items did not demonstrate a significant association with pretrial failure
  - Significant predictors included
    - Current age
    - FTA capiases in last 5 years
    - Criminal history includes misdemeanor convictions
    - Current case has 1 or more felonies (predicted in opposite direction)
      - Most relationships were relatively weak

Validation Results



- Does the Delaware pretrial risk assessment classify risk levels appropriately by distinguishing between low, moderate, and high risk defendants based on increasing pretrial failure rates?
  - No, pretrial failure did not increase with increase in risk level
  - Moderate risk defendants failing at highest rates
  - High risk defendants failing at lowest rates

Validation Results

- Does the Delaware pretrial risk assessment appropriately predict risk of pretrial failure for various subgroups (e.g., by gender, race)?
  - No, the Delaware pretrial risk assessment did not perform well in terms of predicting for various subgroups
  - Prediction was poor by gender and by race
  - Prediction was poor by offense severity

Summary & Limitations

- Individual risk factors on Delaware pretrial risk assessment demonstrated primarily weak and not significant associations with pretrial failure
- Total risk score does not perform well in terms of predicting pretrial failure
  - Similar results for subgroups
- Risk levels do not appropriately classify defendants into low, medium, and high risk based on failure rates

Summary & Limitations

- Failure to appear outcome measure was very low (3%)
  - Appeared to be measuring executed failure to appear warrants as opposed to a defendant missing a court date
- During initial implementation, multiple pretrial risk assessments conducted when defendant had more than one case
- No step-by-step implementation plan to identify early data quality assurance needs

Next Steps

- Determine if current tool should be retained or new tool adopted or developed
  - If adopted, should complete the Consumer Scoring Guide to identify the most appropriate pretrial risk assessment for Delaware
  - If developed, should determine what data are currently available electronically, and what data points could be collected to create a mostly-automated pretrial risk assessment tool
  - Delaware should look to its current tool, as well as publicly available tools and current research to determine data points for developing a tool

Next Steps

- Address electronic data quality
  - Systematize failure to appear data collection and create a failure to appear outcome measure
    - FTA measure should reflect defendant behavior (missing a court date) as opposed to judicial behavior (issuance of FTA capiases)
  - Institute a quality assurance process to ensure all data are consistently and accurately captured system-wide
  - Some outcome data has been hand-collected; while this monumental task allowed for the collection of pretrial failure measures not captured electronically, it is not a sustainable practice and highlights the importance of accurate electronic data collection

Next Steps

- Help Delaware become informed consumers of pretrial risk assessments
  - Provide overview of existing pretrial risk tools and validation results
  - Provide necessary training on pretrial risk assessments
  - Provide institutional knowledge to select and implement a new tool with fidelity

Next Steps

- Conduct training on implementation stages and develop a comprehensive implementation plan for a pretrial risk assessment to be rolled out with fidelity
  - Implementation is an ongoing process and one that takes a significant amount of time and support from all levels of staffing
  - An implementation plan should:
    - Roll out tool with fidelity
    - Establish scoring and administration practices
    - Provide ability for assessment to be evaluated regularly for predictive validity
  - Develop and deliver train the trainer events to sustain fidelity practices

Questions/Contact

- Contact information:

  Kristin Bechtel

  kbechtel@crj.org