OCTOBER 2016

Moving Beyond Money:

A Primer on Bail Reform

CRIMINAL JUSTICE
POLICY PROGRAM
HARVARD LAW SCHOOL

ACKNOWLEDGMENTS

Moving Beyond Money: A Primer on Bail Reform was prepared by the Criminal Justice Policy Program (CJPP) at Harvard Law School. Substantial research and drafting were contributed by Harvard Law School students William Ahee, Micaela Alvarez, Jevhon Rivers, and Grace Signorelli, who participated in the 2015-2016 Criminal Justice Fellows Seminar. The drafting of this primer was overseen by CJPP's executive director, Larry Schwartztol; faculty co-directors, Prof. Carol Steiker and Prof. Alex Whiting; and legal fellow, Anna Kastner. CJPP is grateful for generous insights and feedback from Cherise Fanno Burdeen, Brandon Buskey, Paul Heaton, Alec Karakatsanis, Sandra Mayson, and Timothy R. Schnacke.

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ABOUT THE CRIMINAL JUSTICE POLICY PROGRAM

The Criminal Justice Policy Program (CJPP) at Harvard Law School conducts research and advocacy to support criminal justice reform. It generates legal and policy analysis designed to serve advocates and policymakers throughout the country, convenes diverse stakeholders to diagnose problems and chart concrete reforms, and collaborates with government agencies to pilot and implement policy initiatives.

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INTRODUCTION TO BAIL

OUR NATION'S BAIL SYSTEM AT A CROSSROADS

Bail reform presents a historic challenge – and also an opportunity. Bail is historically a tool meant to allow courts to minimize the intrusion on a defendant's liberty while helping to assure appearance at trial. It is one mechanism available to administer the pretrial process. Yet in courtrooms around the country, judges use the blunt instrument of secured money bail to ensure that certain defendants are detained prior to their trial. Money bail prevents many indigent defendants from leaving jail while their cases are pending. In many jurisdictions, this has led to an indefensible state of affairs: too many people jailed unnecessarily, with their economic status often defining pretrial outcomes.

Money bail is often imposed arbitrarily and can result in unjustified inequalities. When pretrial detention depends on whether someone can afford to pay a cash bond, two otherwise similar pretrial defendants will face vastly different outcomes based merely on their wealth. These disparities can have spiraling consequences since even short periods of pretrial detention can upend a person's employment, housing, or child custody. Being jailed pretrial can also undercut a defendant's ability to mount an effective defense. As these outcomes accumulate in individual cases, improper use of money bail can accelerate unnecessarily high rates of incarceration and deepen disparities based on wealth and race throughout the criminal justice system. Detaining unconvicted defendants because they lack the wealth to afford a cash bond also violates the Constitution.

A recent wave of advocacy has created national momentum for fundamentally rethinking how pretrial decision-making operates. Litigation across the country has resulted in the bail systems of several jurisdictions being declared unconstitutional, destabilizing well-established practices and focusing the attention of policymakers on the problems resulting from money bail.[1] Increasing media attention to the unjust consequences of money bail has intensified scrutiny of existing practice.[2] All of this builds on sustained attention from experts and advocacy groups who have long called for fundamental reform of cash bail.[3] As policymakers across the political spectrum seek to end the era of mass incarceration,[4] reforming pretrial administration has emerged as a critical way to slow down the flow of people into the criminal justice system.

This primer on bail reform seeks to guide policymakers and advocates in identifying reforms and tailoring those reforms to their jurisdiction. In this introductory section, it outlines the basic legal architecture of pretrial decision-making, including constitutional principles that structure how bail may operate. Section II describes some of the critical safeguards that should be in place in jurisdictions that maintain a role for money bail. Where money bail is part of a jurisdiction's pretrial system, it must be incorporated into a framework that seeks to minimize pretrial detention, ensures that people are not detained because they are too poor to afford a cash bond amount, allows for individualized pretrial determinations, and effectively regulates the commercial bail bond industry.

Section III addresses the legal and policy considerations relevant to eliminating the use of money bail. It describes leading reform strategies, highlights competing policy considerations implicated by these strategies, and elaborates constitutional principles that should guide policy reform. It focuses on a set of reforms that many

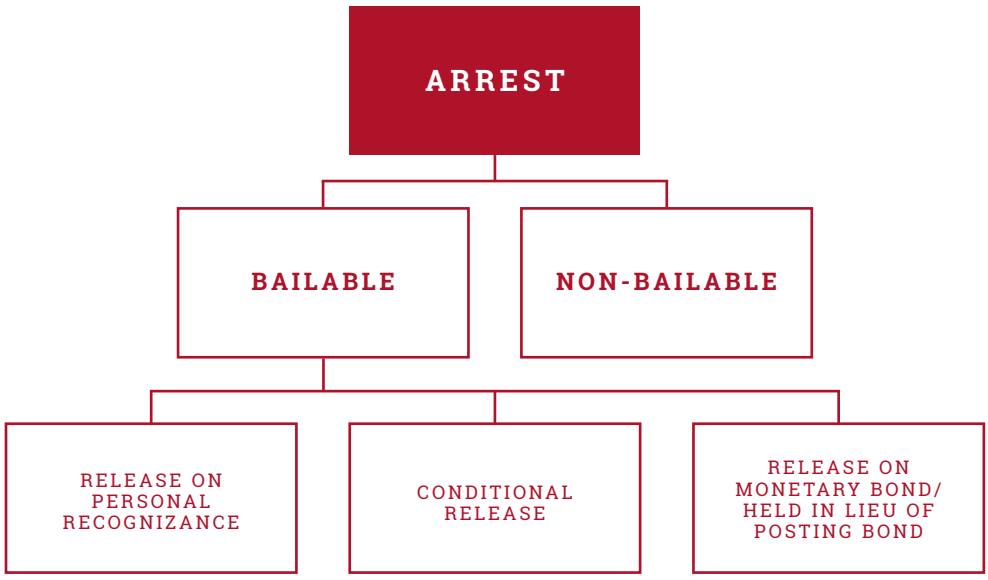
Bail reform presents a historic challenge – and also an opportunity.

advocates have advanced as a way to move to a "risk-based" system of pretrial decision-making. In particular, it focuses on three aspects of such a system: the expanded use of pretrial services agencies and the tools those agencies employ to supervise pretrial defendants in the community; actuarial risk assessment instruments, which provide judges with a quantitative model for forecasting the risk that particular defendants will fail to appear for trial or will commit a serious crime during the pretrial period; and the limited use of preventive detention. This primer does not prescribe a one-size-fits-all package of pretrial reforms. Indeed, some of the potential reforms raise knotty legal and policy questions. Answering those questions will require jurisdictions to assess local circumstances and needs and make fundamental judgments among competing policy values in order to craft appropriate policies. While this primer does not propose a uniform model of bail reform, it can guide advocates and policymakers through the considerations that should structure a reform strategy. It aims to help translate growing momentum for bail reform into on-the-ground change by providing policymakers and advocates with guidance on what alternatives are available and how they might be implemented.

A. BAIL BASICS

When a person is arrested, the court must determine whether the person will be unconditionally released pending trial, released subject to a condition or combination of conditions, or held in jail during the pretrial process. Any outcome other than unconditional release must be justified by a finding of a significant risk that the defendant will not appear at future court appearances or will commit a serious crime in the community during the pretrial period.[5] In some very rare instances, a judge will determine that there is no condition or combination of conditions that can adequately address those risks; in those instances, a judge is deciding that the person is *non-bailable* and should be subject to pretrial detention.

If, however, the judge decides that the person may be released prior to their court date, then the person is *bailable* and several options are available. The judge can release the person on their own *personal recognizance*, meaning that the person promises to reappear for



scheduled court dates in the future. Alternatively, the judge may *conditionally release* the person such that their continued freedom is subject to certain non-monetary conditions, such as pretrial supervision or enrolling in a substance treatment program.

The court can also conditionally release the person by imposing a secured or unsecured bond. A *secured bond* typically allows a defendant to be released only after he pays the monetary amount set by the court, though a bond may also be secured by the defendant's property (such as a house). When bond is *unsecured*, the defendant will owe the unsecured bond amount if he fails to appear in court.

When secured money bonds are used, the amount of money set by the court that a person is obligated to pay as a condition of his release is that person's *cash bail* or *money bail*.[6] The person may be released upon posting a *bond*, or in some cases 10 percent of the total bond amount. Sometimes the person may be able to make that 10 percent payment directly to the court, which will often return the bond payment if the defendant makes all required pretrial appearances. But in many instances, if the person does not have enough money to pay the money bail set by the court, a bail bonds agent, also known as a surety, may make the payment for them via a *surety bail bond*. If the person cannot make the payment, either personally or through a surety, they will remain incarcerated based on their inability to pay the money bail.

B. PATHOLOGIES OF MONEY BAIL AND THE GROWING MOVEMENT FOR REFORM

Reliance on money bail has been shown to unfairly disadvantage impoverished defendants and to undermine community safety. The money bail system results in presumptively innocent people, who have been determined eligible for release, remaining incarcerated simply because they do not have enough money to afford the cash bond. For instance, a 2013 review of New York City's jail system showed that "more than 50% of jail inmates held until case disposition remained in jail because they couldn't afford bail of $2,500 or less."[7] Most of these people were charged with misdemeanors.[8] Of these non-felony defendants, thirty-one percent remained incarcerated on monetary bail amounts of $500 or less.[9] Nationwide, 34% of defendants are kept in jail pretrial solely because they are unable to pay a cash bond, and most of these people are among the poorest third of Americans.[10] National data from local jails in 2011 showed that 60% of jail inmates were pretrial detainees and that 75% of those detainees were charged with property, drug or other nonviolent offenses.[11] In fiscal year 2014 alone, local jails admitted 11.4 million people and the nationwide average daily population included 467,500 pretrial defendants.[12]

Jailing people on the basis of what amounts to a wealth-based distinction violates well-established norms of fairness as well as constitutional principles.

The core critique of money bail is that it causes individuals to be jailed simply because they lack the financial means to post a bail payment. Jailing people on the basis of what amounts to a wealth-based distinction violates well-established norms of fairness as well as constitutional principles. It can also lead to significant levels of unnecessary jailing, which imposes intensely negative consequences on individuals, communities, and the justice system.

Unnecessary pretrial jailing carries significant human costs. The experience of even short terms of pretrial detention can be devastating for an individual. Although "jail operations vary considerably, from local detention facilities in rural America that hold three or four inmates to the jail systems of Chicago, Los Angeles, or New York that hold upwards of 20,000 inmates...regardless of facility size, a consistent theme in the extant literature is that jails have always been characterized by overcrowding, resource limitations, litigation, suicide and violence."[13] Jails "collect and concentrate individuals at high risk of violence, substance abuse, mental illness, and infectious disease."[14] The living and sleeping conditions expose inmates to unsafe and unsanitary conditions. A former jail inmate in Baltimore described conditions including "people that are getting skin bacterial

diseases...they have measles, scabies, lice, fleas."[15] Jails, traditionally designed for short periods of detention, often provide inadequate healthcare, activities, and programming.[16] Serious mental illness affects jail inmates at rates "four to six times higher than in the general population," yet "83 percent of jail inmates with mental illness did not receive mental health care after admission."[17] According to the Bureau of Justice Statistics, suicide has been the leading cause of death in jails every year since 2000.[18]

Pretrial detention also impacts many aspects of an individual's life, including the outcome of his criminal case. Even a short period of pretrial detention can have cascading effects on an individual. Pretrial detention can threaten a person's employment, housing stability, child custody, and access to health care.[19] These destabilizing effects may explain the negative impact that pretrial detention has on the prospects of a defendant's case. Defendants who are detained for the entire pretrial period are "over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial."[20] In addition to a greater likelihood of receiving a jail or prison sentence, defendants who are detained pretrial face *longer* sentences once convicted. The sentences of those who are detained pretrial are "significantly longer – almost three times as long for defendants sentenced to jail, and more than twice as long for those sentenced to prison."[21] Recent studies have identified a causal link between pretrial detention and adverse case outcomes.[22] One of those studies analyzed over 375,000 misdemeanor cases filed between 2008 and 2013 in Harris County, Texas, and concluded that "misdemeanor pretrial detention causally affects case outcomes."[23] The study included a regression analysis that controlled for "a wide range of confounding factors" including demographics, criminal history, and wealth, and found that "detained defendants are 25% more likely than similarly situated releasees to plead guilty."[24]

The current money bail system also exacerbates racial disparities in the criminal justice system. Money bail inherently discriminates against poor defendants, who are by definition less likely to be able to cover bond. Due to well-established linkages between wealth and race,[25] money bail will often result in increased rates of pretrial detention for Black and Latino defendants. Studies have shown that Black and Hispanic defendants are more likely to be detained pretrial than white defendants and less likely to be able to post money bail as a condition of release.[26] Because pretrial detention has such a profound effect on later-in-the-case outcomes, racial disparities in the application of cash bail may reinforce or exacerbate larger inequalities in rates of incarceration.

Unnecessary jailing also undermines community safety. Statistical studies have shown that similarly situated, low-risk individuals who are detained pretrial, even for short periods, are actually more likely to commit new crimes following release.[27] This seemingly counterintuitive outcome reflects the profoundly destabilizing effects of even short durations of pretrial detention. Further, the inability to post money bail may induce innocent people accused of relatively low-level crimes to plead guilty, simply so they can be released.[28] In the case of certain offenses, this endangers communities, as the person actually responsible for committing the crime remains free, yet law enforcement is no longer investigating them.[29] Unnecessary detention is also counterproductive from the perspective of guaranteeing appearance at trial. Studies show that those who remain in pretrial detention for longer than 24 hours and are then released are less likely to reappear as required than otherwise similar defendants who are detained for less than 24 hours.[30]

Policymakers in many states around the country have embraced the call for bail reform. For instance, in 2013, Colorado overhauled its bail statutes to discourage the use of money bail and to encourage the use of risk assessment tools when determining which defendants should be released subject to supervision by a pretrial services agency.[31] In August 2014, New Jersey passed legislation to shift from a money-based to a risk-based system.[32] Connecticut's governor recently announced a proposal for bail reform which included a prohibition on setting money bail for anyone charged with a misdemeanor.[33]

Other jurisdictions have been motivated to take legislative action based on court rulings. In November 2016, New Mexico voters will decide on a constitutional amendment that would authorize limited preventive detention and permit those held on a cash bond to petition the court for relief when they cannot afford bail.[34] The amendment was proposed in response to a 2014 New Mexico Supreme Court opinion, which held that a trial judge erred in using a high bond amount to detain a murder defendant prior to his trial when less restrictive conditions of release would protect public

safety.[35] Across the country, a recent wave of civil rights lawsuits filed in federal court have led localities to reform their practices by ending the use of secured money bail in certain situations for arrestees who are unable to pay.[36]

C. CORE LEGAL PRINCIPLES

A starting point for effectively reforming money bail is understanding the existing legal frameworks that govern pretrial decision-making. This section begins by describing some of the baseline federal constitutional requirements relevant to bail. Next, it describes the role that state constitutions play in defining how bail operates. Finally, this section discusses some of the basic elements of state statutory law and suggests resources for assessing whether a particular state's laws are consistent with best practices.

1. Federal Constitutional Principles

Several constitutional provisions establish basic protections in the pretrial setting. As a threshold matter, the Fourth Amendment's protection against unreasonable seizures guarantees that an arrestee receive a probable cause determination by a neutral magistrate within 48 hours of being arrested.[37]

The Eighth Amendment prohibits the use of "excessive bail,"[38] but it does not define what "excessive" means or specify when bail should be granted.[39] In *Stack v. Boyle*, the Supreme Court provided some guidance in assessing whether bail is excessive. Starting from the premise that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction," the Court defined "excessive" as bail "set at a figure higher than an amount reasonably calculated" to "assure the presence of the accused."[40] Significantly, the Court tied the question of whether a bail determination is excessive to the purpose of bail. As the Court explained, the purpose of bail is to help assure the presence of that defendant at subsequent proceedings.[41] "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."[42] This functional analysis of bail suggests that the Eighth Amendment imposes a sliding scale, linking constitutionally permissible bond amounts (or other conditions of release[43]) to the amount needed to incentivize particular defendants to appear at court proceedings. In practice, however, the courts have not applied this Eighth Amendment principle in a way that has meaningfully constrained the use of bail. The Supreme Court has not substantially addressed these principles since deciding *Stack v. Boyle* in 1951.

Although the Eighth Amendment is the only constitutional provision to explicitly address bail, due process and equal protection principles also apply to the pretrial deprivation of liberty. Due process principles govern the circumstances under which any person can be deprived of their liberty, including through pretrial detention. The Supreme Court has emphasized that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[44] Due process has a substantive component and a procedural one. Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[45] This means that, as a threshold requirement, any system providing for pretrial detention must be narrowly tailored to the compelling government interest put forward to justify detention. Where that substantive requirement is met, a deprivation of liberty must also reflect procedural safeguards designed to balance public and private interests and to minimize the risk of error.[46] The contours of these due process requirements are discussed in more detail in Section III.C.

The use of money bail also implicates equal protection principles, which forbid courts to impose jail or other adverse consequences on the basis of a defendant's indigence. The Supreme Court has repeatedly reaffirmed that "[t]here can be no equal justice where the trial a man gets depends on the amount of money he has."[47] In *Bearden v. Georgia*, the Supreme Court invalidated the automatic revocation of an indigent defendant's probation on the basis of non-payment of a fine, explaining that to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine...would be contrary to the fundamental fairness required by the Fourteenth Amendment."[48] Lower courts have applied this principle to the bail context.[49]

2. Basics of State Law

a. State Constitutional Provisions

Most state constitutions fall into one of two categories:

- **Right to bail:** Most state constitutions include a provisions guaranteeing a right to bail. A typical right-to-bail provision states: "all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great." This common formulation, however, has been subject to varied interpretations.[50] In states where courts have interpreted the word "shall" to require an absolute right to bail, all defendants (except in capital cases) are eligible for release and defendants are only detained in practice if they are unable to pay the monetary bond amount set.[51] In other states, despite employing the same or substantially similar language, the word "bailable" and the "sufficient sureties" clause have been interpreted to preserve the court's discretion in extending bail.[52] In these states, non-capital defendants are eligible for bail but the court may always deny bail if it determines that no amount of surety can prevent a defendant's flight or dangerousness to the community.[53] In a few states, this interpretation has been codified in the state constitution.[54] Additionally, in at least one state, the court has interpreted the constitution to mean that the court can revoke the right to bail if a defendant violates a condition of release.[55]
- **No explicit right to bail:** Nine state constitutions mirror the language of the U.S. Constitution and only prohibit the use of excessive bail.[56]

b. State Statutory Provisions

In most states, provisions governing bail appear in the statutory code, the rules of criminal procedure,[57] or court rules.[58] In some states, there is a specific chapter of the code devoted to bail,[59] while in other states, relevant provisions are scattered throughout the code.[60] For instance, the penal code itself may specify minimum bail amounts for certain offenses.[61]

Certain features of a state's law of bail can entrench the use of money bail and impede reform, while others may facilitate change. For example, a statute encouraging the use of an offense-based bail schedule or bail minimums may present challenges to reforming or eliminating money bail.[62] On the other hand, a statute outlining a robust pretrial services program,[63] or limiting the influx of arrestees by encouraging citations in lieu of arrest,[64] may prove useful in reducing a state's reliance on money bail.

There are resources available to advocates or policymakers seeking a comprehensive overview of the terrain that state law should cover in the pretrial context. The American Bar Association's Standards for Criminal Justice: Pretrial Release ("ABA Standards") provides guidance on the core principles that should structure a state's pretrial justice framework.[65] An extensive treatment of the legal considerations and historical background surrounding pretrial issues is available in Timothy R. Schnacke's "Fundamentals of Bail: A Guide for Pretrial Practitioners and a Framework for American Pretrial Reform" which was published by the U.S. Justice Department in 2014.[66]

II.

CRUCIAL SAFEGUARDS FOR PRETRIAL SYSTEMS THAT USE MONEY BAIL

TOOLS TO MITIGATE THE HARM OF MONEY BAIL

There are a variety of ways that states can limit the harms of money bail or eliminate the use of money bail almost entirely. This section describes strategies for mitigating the harmful effects of money bail. Examples of such reforms include guaranteeing meaningful ability to pay determinations, eliminating bail schedules, and regulating commercial sureties. The reforms outlined in this section are each powerful tools for addressing some of the worst harms of money bail; however, they all rest on the premise that money bail is being used at least in some circumstances. Any reforms should reflect the principle that pretrial detention should be reduced except where strictly necessary.

A. GUARANTEEING ABILITY TO PAY DETERMINATIONS

If jurisdictions intend to impose money bail as a condition of release, it is critical to ensure that courts inquire into the defendant's ability to pay any monetary sum imposed. The Supreme Court has held that a person may not be jailed based on his inability to make a monetary payment unless the court has made an inquiry into the person's ability to pay and determined that non-payment was willful or that no other alternative measure will serve the government's legitimate interests.[67] Though elemental, this principle is violated routinely in jurisdictions all over the country.[68] While there are undoubtedly complex questions about how to structure pretrial decision-making, a clear first principle should be that wealth should not be the determining factor in whether any particular defendant is released or detained.

The Supreme Court has provided some guidance on what an ability-to-pay determination should entail. In *Turner v. Rogers*, a case involving unpaid child support obligations, the Court held that jailing a defendant without inquiring into his financial status "violated the Due Process Clause."[69] In reaching its holding, the Court noted certain procedures that, taken together, create "safeguards" that can "significantly reduce the risk of an erroneous deprivation of liberty" in the nonpayment context.[70] These safeguards included:

> (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.[71]

In the bail context, an ability-to-pay determination with substantially similar safeguards would ensure that people are not held in jail solely as a result of their inability to pay money bail. Although the Supreme Court has not stated exactly what procedures are required, an ability-to-pay determination during a bail hearing should include the following procedures:

- **Notice to the defendant that bail determinations must be individualized.** A defendant should be notified that his ability to pay may be a critical consideration in setting the amount of bail.
- **Use of a standard form.** Courts should use a standard form setting out a defendant's income, assets, financial obligations, and receipt of public benefits, or other financial information relevant to gauging ability to pay.[72]
- **Presumptions about indigence or inability to pay money bail.** At a certain threshold, a defendant should be presumed indigent and therefore unable to pay money bail as a condition of release. Such presumption may be appropriate where, for example, a defendant's income is below a certain threshold, such as income at or below 125% of the Federal Poverty Level.[73]
- **Clearly articulated standards and operative terms.** Terms such as "ability to pay" or "indigence" should be clearly defined by court rules or statute.
- **The right to counsel.** The right to counsel at the bail determination is necessary to ensure that defendants are not unnecessarily detained prior to trial.[74] According to a 2011 national survey, "only ten states guarantee representation at the initial assessment of bail at an initial appearance."[75]
- **A hearing on the record.** A bail hearing on the record will ensure proper procedures are met and give the defendant an opportunity to contest a bail determination.[76]
- **Right to prompt review.** The right to promptly seek review of a bail determination will also ensure that defendants who are unable to pay money bail are not unnecessarily jailed.[77]

Much of the information about a defendant's ability to pay may already be collected when the court determines whether the person qualifies for court-appointed counsel. Such financial information is routinely obtained within minutes from arrestees under penalty of perjury. Drawing on that information-collecting process will be crucial in order to allow prompt ability-to-pay determinations to take place. Having an ability-to-pay determination with these safeguards would ensure that judges set money bond only in an amount that a defendant can afford. This would ensure that money bail is only used where it can facilitate release by realistically incentivizing appearance.

B. INDIVIDUALIZING BAIL DETERMINATIONS AND ELIMINATING BAIL SCHEDULES

Jurisdictions throughout the country use bail schedules to determine the amount of money bail that will be applied to certain categories of offenses. Generally, a bail schedule will list particular offenses or offense types (*e.g.*, various classes of misdemeanor or felony) and assign a specific dollar amount or dollar range. Jurisdictions may embrace bail schedules as a tool of efficiency or because they provide uniformity along certain dimensions (that is, defendants accused of the same offense will have the same bond amount applied to them). Bail schedules present another benefit: by creating a rigid framework for bail determinations, they prevent decision-makers from directly discriminating on the basis of suspect characteristics, like race. But by setting out a simple matrix of offenses and corresponding dollar amounts, bail schedules do not allow for meaningfully individualized considerations of a defendant's circumstances. Bail schedules are often used to set cash bond prior to a defendant's first appearance before a judge or magistrate, precluding judges from determining a defendant's ability to pay or tailoring the amount of the money bond to the defendant's risk of failing to appear.[78]

Bail schedules may be mandatory or advisory and may be set at the state or local level.[79] Once bail schedules are in place, however, they often become de facto law even if they are not formally mandatory. For example, in Alabama, the bail statute states that "[t]he amount of bail shall be set in the amount that the judicial officer feels, in his or her discretion, is sufficient to guarantee the appearance of the defendant."[80] But judges also have the option of using a bail schedule that the Alabama Supreme Court or the local judge has prescribed.[81] Although the bail schedule adopted by the Alabama Supreme Court notes that "courts should exercise discretion in setting bail above or below the scheduled amounts,"[82] in practice this has not always occurred. In a lawsuit challenging bail practices in the City of Clanton, Alabama, a federal judge found that the Clanton Municipal Court did not deviate from a generic bail schedule and that indigent defendants who could not post bail were forced to wait up to a week until they received an individualized bail determination.[83]

By setting out a simple matrix of offenses and corresponding dollar amounts, bail schedules do not allow for meaningfully individualized considerations of a defendant's circumstances.

Some states, rather than require or authorize the creation of bail schedules, will set minimum bail amounts for certain offenses by statute. Statutory bail minimums also preclude judges from making individualized bail determinations. For example, in Alaska, a judge must impose a minimum cash bond of $250,000 for persons charged with offenses involving methamphetamines who have been previously convicted of possession, manufacture, or delivery of the drug.[84] The judge can reduce this amount only if the defendant demonstrates that he or she did not stand to gain financially from the methamphetamine involvement and only participated as an aider or abettor.[85] These standard amounts have no relation either to the amount necessary to ensure appearance or the individual defendant's ability to pay.

Bail schedules are fundamentally inconsistent with individualized decision-making. Money bail may serve only one legitimate role: to incentivize someone to return to court as required.[86] To do that, it must be individualized to the defendant. Just as a fixed bail amount may be too high for a poor defendant to post (and therefore will have the effect of imposing pretrial detention), that same bail amount may be so inconsequential to a wealthy defendant that the prospect of forfeiting bail will not function as a meaningful incentive to appear for trial. The ABA Standards emphasize the importance of properly individualized determinations when setting money bail. Under those standards, money bail may be "imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court."[87] Cash bonds "should not be set to prevent future criminal conduct during the pretrial period."[88] Significantly, the ABA Standards state:

> Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.[89]

Individualized determinations of appropriate bail amounts should be seen as a baseline precondition in any system using money bail. It reflects best practices as well as foundational constitutional requirements.[90]

C. REGULATING OR PROHIBITING COMPENSATED SURETIES

Commercial sureties play a central role in the pretrial procedures of many jurisdictions. A commercial surety, or bail bond agent, purports to guarantee a defendant's appearance by promising to pay the financial condition of a bond if the individual does not appear for court. Bail bond agents are usually licensed by a state and the bonds are underwritten by an insurance company. Bond agents not only charge a non-refundable fee for their service, but usually require the defendant or his friends or family to provide collateral for the full amount of the financial condition. Between 1994 and 2004, the percentage of defendants released on commercial sureties increased from 24% to 42%.[91] In some circumstances, the existence of commercial sureties will act as a safety valve against unnecessary detention by enabling some defendants who could not afford a full bond amount to avoid pretrial detention.

But commercial sureties have also been subject to strong criticisms. Commercial sureties can deepen the pathologies of money bail by devolving pretrial decisions from courts to private companies. For many defendants, pretrial release or detention will depend on whether a commercial surety posts their bond. Ironically, some bail bond agents will not post bail for defendants with low money bail amounts because it is less lucrative for the bail bond company than posting bail for defendants

with high cash bonds.[92] The effect of those incentives may be that defendants with lower bond amounts – typically defendants a court perceives to present lower pretrial risk – remain detained because they cannot pay a cash bond and commercial sureties do not view them as worthwhile clients. Moreover, commercial surety companies face frequent criticism for inadequate training and aggressive pricing practices.[93] Private sureties are also notorious for physically and economically coercive practices and exacerbating the potential for violence, bribery, and corruption in the bail context.[94] The prominence of compensated sureties is, from a global perspective, an outlier – outside the U.S., only the Philippines allows the operation of a commercial surety industry.[95]

Some states, such as Kentucky and Illinois, have passed legislation to ban the bail bonds industry entirely.[96] States can also pass legislation that reduces the role of compensated sureties by allowing defendants to pay deposits directly to the court, instead of bond agents. For example, in Massachusetts, trial court judges now routinely set a money bail amount as a percentage of the surety required so that defendants can pay a 10% deposit directly to the court, rather than a bond agent, and have the deposit returned at the resolution of their case – a practice that effectively eliminated the bail bonds industry.[97]

III.

MOVING BEYOND MONEY: PRACTICAL, LEGAL, AND POLICY CONSIDERATIONS SURROUNDING RISK-BASED SYSTEMS FOR PRETRIAL JUSTICE

NAVIGATING ALTERNATIVES TO MONEY BAIL

The reforms described above assume the continued use of money bail and propose safeguards to help mitigate the worst harms that flow from that system. An alternative approach is to re-conceptualize the pretrial process in a way that replaces money bail with tools better suited to further the legitimate purposes of pretrial decision-making. If cash bonds serve to incentivize defendants to appear for trial, are there alternative practices that more effectively and fairly reduce the risk of pretrial flight? Similarly, to the extent that some judges use high cash bonds as a *sub rosa* means of detaining pretrial defendants whom they consider dangerous, are there mechanisms that promote community safety in a more equitable and transparent way?

One model for displacing the role of money bail is a risk-based approach to pretrial justice. A risk-based model proceeds from the presumption that pretrial defendants should be released. When that presumption is overcome by a significant risk that the defendant will fail to appear or commit a serious crime, a court should impose the minimally invasive condition necessary to address that risk.[98] Many champions of bail reform have called for risk-based system composed of three elements:

1. Pretrial service agencies that use a variety of non-detention-based interventions to ensure appearance at trial and promote community safety
2. Quantitative risk assessment determinations that use algorithms to assign a risk category that judges can incorporate into pretrial decision-making
3. Limited use of preventive detention

This section discusses each of those elements in turn, addressing practical, legal, and policy questions. While this primer takes no position on whether jurisdictions should adopt those elements, it does seek to highlight some of the important considerations that a jurisdiction ought to consider in weighing potential approaches to bail reform. The discussion below seeks to bring the relevant considerations to the surface.

A. PRETRIAL SERVICES AGENCIES AND CONDITIONS OF RELEASE

A key element of a risk-based model is the strategic, evidence-based use of pretrial services. Pretrial services can take many forms, but it generally refers to the bundle of interventions that will ensure that an individual defendant appears at trial and is not rearrested during the pretrial period. Pretrial services are thus an indispensable element of a system that replaces money bail. Instead of relying on cash bonds and pretrial detention, pretrial services offer an array

WASHINGTON D.C.: A CASH-LESS BAIL SYSTEM

Washington, DC offers an example of a busy and complex court system that has virtually eliminated money bail and maintained positive pretrial outcomes. The city has a high-functioning pretrial services agency that facilitates pretrial release and detention decisions and provides appropriate levels of supervision and treatment for released defendants that do not rely on money bail.[99] Nearly 88% of defendants in Washington D.C. are released with non-financial conditions.[100] This nearly cash-less bail system has proven successful in maintaining public safety and the integrity of the court system. Between 2007 and 2012, 90% of released defendants have made all scheduled court appearances and over 91% were not rearrested while in the community before trial.[101] Ninety-nine percent of released defendants were not rearrested on a violent crime while in the community.[102] At the same time, the D.C. bail system has allowed defendants awaiting trial to remain in their communities for the entirety of their pretrial period; 88% of released defendants remained in the community while their cases were pending without a revocation of release or supervision.[103] Of course, the DC system has certain unique characteristics: all of its judges operate in a single courthouse, which may reinforce a culture of pretrial release; it has an extremely high-functioning public defender system, which helps ensure proper representation at pretrial detention hearings; and its pretrial services agency receives funding from the federal government. Still, the D.C. bail system demonstrates that, with alternative methods to manage risk, money can be virtually eliminated from the bail process without negatively affecting court appearance rates or public safety.

of less restrictive tools that are likely to produce better outcomes for the jurisdictions in which they operate. For these reasons, expanded pretrial services have been an important component of recent state-based efforts at bail reform.

Some states already authorize the creation of a pretrial services agency that is empowered to screen defendants, make recommendations regarding detention or bail, and provide services such as treatment for mental health conditions and substance use disorder.[104] In recent years, six states – Colorado, Hawaii, Nevada, New Jersey, Vermont, and West Virginia – have passed legislation to create or bolster pretrial services agencies.[105] In Colorado, for example, pretrial services are authorized by state statute and administered at the county level.[106] The Mesa County, Colorado Pretrial Services Agency has been held up as a national model. The agency uses risk assessment tools to determine a defendant's risk of failure to appear or re-arrest and supervises defendants who are released prior to trial.[107] The lowest level defendants receive phone calls reminding them of their court dates, while other defendants may be required to meet with their pretrial services officer as often as once a week.[108] From July 2013 to December 2014, the county was able to reduce its pretrial jail population by 27% without negative consequences for public safety.[109]

While some jurisdictions attach pretrial services to probation or other supervisory departments or include it in the role of the courts, the best practice is to create a separate agency to administer pretrial service. The National Association of Pretrial Services Agencies (NAPSA) has emphasized the importance of independence to the critical role of the pretrial services agency, especially in light of the "unique mission and role of pretrial services, which in some instances may not be congruent with the mission of the host entity" if the agency is housed within another department.[110] NAPSA's Standards on Pretrial Release reiterates that "although a pretrial services program may be organizationally housed within a probation department, sheriff's office, or local corrections department, it should function as an independent entity."[111]

Any state seeking to mandate the use of pretrial service agencies, of course, must contend with the budgetary implications of establishing or expanding a freestanding criminal justice agency. The costs involved will vary depending on the needs of particular jurisdictions. Though it is not possible to forecast those costs for all jurisdictions,

> Electronic monitoring should only be used as an alternative to incarceration, not as a way to monitor low or medium-risk defendants whose detention would clearly not be justified.

in many instances those start-up and operational costs may be counterbalanced by the savings that flow from decreased detention and improved pretrial outcomes, including fewer new crimes being committed.[112]

Pretrial services may employ an array of interventions to ensure appearance and protect public safety. Most of these interventions operate on a continuum of liberty restrictions from the most minor, such as monthly phone calls with a pretrial services agency, to the most restrictive, such as electronic monitoring or house arrest. As discussed below, more restrictive interventions may raise significant constitutional considerations.[113] Depending on how they are implemented, pretrial conditions of supervision may implicate the prohibitions against unreasonable searches, deprivations of liberty without due process, or excessive bail.[114] For both legal and policy reasons, it is crucial that the least restrictive alternatives to detention be imposed in order to ensure a defendant returns to court or avoids re-arrest during the pretrial period.

Jurisdictions may consider a broad range of potential conditions. Without attempting to exhaustively catalogue every condition a jurisdiction may employ, each of the following sub-sections describes a potential pretrial intervention, highlighting practical and constitutional considerations that should inform decisions about whether to deploy those interventions.

1. Court Date Notification

The least invasive tool to ensure that defendants show up to court is also one that has been shown to be quite effective: reminders. Studies over the past three decades have demonstrated that simply reminding defendants of their upcoming court date improved appearance rates.[115] These studies highlight how notifications had varying degrees of effectiveness depending on the type of contact. The different approaches included: (1) having people call the defendants; (2) using an automated calling system to contact defendants; (3) sending letters or postcards; and (4) a combination of the above. While it is not possible to make a direct comparison between the approaches because the studies employed different methodologies, the results indicate that all effectively reduced failures to appear in court. In Multnomah County, Oregon, simply calling defendants dramatically decreased rates of failure to appear. The use of automated telephone call reminders, referred to as "Court Appearance Notification System," was associated with a 41 percent decrease in failures to appear among defendants who successfully received a phone call.[116] Similarly, Coconino County, California[117] and Jefferson County, Colorado[118] reduced their failure to appear rates significantly through phone calls by volunteers.[119]

2. Pretrial Supervision

Pretrial supervision refers to the practice of maintaining regular contact with defendants, often to facilitate, support, and monitor their compliance with their pretrial release conditions. There is no consensus definition of what pretrial supervision entails, and the requirements and practices referred to as pretrial supervision vary widely.[120] The primary mechanisms used to supervise pretrial defendants include in-person contact, home contact, telephone contact, contact with those knowledgeable about the defendant's situation, regular criminal history checks, and also court date reminders.[121] The most recent studies that focus on regular communication suggest that it may reduce rates of failure to appear and re-arrest compared with defendants released without supervision. A 2006 study in Philadelphia found that regular supervision substantially reduced rates of re-arrest and failure to appear,[122] and a study by the Laura and John Arnold Foundation also found that moderate-to-high-risk defendants who were regularly supervised were more likely to appear in court and less likely to be re-arrested.[123] Controlling for relevant variables, moderate-risk defendants who were supervised missed court dates 38% less than unsupervised defendants. Supervised high-risk defendants missed court appearances 33% less often.[124] The study found that supervision decreased re-arrest rates for medium and high risk defendants.[125]

3. Electronic Monitoring

Electronic monitoring is a tool to track a defendant's movements in order to deter him from absconding or committing a serious offense. Electronic monitoring has been used for the past twenty years and its popularity is growing.[126] From 2000 to 2014 the use of electronic monitoring grew by 32 percent.[127]

Existing research on the efficacy of electronic monitoring has documented mixed results. This is probably because increased monitoring also increases the rate at which violations are detected, and because of the comparatively high-risk population that currently receives electronic monitoring.[128] Electronic monitoring as a condition of pretrial release has not been shown to reduce pretrial failure.[129] However, there are significant limitations to the studies, which examined programs that may have already been using electronic monitoring for more high-risk defendants – defendants who may not otherwise have been released if not for the availability of this alternative to detention. Electronic monitoring may have potential to reduce unnecessary detention for higher risk defendants with an acceptable level of risk. Electronic monitoring may be a powerful tool for ensuring pretrial success while reducing or minimizing the need for detention.

Electronic monitoring should only be used as an alternative to incarceration, not as a way to monitor low or medium-risk defendants whose detention would clearly not be justified.[130] Electronic monitoring is not a neutral restriction that should simply be imposed as a matter of course; it restricts liberty in profound but sometime subtle ways. Electronic monitoring can be intrusive and deleterious to a defendant's relationships and employment.[131] In a survey of probation officers and convicted people who were given an electronic monitoring device in Florida, both groups described a negative impact on the individual's relationships and employment.[132] Those who had to wear the electronic monitoring device told researchers that the device gave them a "sense of shame" and a feeling of being "unfairly stigmatized."[133] Forty-three percent of those who wore it believe that electronic monitoring had a negative impact on their partners because of the inconvenience it created.[134] Probation officers and those who wore the devices were unanimous in their belief that wearing an electronic monitoring device made it difficult to hold a job.[135]

Jurisdictions considering electronic monitoring must also tailor such programs to ensure that they comply with constitutional requirements. For example, several federal courts have ruled that it is unconstitutional to impose electronic monitoring as a mandatory condition for certain categories of offenses. Because electronic monitoring constitutes a significant deprivation of liberty,[136] these courts have found that imposing it categorically – without an inquiry into whether it serves legitimate pretrial needs in particular cases – may violate the Constitution.[137] And in light of the growing understanding that GPS empowers the government to invade constitutionally-protected privacy in unique ways,[138] courts may

AVOIDING "OFFENDER-FUNDED" INTERVENTIONS

Moving away from a money bail system that penalizes the poor is a good thing, but policymakers and reformers should be wary of a new hazard that may emerge: "offender-funded" supervision. For example, in all states except Hawaii and the District of Columbia, defendants are charged a fee for electronic monitoring.[147] Defendants may also be charged a monthly fee for pretrial services supervision, drug or alcohol testing, or participation in counseling or anger management classes.[148] In some cases, a defendant who is ordered released with conditions like electronic monitoring may be forced to wait in jail until he can pay a fee to setup the GPS monitoring, or may be sent back to jail if he cannot continue paying fees.

These onerous conditions of release may create harms that mirror the injustices associated with money bail. Jurisdictions should avoid charging fees for pretrial supervision. Any jurisdiction that charges fees pretrial should ensure that defendants receive an ability-to-pay hearing and provide judges the option of fee waiver. If fees are imposed on pretrial defendants, it is critical that defendants not be detained because of their inability to pay such fees.

increasingly subject electronic monitoring of pretrial defendants to probing Fourth Amendment scrutiny. Ultimately, the invasiveness of electronic monitoring will almost always be less severe than detention, so these constitutional considerations should not lead jurisdictions to conclude that electronic monitoring is unavailable as an alternative to incarceration. But as a general matter, these constitutional considerations counsel in favor of procedures that require courts to engage in individualized decision-making to determine whether electronic monitoring will significantly advance the purposes of pretrial supervision in light of the circumstances of particular defendants.

Electronic monitoring can also be expensive for defendants, many of whom are required to pay fees in order to be subject to electronic monitoring.[139] One recent news report documented the experience of a man in Richland County, South Carolina who was charged with driving without a license and required to pay a $179.50 setup fee and $300 a month fee to be on electronic monitoring as a condition of his release – if he stopped making payments, he would be detained prior to his trial.[140] The unnecessary use of expensive electronic monitoring could potentially replicate the same economic injustices that exist in a money bail system. For that reason, jurisdictions should eliminate or minimize fees imposed on pretrial defendants, and any fees imposed should be conditioned on a judicial finding that the defendant has a reasonable ability to pay such fees.

4. Drug Testing

Drug testing is a widely used condition of release that is counterproductive in the pretrial supervision context.[141] Drug testing has increased considerably as a condition of release since its inception in the 1980s, despite the fact that no empirical studies have found solid evidence that it is effective at reducing pretrial failure. The number of pretrial services agencies offering drug testing as a pretrial release condition has grown from 75 percent in 2001 to 90 percent in 2009.[142] Yet the studies examining the effectiveness of drug testing have all found that drug testing fails to improve pretrial outcomes.[143] Drug testing is simply ineffective in reducing pretrial failure, even when the court subjects defendants to increasingly severe sanctions for noncompliance.[144] Moreover, a program that adopts drug testing as a condition of pretrial release may not only be less effective at reducing pretrial failure rates but could entrench a defendant even further in the criminal justice system. Mandatory drug testing also raises well-established Fourth Amendment considerations,[145] and for court-ordered drug testing to survive Fourth Amendment scrutiny a jurisdiction utilizing drug testing on pretrial defendants will need to ensure that it has adequate empirical evidence justifying the use of drug testing to further the legitimate aims of pretrial supervision.[146] Because defendants seem to fail to abide by drug testing conditions regardless of the sanctions imposed, programs that use drug testing and impose sanctions for noncompliance are setting defendants up to fail.

B. ACTUARIAL RISK ASSESSMENT

"Risk assessment" is a broad term that encompasses a range of procedures for predicting criminal justice outcomes, and risk assessment tools are used widely beyond the pretrial context. In the pretrial context, risk assessment instruments are typically used to gauge the risk of failing to appear for court proceedings or being arrested while awaiting trial. Pretrial decision-making is always, at bottom, a process of risk assessment. Whether applying categorical criteria, exercising unfettered judicial discretion, or implementing charge-based schedules, pretrial decisions represent a forward-looking appraisal of what interventions (if any) are needed to prevent a defendant from failing to appear or committing a serious crime while his case is pending. When reformers or scholars refer to "risk assessment tools" or "risk assessment instruments," they generally refer to a formalized system for incorporating those kinds of forward-looking assessments into the pretrial decision-making process.

Broadly, pretrial risk assessment tools will fall into two categories: clinical tools, which rely on specialists within the court system (typically pretrial services workers) to exercise judgment, and actuarial risk assessment instruments, which generate risk scores based on statistical analysis. The discussion in this primer focuses on actuarial tools, often referred to as Actuarial Pretrial Risk Assessment Instruments (APRAIs).[149]

Building an APRAI requires not only the expertise of statisticians, but also access to and maintenance of a high-quality pretrial database. An APRAI assesses the risk that a defendant presents on the basis of "risk factors" incorporated into a statistical formula that uses existing

data to estimate future outcomes.[150] Some factors may reflect information that is immediately available from mining a defendant's criminal history and current charge. Other factors, like employment, history of substance abuse, and residency status, will require interviewing the defendant. The complexity of the risk-factor scheme presents a set of trade-offs: more factors may allow an instrument to achieve greater accuracy, but collecting more extensive information may add administrative costs to or slow-down the application of the instrument, which may result in some defendants remaining in jail during that information-gathering process. Once the risk factors are entered into an APRAI's statistical algorithm, the judge considers the resulting "risk score" in setting conditions of release.

It is not enough for a jurisdiction to proclaim that it will use a quantitative risk assessment tool – jurisdictions must ensure the tool's validity. A valid tool is one that has been shown (and can be shown on an ongoing basis) to accurately predict the outcomes it purports to track.[151] After an APRAI is in use, ongoing validation of the tool is required to ensure its continued efficacy, particularly in light of changes to a jurisdiction's population or other conditions.[152] This validation process consists of applying an instrument to an existing dataset and comparing risk scores to results.[153] Validation studies may include not only the examination of actual re-arrest or failure to appear rates, but also racial disparities or other unwarranted disparities that cannot be justified by risk differences.[154] This validation process may be costly and complicated. Indeed, once an APRAI is implemented within a jurisdiction, it becomes increasingly difficult to validate the accuracy of its results because there may no longer be a comparison group available. For example, if a tool designates certain offenders as "high risk," and almost all of those "high risk" defendants are detained, it becomes impossible to test whether individuals who receive that designation actually have high rates of pretrial failure.

A NATIONAL ACTUARIAL MODEL

Increasingly, individual jurisdictions or entire states may consider deploying nationally applicable risk assessment instruments.[159] Much of that change is being driven by a national APRAI developed by the Laura and John Arnold Foundation (LJAF).[160] It has developed an APRAI it describes as an "entirely objective risk assessment score" based solely on factors related to criminal history, current charge, and age.[161] The tool was piloted in Kentucky, and one Arnold Foundation-funded study found that the predictive power of the APRAI was not diminished by the elimination of the interview-dependent factors, which had previously made the assessment difficult to administer.[162] After deploying the tool, Kentucky was able to reduce re-arrests among defendants on pretrial release while increasing the percentage of defendants who are released before trial.[163] These findings led the foundation to the second phase of its project, in which the researchers amassed a database comprised of over 1.5 million cases drawn from over 300 jurisdictions.[164] Researchers analyzed the predictive power of and relationship between hundreds of factors, both interview and non-interview dependent. They identified the nine most predictive factors, all of which were drawn from a defendant's existing case and prior criminal history.[165] From this dataset they constructed the Public Safety Assessment-Court (PSA-Court), which produces three separate risks scores for each defendant, on a scale of one to six.[166] The three axes on which defendants are scored are risk of "failure to appear," "new crime", and "new violence."[167]

A report published in June of 2014 summarizing the results of the first six months of Kentucky's use of the PSA-Court revealed that 70% of defendants were released, which represented only a slight increase in the rate of release, which had averaged 68% in the four years prior.[168] The rate of pretrial arrest was reduced by close to 15%.[169] Using a control group to test the usefulness of the third category of risk (new violent crime), the summary reports that the PSA-Court predicted this risk with a "high degree of accuracy."[170] Specifically, those flagged as posing an increased risk of violent crime were arrested for a violent offense at a rate 17 times that of defendants who were not flagged (8.6% versus 0.5%).[171] The PSA-Court has been adopted in jurisdictions around the country, including across Arizona, New Jersey and in several major cities.[172]

Actuarial pretrial risk assessment tools are in use around the country. They are currently employed statewide in Virginia, Kentucky, and Ohio, in at least one county of several states (Arizona, Illinois, Minnesota, New York, Pennsylvania, and Texas), in Washington, D.C., and for certain defendants in the federal system.[155] Although risk assessment may be used in a cash-based bail system, states aiming to reduce their reliance on money bail, including New Mexico and New Jersey, have relied on risk assessment as a key feature of reform.[156] APRAIs may be developed on behalf or specific state agencies, by non-profit groups, or by for-profit corporations.[157]

Actuarial risk assessment tools have been embraced by many reformers seeking to ensure greater fairness and efficacy in pretrial justice. Instead of setting bail using offense-based bail schedules or a judge's hunch, these tools give judges an evidence-based framework to set appropriate conditions of release, reducing the risk that a defendant will fail to appear in court or be a danger to the public in the pretrial period. When used properly, risk assessment tools may offer great promise as a way to replace money bail with an alternative grounded in statistical assessments of pretrial outcomes.

At the same time, the use of risk assessment tools in the pretrial context raises very serious concerns and has attracted considerable criticism. Even the strongest arguments in favor of risk assessment recognize that a tool must be properly calibrated to reflect a jurisdiction's specific population, which means that the potential benefits turn on complicated and potentially costly determinations about which instrument to use.[158] Moreover, even the best risk assessment tools may generate serious disparities along racial or other demographic lines. Without being considered in a broader context, quantitative risk assessment scores may also displace other potentially relevant considerations, resulting in mechanical application of pretrial outcomes that may be poorly suited to the circumstances and needs of individual defendants.

Risk assessment tools, in other words, present complex considerations. This primer does not attempt to provide a standard prescription for every jurisdiction. Instead, the following discussion outlines some of the policy and legal considerations that should guide the decision-making about whether to utilize quantitative risk assessment tools in any particular jurisdiction.

1. Policy Considerations

a. Potential Benefits of Risk Assessment

Several policy considerations may counsel in favor of using actuarial risk assessment as one factor during bail determinations. Risk assessment tools may transform some of the worst pathologies of the pretrial process by replacing arbitrary or discriminatory decision-making with a more systematic method grounded in evidence. As noted earlier, there are only two legitimate bases for restricting a pretrial defendant's liberty: preventing failure to appear at trial and protecting the community from serious crime. Both of those justifications are, at bottom, inescapably about assessing risk. The promise of risk assessment tools is that they allow judges to consider risk based on sophisticated analysis of data, as opposed to a more intuitive or amorphous kind of risk prediction grounded in an individual decision-maker's experiences or analysis.[173] While no quantitative instrument can perfectly predict the outcome in a particular defendant's case, proponents of risk assessment argue that it is far superior to a judge's unguided discretion, which may reflect stereotypes and other biases or otherwise fail to engage in individualized consideration of a defendant.[174] Indeed, researchers have found that actuarial predictions are in many contexts more predictive than clinical assessments of dangerousness and risk of re-offense.[175]

In addition to improving individual outcomes, risk assessment tools may decrease the overall rates of pretrial detention. A 2012 study, which looked at a dataset of 116,000 defendants from 1990 to 2006, found that if judges chose to release all defendants with less than a 30 percent chance of being rearrested for any crime during the pretrial period, 85 percent of pretrial defendants would have been released, significantly more than the number of defendants who were actually released during that period.[176] Risk assessment tools may supply courts with an objective basis to release low-risk defendants on their own recognizance or with limited pretrial conditions. Reducing the jail population serves many important interests: it spares individuals from the serious infringement on liberty and collateral consequences (such as exposure to violence or job loss) that can follow even a short period of pretrial detention,[177] and it spares defendants' families the destabilizing effects that may follow from loss of income, housing, or child custody. Reduction of detention at a sufficiently significant scale also lowers the economic costs associated with administering jails.

Risk assessment tools may also counteract unfair disparities in current bail practices, particularly along racial and socioeconomic lines. Actuarial predictions may help ameliorate these disparities in several ways. First, simply by helping to displace money bail, risk assessment tools may substantially cure racial or other unwarranted disparities. As noted earlier, entrenched linkages between race and wealth will result in patterns of racial inequality when a policy has the effect of discriminating against the poor.[178] Risk assessment may also diminish racial or socioeconomic disparities by counterbalancing implicit or explicit biases of judges.[179] To the extent that evidence-based methods run counter to those biases, a jurisdiction may achieve significantly fairer outcomes.

Initial experiences in some jurisdictions suggest that risk assessment tools may improve pretrial outcomes on many dimensions. After Kentucky began to use a risk assessment tool, the state was able to increase the percentage of defendants who were released before trial while reducing re-arrests among defendants on pretrial release.[180] Virginia has also kept pretrial failure rates low by using a risk assessment tool. In fiscal year 2012, Virginia defendants who were released pretrial had a 96.3% appearance rate in court and less than 4% of released defendants were re-arrested.[181] Mecklenburg County, North Carolina has been able to reduce the number of people held in jail pretrial since using a risk assessment tool.[182] Just a month after Allegheny County, Pennsylvania instituted changes to its pretrial services program, including the use of risk assessment tools to inform bail determinations, the number of defendants held in jail after their first appearance was reduced by 30 percent.[183]

b. Implementation Considerations

Capturing the potential benefits of risk assessment requires close attention to several important implementation considerations. First, policymakers must carefully consider how to characterize different risk levels. Risk assessment tools typically define certain risk levels as "high," "moderate," or "low," but that characterization is a policy judgment, not a statistical one. Calling a risk score "high" is likely to significantly impact how judges, and the public, view particular outcomes. An initial decision over where to set that threshold – is a "high risk" defendant one with a 30% risk of failure, or should that label be reserved for 50% or 75% risk? – should take place transparently and with the involvement of all criminal justice system stakeholders. Second, judges and other system actors must undergo training that allows them to understand precisely what it is that a risk score conveys: a statistical estimate of a particular outcome based on the observed outcomes among a population of individuals who share certain characteristics. In many instances, an actuarial tool may be very predictive for the group on average but not accurate for any given member of that group.[184] If a judge relies on a risk score without considering other factors that may be relevant in making a bail determination, the risk score could carry undue weight.

It is also important to ensure a consistent structure for balancing a risk assessment score with other considerations. If the point of risk assessment is to displace arbitrary or biased decision-making, that purpose would be defeated if the ultimate pretrial decisions are not structured to ensure consistent risk-based decision-making. Jurisdictions should issue guidance for judges to structure the relationship between a defendant's risk score and other considerations. This might include a list of factors that can justify departing from what the instrument indicates. Such criteria should embody the principle that a pretrial decision should impose the least restrictive conditions necessary.[185] It could do this, for example, by requiring that any outcome *more restrictive* than a risk score indicates must be justified in writing based

Risk assessment tools may transform some of the worst pathologies of the pretrial process by replacing arbitrary or discriminatory decision making with a more systematic method grounded in evidence.

on certain enumerated criteria. Judges, prosecutors, defense attorneys, and other practitioners will need to be trained in how to interpret and utilize risk assessment scores before a jurisdiction implements an actuarial risk instrument in the pretrial setting. Defense counsel should also have a role in the application of a risk assessment instrument – this may include being present with a defendant during an initial interview and promptly receiving a copy of the data inputted into an APRAI and the ultimate report. Finally, implementation of any APRAI should be accompanied by a robust data-collection requirement that allows a jurisdiction and outside observers to measure the instrument's effects in terms of overall detention rates, pretrial failure rates, and racial disparities.

Potential Harms of Risk Assessment

Despite the potentially promising aspects of risk assessment, policymakers should also consider the very serious possible drawbacks. For one thing, all of the potential benefits of risk assessment hinge on generating consistently accurate predictions. That requires a reliable method of gathering data for the underlying algorithm and properly inputting information about individuals who the risk assessment instrument evaluates. But "criminal justice data is notoriously poor,"[186] and reliance on an ostensibly scientific process fueled by faulty data may skew outcomes.[187] Before utilizing risk assessment, many jurisdictions will need to improve the collection of criminal justice data that they will rely on. This is an ongoing process. It means having sufficiently reliable means for collecting data relevant to individual defendants to input into their risk calculation; depending on the instrument, it may also mean continually collecting reliable information about the overall population of pretrial defendants and other related aggregate-level data to ensure that the instrument reflects current populations and pretrial outcomes. In many jurisdictions, the costs related to data collection and maintenance may significantly strain limited budgets.

In addition to the possibility of inaccuracies flowing from erroneous inputs, risk assessment tools may distort pretrial outcomes to the extent that the "risk" they forecast is ambiguous or otherwise subject to broad interpretation. In many instances, prediction tools do not distinguish between risk of pretrial flight and risk of arrest. Even when tools make that basic distinction, a simple designation of "high risk" may not tell a decision-maker whether that reflects risk of arrest for a serious violent crime, whether the arrest will be occurring during the pendency of the defendant's case, or which interventions are likely to be effective in mitigating that risk.[188]

The potentially negative effects of risk assessment, moreover, may disproportionately impact Black and Latino defendants or other minority groups. In particular, many critics argue that by relying on underlying factors that are shaped by race discrimination, statistical tools may reinforce and deepen inequalities in the criminal justice system.[189] To the extent that risk scores reflect prior interaction with the criminal justice systems, the disproportionate exposure of African Americans and Latinos to law enforcement will skew those assessments – even where those underlying disparities reflect discrimination or other unjust patterns.[190] Similarly, risk assessment scores that incorporate educational history, housing instability, or other socioeconomic factors that correlate with race may also import serious racial disparities.[191]

Former Attorney General Eric Holder has expressed the concern that, in the sentencing context, actuarial risk assessment "may inadvertently undermine our efforts to ensure individualized and equal justice."[192] In Holder's view, "[b]y basing sentencing decisions on static factors and immutable characteristics – like the defendant's education level, socioeconomic background, or neighborhood – [risk assessment instruments] may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society."[193] This can lead to a vicious cycle: because pretrial detention has been shown to lead to worse criminal justice outcomes, the characteristics of the individuals detained pursuant to risk assessment will gain an even stronger association with pretrial failure over time, thus strengthening the seeming predictive power of those features.[194] Indeed, because APRAIs are based on empirically-derived factors, it is possible that risk assessment tools will not only entrench but exacerbate existing racial and socioeconomic disparities by appearing to give a scientific imprimatur to unequal outcomes.

Some critics of risk assessment have also argued that the very premise of an actuarial model – drawing on aggregate data to make decisions about individuals – violates fundamental norms of fairness. While an *individual's* conduct is within his control, that individual cannot control the aggregate conduct of others who share some characteristic deemed relevant for the risk

assessment instrument.[195] Therefore, because actuarial models derive outcomes from aggregated data, the individual's treatment is based, at least partially, on the independent decisions of others.[196]

Jurisdictions considering the use of actuarial risk assessment tools should consider the policy considerations outlined above in deciding what framework will deliver a fair and effective pretrial system. Significantly, the determination of whether to use actuarial risk assessment is inherently a relative decision. In other words, the potential costs and benefits – including the effects on detention rates, efficacy in improving pretrial outcomes, fairness to individual defendants, and racial disparities – must be considered relative to a preexisting status quo or a likely alternative pretrial framework. In making those judgments, the details will matter. The potential benefits and drawbacks of risk assessment will vary depending on how an instrument is implemented – whether it is accompanied by a reliable system for collecting and maintaining data, whether judges and other system actors receive proper training, whether appropriate procedural safeguards are in place, and how risk assessment is integrated into an overall decision-making framework. Policymakers considering a risk-based system should begin from the premise that the efficacy and fairness of risk assessment instruments are not matters that can be resolved in a vacuum. Rather, the policy value of risk assessment should be measured against the kinds of potential advantages and hazards outlined in this section.

2. Constitutional Considerations

There is very little judicial guidance on the constitutional implications of risk assessment tools, and the cases that have examined issues related to risk assessment have not arisen in the pretrial context.[197] Depending on how such tools are used, substantial constitutional considerations may come into play. Much will depend on the specific context in which risk assessment tools are used. For example, one set of constitutional implications may attach to risk assessment instruments used to determine what conditions are necessary to ensure appearance at trial; different constitutional considerations may apply where risk scores are incorporated into a decision of whether to preventively detain an individual deemed dangerous to the community. The discussion here does not attempt to provide definitive or exhaustive answers to jurisdictions navigating that constitutional terrain. Rather, it outlines the principal constitutional considerations likely to be relevant to any jurisdiction considering the use of quantitative risk assessment tools as part of their pretrial system.

Any risk assessment tool that determines or influences pretrial outcomes must conform to the Equal Protection Clause of the Fourteenth Amendment. Equal protection principles generally prohibit the government from taking adverse action against a person on the basis of certain protected characteristics, particularly race, national origin, and sex.[198] Typically, this prevents the government from acting on the basis of racial classification except in exceedingly narrow circumstances; classifications based on sex will receive slightly more deference but must also satisfy exacting judicial scrutiny.[199] In the risk assessment context, those "classifications" will consist of the inputs that drive an assessment tool's statistical analysis. As a starting point, then, equal protection considerations counsel strongly against using a system in which race or sex are incorporated into risk scores.[200] It is important to note that equal protection principles will generally prohibit express classification based on race or sex or intentional discrimination on those bases, but the Constitution does *not* proscribe policies that have an unintentional disparate impact on particular groups, even if those disparities are foreseeable.[201] While such disparities will not violate constitutional guarantees, they may violate core policy imperatives to avoid racially unjust outcomes. Jurisdictions should carefully consider these policy issues before implementing a risk assessment tool. Those considerations are discussed further in Section III.B.1.

Incorporating risk assessment tools into pretrial decision-making may also implicate constitutional due process guarantees. Again, the dimensions of any due process analysis will depend on what purpose the risk assessment instrument serves. Decisions about whether or not to detain someone pretrial will demand more stringent due process protections than decisions about what array of non-detention conditions – such as check-in requirements or electronic monitoring – may be necessary to ensure appearance at trial. But all of these decisions involve potential infringements on a defendant's pretrial liberty, which means that any risk assessment tool must be consistent with a defendant's due process rights.

The Constitution's due process protections require that, before a person is deprived of liberty by the government, she must enjoy sufficient procedural safeguards to "minimize substantively unfair or mistaken outcomes."[202] The hallmarks of such procedures are reasonable notice and an opportunity to be heard.[203] In the pretrial context, the Supreme Court has emphasized that, at least for a preventive detention decision, the procedural due process inquiry turns on whether a defendant enjoys "procedures by which a judicial officer evaluates the likelihood of future dangerousness [that] are specifically designed to further the accuracy of that determination."[204] These principles should be reflected in any procedures that rely on actuarial risk assessment. Generally, that means that a defendant must have some opportunity to contest potentially inaccurate or substantively unfair risk assessment procedures.

There is no case law at this point elaborating what that should mean in the pretrial context, but case law in other areas suggests some ways jurisdictions might ensure adequate procedures. In one recent case, the Wisconsin Supreme Court upheld the use of a risk assessment instrument in the sentencing context, but outlined several requirements for applying it consistently with due process. The court held that the instrument could be used to determine whether portions of a sentence could be served in the community instead of prison. But the court went on to hold that the instrument could not be used "to determine the severity of the sentence or whether an offender is incarcerated" and the court imposed "the corollary limitation that risk scores may not be considered the determinative factor in deciding whether the offender can be supervised safely and effectively in the community."[205] The court further held that sentencing judges considering risk reports must receive an accompanying advisory alerting them to four points: that the company that created the tool has invoked its proprietary interest to prevent disclosure of how factors are weighted or risk scores are determined; that risk assessment scores are based on group data and are able to identify groups of high-risk offenders, not a particular high risk offender; that some studies of the tool being used have "raised questions about whether they disproportionately classify minority offenders as higher risk of recidivism"; and that the tool is based on a national sample that has not been validated for Wisconsin and that risk assessment tools must be constantly monitored and re-calibrated for accuracy as the population changes.[206]

In light of these due process principles, numerous safeguards should be in place when risk assessment instruments are used in the pretrial context. Those safeguards should reflect the weighty liberty interests involved in the pretrial setting, where presumptively innocent defendants face a deprivation of liberty.[207] While the specific framework will depend on the instrument being used and its role in pretrial decision-making, a defendant should be provided with a substantive understanding of how the instrument works and a meaningful opportunity to contest its application in his case. This means disclosing the defendant's risk assessment score, the factors considered in determining the score, the relative weights given to different factors, and information about when and how the instrument was validated and re-normed, including information about the population samples used in validating it.[208] A procedural framework should also ensure disclosure of relevant information about the instrument's accuracy – including studies demonstrating unwarranted race disparities or other inaccuracies – and set out clear parameters about precisely what role the instrument may play in shaping pretrial decisions.

C. PREVENTIVE DETENTION

One of the most significant pathologies of money bail is its use as a subterranean mode of preventive detention; judges address perceived risk to the community by setting bond at a level that will be presumptively out of reach to a defendant.[209] Using cash as a proxy to preventively detain defendants viewed as dangerous

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

is indefensible as a matter of principle, but it reflects a real concern by many judges about the risk that certain people will commit serious crimes while on pretrial release. For this reason, the discussion of moving to a risk-based bail system is often accompanied by a call for risk-based preventive detention.

At least twenty-two states, the District of Columbia, and the federal system already authorize the use of pretrial preventive detention in some circumstances.[210] Many more states are likely to consider using or expanding preventive detention in conjunction with a risk assessment system. But a jurisdiction that chooses this path should do so with extreme care. Insofar as states choose to utilize preventive detention as an aspect of pretrial reform, this section outlines the baseline legal and policy considerations that should guide policymaking.

This primer does not take a position on whether, as a policy matter, preventive detention is appropriate. Indeed, many observers raise grave concerns about the use of preventive detention. Among other things, critics point out that there is no guarantee that authorizing judges to use preventive detention will reduce the number of individuals detained pretrial – if the standards are open-ended enough, or define pretrial risk broadly enough, a tool intended to reform excessive jail populations could have the opposite effect. More fundamentally, some question whether preventive detention is legitimate as a matter of principle.[211] Pretrial defendants are presumed innocent and using a mere arrest as a trigger for depriving a person of his liberty strikes some as contrary to the basic underpinnings of a free society. On the other hand, many reformers have championed risk-based pretrial detention as a way to cure the arbitrary and discriminatory practices inherent in money bail while providing judges with a more transparent and rational tool for addressing serious risk to the community. Proponents of limited authority for pretrial detention note that the Supreme Court has ruled that such mechanisms can be consistent with constitutional guarantees, and they maintain that the Court's rulings will ensure robust procedural safeguards as a prerequisite to any pretrial detention authority.

1. Constitutional Requirements

The Supreme Court's decision in *United States v. Salerno* articulates the constitutional principles governing the use of preventive detention in the pretrial context. In upholding the constitutionality of the federal Bail Reform Act, the *Salerno* Court first emphasized the importance of the statutory purpose of preventive detention: detention that is "regulatory, not penal" does not constitute "impermissible punishment before trial."[212] The test for determining whether a preventive detention policy is regulatory or punitive depends, first, on whether there was an express legislative intent to punish; if not, the inquiry turns to whether there is a rational connection between the policy and a non-punitive justification and, finally, whether the policy is proportional to that justification.[213] In *Salerno*, the Court found that the federal bail statute fell on the regulatory side of this distinction. Significantly, in examining whether the preventive detention scheme embedded in the Bail Reform Act was proportionate to the regulatory interest in preventing danger to the community, the *Salerno* Court emphasized the statute's limited reach and detailed safeguards:

> The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. The arrestee is entitled to a prompt detention hearing, and the maximum length of pretrial detention is limited by the Speedy Trial Act. Moreover...the conditions of confinement envisioned by the Act appear to reflect the regulatory purposes relied upon by the Government...[T]he statute at issue here requires that detainees be housed in a facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.[214]

Having determined that the statutory authority to detain pretrial defendants was regulatory rather than punitive, the Court went on to decide that the restrictions the statute imposed on pretrial liberty could be adequately justified by the compelling governmental interest. In doing so, the Court emphasized the "narrow circumstances" in which preventive detention was authorized.[215] Once again, the Court's detailed description of the Bail Reform Act's procedural framework reveals the considerations it deemed vital to the constitutional analysis:

> The Bail Reform Act...narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The

> Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.[216]

Given this detailed and robust procedural framework, the Court ruled that, "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community...a court may disable the arrestee from executing that threat."[217]

Jurisdictions contemplating the use of preventive detention should adopt the safeguards emphasized by the *Salerno* Court to the greatest degree possible. While the *Salerno* Court never stated explicitly which individual safeguards may be constitutionally mandatory, two appear to be particularly important components of ensuring the constitutionality of preventive detention schemes: an adversarial hearing and the right to the presence of counsel at bail hearings. As described in more detail below, those two features are elemental to the broader array of procedural protections at the heart of the court's analysis. Beyond these two overarching, structural protections, the Court's analysis gives useful guidance for states seeking ways to structure preventive detention authority. As a matter of law and policy, such systems should treat as a first principle one of the Court's concluding remarks: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[218]

a. Adversarial Hearings

All preventive detention frameworks should provide defendants with an adversarial hearing. The statutory provisions identified by the *Salerno* Court as sufficient to satisfy due process included defendants' ability to "testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses,"[219] which necessarily must be part of an adversarial hearing. Similarly, the Court emphasized that in detention hearings under the Bail Reform Act the government bears the burden of demonstrating by clear and convincing evidence that no less restrictive conditions suffice; this kind of stringent burden of proof implies the use of an adversarial hearing to test the government's showing. While the exact protections within a hearing may vary, the Court's reasoning assumes an adversarial hearing to be an essential component of a constitutional preventive detention framework.

b. Right to Counsel

Just as an adversarial hearing provides the structure in which the procedural protections outlined in *Salerno* can operate, the right to counsel ensures that a pretrial defendant can enjoy those protections in a meaningful way. Like the right to an adversarial hearing, the right to counsel is an indispensable safeguard. Indeed, *Salerno* stressed the importance of a combination of procedures and rights "specifically designed to further the accuracy" of a determination of dangerousness.[220] Many of the same safeguards that imply the structure of an adversarial hearing – the ability to testify, present evidence, and cross-examine adverse witnesses – will typically require the presence of counsel to ensure they are meaningful. The Court also noted that the ultimate detention or release decision must be rooted in statutorily enumerated factors.[221] Those protections will lack any functional significance unless defendants have competent lawyers to take advantage of such procedural opportunities.[222] Because failing to provide a right to counsel would, in practical terms, vitiate the other procedural safeguards emphasized in upholding the Bail Reform Act, it should be regarded as a bedrock requirement in any system allowing preventive detention.

2. Vital Procedural Protections

Salerno did not dictate a universal statutory architecture for preventive detention. While the rights to an adversarial hearing and an attorney emerge as indispensable elements, the Court's analysis suggests that standing alone, those safeguards would be insufficient. The following procedural protections would fortify a preventive detention framework's compliance with due process.

a. Speedy Trial

Where a defendant's liberty is substantially impaired prior to trial, the pretrial period should be limited. The specific language used to guarantee a speedy trial for pretrial detainees may vary from state to state, but it should be defined for preventively detained individuals in particular. Some jurisdictions have implemented statutory language designed to give effect to this principle:

b. D.C.

> The case of the person [preventively] detained pursuant to ... 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.[223]

c. Vermont

> (a) Except in the case of an offense punishable by death or life imprisonment, if a person is held without bail prior to trial, the trial of the person shall be commenced not more than 60 days after bail is denied.
>
> (b) If the trial is not commenced within 60 days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set bail for the person.[224]

Additionally, states should examine their speedy trial statutes to ensure that carve-outs do not render the law ineffective. For example, under New York's "ready rule," as long as the prosecutor has declared that he or he is ready for trial, the delays from "court congestion" or even an adjournment because the prosecutor failed to turn over evidence are not counted as part of the trial clock.[2255]

d. Limited Entry Points

In *Salerno*, the Court repeatedly emphasized the narrow scope of the preventive detention authority in the federal pretrial system – it noted that the challenged statute "carefully limits the circumstances under which detention may be sought to the most serious crimes;"[226] that the statute "narrowly focuses on a particularly acute problem in which the Government interests are overwhelming;"[227] and that it applied only in "narrow circumstances."[228] In other words, the Court placed significant weight on the *limited entry points* to the scheme of preventive detention – the carefully circumscribed threshold circumstances under which any defendant might face a preventive detention determination. Policymakers and advocates seeking to implement preventive detention schemes should carefully limit the entry points to preventive detention hearings. There are three different types of entry points that may be utilized to preventively detain a defendant – risk assessment score, offense charged, and motion by a prosecutor – each of which is discussed in turn.

One way to limit the entry points to preventive detention determinations is to use actuarial risk assessment scores as a necessary, but not sufficient, basis to trigger a hearing. Significantly, this will require that states rely on risk assessment instruments geared specifically to the risk of re-arrest for violent or serious crime, as opposed to instruments that lump together re-arrest for serious and non-serious crime or do not distinguish between re-arrest and non-appearance. Kentucky's pilot program is one example. That system allows the state to conduct initial assessments that channel individuals with high risk assessment scores into hearings that afford greater rights and safeguards in order to make more accurate individualized determinations.[229] A jurisdiction might further assure limited entry points by only utilizing risk assessment tools for individuals charged with particular offenses, as is the case in New Jersey.[230]

Some jurisdictions have automatically triggered preventive detention hearings based on the offense charged, even though the offense charged may not correspond to risk of reoffending. For example, under both the D.C. and federal system, particular types of offenses create a rebuttable presumption that no condition or combination of conditions will reasonably assure appearance of public safety.[231] These rebuttable presumptions trigger detention hearings and lead to the detention of many charged individuals. Offense-based triggers are problematic because they are not tied to individual circumstances of a defendant and reflect the relatively low threshold for issuing a charge. If used, it is crucial that such enumerated offenses remain narrow and that, even when they trigger hearings, they do not dictate outcomes or prevent an individualized determination based on the defendant's circumstances. This is especially important because prosecutors exercise wide discretion in making charging decisions, and inappropriate charging decisions could lead to unnecessary preventive detention.[232]

Another potential pathway to preventive detention hearings is authorizing prosecutors to move for such hearings. Both the D.C. and federal systems also allow the prosecutor to move for pretrial detention based on a number of grounds.[233] This discretion may be appropriate in some circumstances, but it should be structured so that prosecutors may only move for pretrial detention based on clearly defined, limited circumstances. To the extent a defendant is detained prior to the hearing, the prosecutor should be required to make a substantial initial showing to justify that detention.

e. Statutorily Enumerated Factors Guiding Bail Determinations

The *Salerno* Court noted that, in the federal scheme, judicial officers must follow statutory guidelines and make a finding by clear and convincing evidence that there is a statutorily permissible reason for detention.[234] Imposing clear and stringent standards that must be satisfied to preventively detain a defendant helps ensure adherence to constitutional standards.

In addition to imposing a stringent standard, jurisdictions should supply courts with clear criteria to apply in weighing a preventive detention decision. The D.C. statute offers an example of the types of factors that states should address:

1. The **nature and circumstances of the offense** charged, including whether the offense is a crime of violence or dangerous crime...or involves obstruction of justice...;
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.[235]

Many other states mirror D.C.'s statute.[236]

Given the forward-looking, regulatory nature of preventive detention, states should not place exclusive or predominant weight on the nature of the charged offense, or the weight of the evidence, in prescribing standards for pretrial release or detention. The charged offense may deserve some weight in those determinations, insofar as the most serious charges carry elevated penalties that may increase a defendant's incentive to abscond. But it is important that these considerations not subsume the individual determination focused on a defendant's particular circumstance, nor should a focus on the charged offenses give rise to a mini-trial on the defendant's guilt or innocence. To the extent that the gravity of the charged offense informs the pretrial release decision, it should be just one consideration that may be reinforced or counterbalanced by other factors. Policymakers should avoid statutory language that requires or implies that the charged offense is the sole or predominant consideration.

Additionally, while actuarial risk assessment tools may be utilized in an initial screening, they should not displace

Policymakers and advocates seeking to implement preventive detention schemes should carefully limit the entry points to preventive detention hearings.

the other listed factors. Where actuarial risk assessment tools suggest a high risk of committing some future crime, a judicial officer should still consider the nature and seriousness of the danger and allow the defendant to rebut the risk assessment by providing additional evidence through an adversarial hearing with the assistance of counsel.

IV.

MOVING FORWARD

SEIZING THE MOMENTUM FOR REFORM

The country's approach to the pretrial process is undergoing intensive reexamination and may be on the verge of fundamental change. Money bail, nearly ubiquitous and deeply entrenched for decades, is now subject to scrutiny and criticism from a broad array of observers and advocates. Litigation challenging practices that result in wealth-based detention have gained traction, creating an opening for remaking pretrial systems in jurisdictions around the country. An energized movement for reform has embraced a risk-based model that a number of jurisdictions have now implemented, with many others watching closely. These trends are encouraging and should spur further action. At the same time, all stakeholders need to ensure that this wave of reform yields workable new models that solve the problems plaguing the current system without producing new forms of injustice. Striking that balance will require careful attention by all stakeholders to the legal and policy questions outlined in this primer. With those considerations in mind, and guided by local needs and opportunities, advocates and policymakers should forge a new path for pretrial justice that furthers the highest ideals of our legal system and ensures fair, consistent, and efficient administration of justice.

V.

ENDNOTES

1. *See infra*, note 36, listing cases.
2. *See, e.g.*, Nick Pinto, *The Bail Trap*, N.Y Times Magazine, Aug. 13, 2015; Leon Neyfakh, *Is Bail Unconstitutional?*, Slate, June 30, 2015, *available at* http://www.slate.com/articles/news_and_politics/crime/2015/06/is_bail_unconstitutional_our_broken_system_keeps_the_poor_in_jail_and_lets.html; Last Week Tonight with John Oliver, *Bail* (June 7, 2015), *available at* https://www.youtube.com/watch?v=IS5mwymTIJU.
3. *See, e.g.*, Ram Subramanian et al., Vera Inst. of Justice, *Incarceration's Front Door: The Misuse of Jails in America*, July 29, 2015, *available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf; Timothy R. Schnacke, Nat'l Inst. of Corrs., *Money as a Criminal Justice Stakeholder: The Judge's Decision to Detain or Release a Person Pretrial* (Sept. 2014), *available at* http://www.clebp.org/images/2014-11-05_final_nic_money_as_a_stakeholder_september_8,_2014_ii.pdf; Christopher T. Lowenkamp et al., Laura & John Arnold Found., *The Hidden Cost of Pretrial Detention* (Nov. 2013), *available at* http://www.pretrial.org/download/research/The%20Hidden%20Costs%20of%20Pretrial%20Detention%20-%20LJAF%202013.pdf; Michael R. Jones, Pretrial Justice Inst., *Unsecured Bonds: The Most Effective and Most Efficient Pretrial Release Option* (Oct. 2013), *available at* http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf.
4. *See, e.g.*, Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, N.Y. Times, Feb. 18, 2015.
5. *See* Amer. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-1.4(a) (3d ed. 2007) ("additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case reasonably to ensure appearance at court proceedings, to protect the community, victims, witnesses or any other person and to maintain the integrity of the judicial process.").
6. Timothy R. Schnacke, U.S. Dept. of Justice, Nat'l Inst. of Corrs., *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 2 (2014), *available at* http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf (recognizing that "depending on the source, one will see bail defined variously as money, as a person, as a particular type of bail bond, and as a process of release"). When this primer refers generally to "money bail" or "cash bail," it is referring to secured money bonds.
7. Subramanian et al., *supra* note 3, at 32.
8. *Id.*
9. *Id.*
10. Prison Pol'y Inst., *Detaining the Poor* 2-3 (2016), *available at* http://www.prisonpolicy.org/reports/DetainingThePoor.pdf.
11. *See* Richard Williams, *Bail or Jail: State Legislatures* (May 2012), *available at* http://www.ncsl.org/research/civil-and-criminal-justice/bail-orjail.aspx.
12. Todd Minton & Zhen Zeng, Bureau of Justice Statistics, *Jail Inmates at Midyear 2014* 1-3, 8 (2015), *available at* http://www.bjs.gov/content/pub/pdf/jim14.pdf.
13. David C. May, et al., *Going to Jail Sucks (And It Really Doesn't Matter Who You Ask)*, 39 Am. J. Crim. Just. 250, 251 (2014), available at http://link.springer.com/article/10.1007/s12103-013-9215-5#enumeration.
14. Nicholas Freudenberg, *Jails, Prisons, and the Health of Urban Populations: A Review of the Impact of the Correctional System on Community Health*, 78 J. of Urban Health: Bulletin of the New York Academy of Medicine 214 (June 2001).
15. Justice Pol'y Inst., *Bailing on Baltimore: Voices from the Front Lines of the Justice System* 15 (Sept. 2012), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/bailingonbaltimore-final.pdf.
16. *See* Norimitsu Onishi, *In California, County Jails Face Bigger Load*, N.Y. Times, August 6, 2012, *available at* http://www.nytimes.com/2012/08/06/us/in-california-prison-overhaul-county-jails-face-bigger-load.html?_r=0.
17. Subramanian, *supra* note 3, at 12.
18. Noonan et al., U.S. Dept. of Justice, Bureau of Justice Statistics, *Mortality in Local Jails and State Prisons, 2000- 2013*, Statistical Tables 1 (August 2015), *available at* http://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf.
19. *See* Laura Sullivan, *Inmates Who Can't Make Bail Face Stark Options*, Nat'l Public Radio (Jan 22, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=122725819. *See also Barker v. Wingo*, 407 U.S. 514, 532-33 (1972) ("The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.").
20. Laura & John Arnold Found., *Pretrial Criminal Justice Research* 2 (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJResearch-brief_FNL.pdf
21. *See id.*
22. Megan Stevenson, *Distortion of Justice: How the Inability to*

Pay Bail Affects Case Outcomes 22 (Working Paper, 2016), *available at* https://www.law.upenn.edu/cf/faculty/mstevens/workingpapers/Distortion-of-Justice-April-2016.pdf; Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention* 3 (July 2016), *available at* http://ssrn.com/abstract=2809840.

23. Heaton et al., *supra* note 22, at 3.

24. *Id*. at 3-4, 19, 21.

25. *See, e.g.,* Rakesh Kochhar & Richard Fry, Pew Research Ctr., *Wealth Inequality has Widened Along Racial, Ethnic Lines Since End of Great Recession*, Dec. 12, 2014, *available at* http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession (discussing the wealth gap between white and black households). Studies have also shown that white defendants receive more favorable bail determinations than similarly situated African American defendants, either because of racial animus or implicit bias on the part of decision makers. Cynthia E. Jones, *Give Us Free*, 16 Legis. & Pub. Pol'y 919, 943 (2013).

26. *See*, *e.g.*, Traci Schlesinger, *Racial and Ethnic Disparities in Pretrial Criminal Justice Processing*, 22 Justice Quarterly 170, 187-88 (2005); Stephen DeMuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 Criminology 873, 895, 897 (2003); Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 Stanford L. Rev. 987 (1994).

27. *See, e.g.,* Arpit Gupta, et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* 3, 19 (May 2, 2016), *available at* http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf (studying the assessment of money bail in Philadelphia and Pittsburgh courts and finding that the imposition of money bail led to a 6-9 percent yearly increase in recidivism;) Laura & John Arnold Found., *supra* note 20, at 5 ("Compared to individuals released within 24 hours of arrest, low-risk defendants held 2-3 days were 17 percent more likely to commit another crime within two years. Detention periods of 4-7 days yielded a 35 percent increase in re-offense rates. And defendants held for 8-14 days were 51 percent more likely to recidivate than defendants who were detained less than 24 hours.").

28. Justice Pol'y Inst., *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* 25 (2012), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf.

29. *Id*. at 26.

30. Laura & John Arnold Found., *supra* note 27, at 5 (finding that "[l]ow risk defendants held for 2-3 days were 22 percent more likely to fail to appear than similar defendants (in terms of criminal history, charge, background, and demographics) held for less than 24 hours").

31. Colo. H.B. 13-1236 (2013). *See also*, Timothy R. Schnacke, *Best Practices in Bond Setting: Colorado's New Pretrial Bail Law* 20-24 (July 3, 2013), *available at* http://www.pretrial.org/download/law-policy/Best%20Practices%20in%20Bond%20Setting%20-%20Colorado.pdf.

32. N.J. P.L. 2014, Ch. 31, §1-20. *See also*, Amer. Civil Liberties Union, *ACLU-NJ Hails Passage of NJ Bail Reform as Historic Day for Civil Rights*, (Aug. 4, 2014), *available at* https://www.aclu.org/news/aclu-nj-hails-passage-nj-bail-reform-historic-day-civil-rights.

33. Christine Stuart, *Malloy Pitches Bail Reform as Part of Connecticut's Second Chance Society 2.0*, New Haven Register, Jan. 28. 2016, *available at* http://www.nhregister.com/article/NH/20160128/NEWS/160129552.

34. N.M. State Legis., *Final Senate Joint Resolution* 1, *available at* http://www.nmlegis.gov/Sessions/16%20Regular/final/SJR01.pdf. *See also, New Mexico House GOP, Senate Dems Reach Deal on Bail Reform*, KQRE News 13, Feb. 12, 2016, *available at* http://krqe.com/2016/02/12/new-mexico-house-gop-senate-dems-reach-deal-on-bail-reform/.

35. *See State v. Brown*, 338 P.3d 1276, 1278 (N.M. 2014) (concluding that "the district court erred by requiring a $250,000 bond when the evidence demonstrated that less restrictive conditions of pretrial release would be sufficient").

36. *See Walker v. City of Calhoun,* 2016 WL 361580 (N.D. Ga. 2016) (court order certifying as a class for declaratory and injunctive relief "all arrestees unable to pay for their release who are or will be in the custody of the City of Calhoun as a result of an arrest involving a misdemeanor, traffic offense, or ordinance violation"); *Jones v. City of Clanton*, 2015 WL 5387219, at *4-5 (M.D. Ala. 2015) (granting declaratory judgment); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015) (enjoining the practice of arresting and detaining probationers for nonpayment of court costs); *Pierce v. City of Velda City*, 2015 WL 10013006, at *1 (E.D. Mo. 2015) (issuing declaratory judgment that "no person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond"); *Thompson v. Moss Point*, 2015 WL 10322003, at *1 (S.D. Miss. 2015) (issuing declaratory judgment); *Mitchell v. City of Montgomery*, 2014 WL 11099432 (M.D. Ala. 2014) (granting declaratory and injunctive relief).

37. *See City of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (requiring that probable cause determination for arrestees occur within 48 hours of arrest); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest).

38. U.S. Const. amend. VIII

39. *See U.S. v. Salerno*, 481 U.S. 739, 752 (1987); *Carlson v. Landon*, 342 U.S. 524, 546 (1952) ("[T]he very language of the Amendment fails to say all arrests must be bailable.").

40. *Stack v. Boyle*, 342 U.S. 1, 3 (1951).

41. *Id*. at 5.

42. *Id*.

43. *See Salerno*, 481 U.S. at 754 (holding that under Excessive Bail clause "proposed conditions of release or detention" may not be excessive).

44. *Id.* at 751.

45. *Reno v. Flores*, 507 U.S. 292, 302 (1993); *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Salerno*, 481 U.S. at 749-51.

46. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also Salerno*, 481 U.S. at 751-52.

47. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *see also, Williams v. Illinois*, 399 U.S. 235, 241 (1970).

48. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

49. *See*, *e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (*en banc*) ("We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint."); *Jones v. City of Clanton*, 2015 WL 5387219, at *3 (M.D. Ala. 2015) ("Criminal defendants, presumed innocent, must not be confined in jail merely because they are poor. Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all."); *Pierce v. City of Velda City*, 2015 WL 10013006, at *1 (E.D. Mo. 2015) ("No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor

to post a monetary bond."); *Walker v. City of Calhoun,* 2016 WL 361580 at *49 (N.D. Ga. 2016) ("Any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause."); *Williams v. Farrior*, 626 F.Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainee infringes on both equal protection and due process requirements.")

50. Ariana Lindermayer, Note, *What The Right Hand Gives: Prohibitive Interpretation of the State Constitutional Right to Bail*, 78 Fordham L. Rev. 267, 275 (2009).

51. *See, e.g.*, *Henley v. Taylor*, 918 S.W.2d 713, 714 (Ark. 1996) ("As can be seen from the constitutional provision and the criminal procedure rule [setting out conditions of release that may be required for defendants who are likely to commit another crime], a non-capital defendant's absolute right to bail may only be curbed by the setting of certain conditions upon his release, and not its complete denial."); *Sprinkle v. State*, 368 So.2d 554, 559 (Ala. Crim. App. 1978) ("In Alabama, an accused upon arrest and before conviction, is entitled to bail as an absolute right provided he has sufficient sureties. Bail may only be denied in capital offenses, when the proof is evident or the presumption great."); *see also Lindermayer*, *supra* note 50, at 276.

52. *See, e.g.*, *Rendel v. Mummert*, 474 P.2d 824, 828 (Ariz. 1970) (finding that the constitution "does not guarantee bail as a matter of absolute right but is conditioned upon the giving of 'sufficient sureties.' We are of the opinion that the words 'sufficient sureties' mean, at a minimum, that there is reasonable assurance to the court that if the accused is admitted to bail, he will return as ordered until the charge is fully determined"); *People ex rel. Hemingway v. Elrod*, 322 N.E.2d 837, 840-41 (Ill. 1975) ("In our opinion the constitutional right to bail must be qualified by the authority of the courts, as an incident of their power to manage the conduct of proceedings before them, to deny or revoke bail when such action is appropriate to preserve the orderly process of criminal procedure."); *see also Lindermayer*, *supra* note 50, at 276.

53. *See, e.g.*, *Rendel,* 474 P.2d at 828, (defining sufficient sureties as a reasonable assurance to the court that the defendant will appear for trial if admitted to bail).

54. *See, e.g.*, Ariz. Const. art II, § 22 (public safety exception for felony offenses); Cal. Const. art. I § 12 (public safety exception for sexual assault and violent felonies); Mo. Const. Art. 1 § 32.2 ("Notwithstanding section 20 of article I of this Constitution [which states that '[a]ll persons shall be bailable upon sufficient sureties'"], upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may impose special conditions which the defendant and surety must guarantee.").

55. *State v. Cardinal*, 147 Vt. 461, 465 (1986) ("[If a] defendant violates conditions of release other than an appearance condition, a court can impose increasingly more restrictive conditions, as well as revoke the right to bail altogether, if the court determines that no conditions of release will assure the defendant's appearance at trial.") (citations omitted).

56. *See* Ga. Const. art. 1, § 1, ¶ XVII; Haw. Const. art. 1, § 12; Md. Const. [Declaration of rights] art. 25; Ma. Const. Pt. 1, art. 26; N.H. Const. Pt. 1, art. 33; N.Y. Const. art. 1, § 5; N.C. Const. art. 1, § 27; Va. Const. art. 1, § 9; W.V. Const. art. 3 § 5.

57. *See*, *e.g.*, Ala. R. Cr. Proc. 7.2.

58. *See*, *e.g.*, Cal. R. Super. Ct., County of Colusa Local R. Ct. 6.02 ("Bail").

59. *See*, *e.g.*, Ala. Code § 15, chapter 13 ("Bail"); Alaska Stat. Ann. § 12.30 ("Bail").

60. *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 20, Ch. 2, art. 3.5 ("Bail Bond Agents and Bail Recovery Agents" appears in the section of the code devoted to insurance regulation).

61. *See*, *e.g.*, Alaska Stat. Ann. § 12.30.016(d) (imposing a minimum cash bond of $250,000 for those persons charged with misconduct regarding methamphetamines who have been previously convicted of possession, manufacture, or delivery of methamphetamines).

62. *See*, *e.g.* Ga. Code Ann. § 17-6-1(f)(1) ("the judge of any court of inquiry may by written order establish a schedule of bails and unless otherwise ordered by the judge of any court, a person charged with committing any offense shall be released from custody upon posting bail as fixed in the schedule."); Alaska Code § 12.30.016(d) (requiring $250,000 cash bond for offense involving manufacture of methamphetamine after a prior conviction for similar offense).

63. One example is the Illinois Pretrial Services Act of 1990, which created a legal framework for pretrial services in the state. Unfortunately, Administrative Office of the Illinois Courts found that the Act "has become largely aspirational" in Cook County, at least in part because of concerns about the credibility of risk assessment determinations made by pretrial services officers. *See* Illinois Supreme Court, Administrative Office of the Illinois Courts, *Circuit Court of Cook County Pretrial Operational Review* 5 (2014) *available at* http://www.illinoiscourts.gov/SupremeCourt/Reports/Pretrial/Pretrial_Operational_Review_Report.pdf.

64. *See*, *e.g.,* Cal. Penal Code § 853.6(a)(1) ("In any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance, and does not demand to be taken before a magistrate, that person shall, instead of being taken before a magistrate, be released...").

65. Amer. Bar Ass'n, *supra* note 5.

66. Schnacke, *supra* note 6.

67. *Bearden*, 461 U.S. at 672-73.

68. *See* Prison Pol'y Inst., *supra* note 10, at 1 (noting that 34% of defendants are kept in jail pretrial solely because they are unable to pay a cash bond, and most of these people are among the poorest third of Americans); Marie VanNostrand, *New Jersey Jail Population Analysis* at 13 (March 2013) (finding that 38.5% of New Jersey pretrial inmates are held in custody "solely due to their inability to meet the terms of bail" and that approximately 800 inmates held in custody "could have secured their release for $500 or less"), *available at* https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf; Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* at 20-21 (Dec. 2010) *available at* https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (reporting that "at any given moment, 39 percent of New York City's jail population consists of inmates who are in jail pretrial solely because they have not posted bail").

69. *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011).

70. *Id*. at 2511.

71. *Id*. at 2519.

72. *See* Agreement to Settle Injunctive and Declaratory Relief Claims, *Mitchell v. City of Montgomery*, No. 2:14-cv-186-MHT-CSC (M.D. Ala. Nov. 17, 2014), *available at* http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Final-Settlement-Agreement.pdf (setting out a standard "Affidavit of Substantial Hardship Form" to prevent indigent people from being jailed based on their inability to pay fines and fees).

73. *See id.* (creating a presumption that those with income at or

below 125% of the Federal Poverty Level, who do not have substantial assets, will be considered indigent).

74. *See* Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. Ill. L. Rev. 1, 5 (1998) (noting that "most state courts decline to provide poor people with a lawyer during the first stage of a criminal case when her presence truly matters: at the initial bail determination").

75. Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff. L. Rev. 333, 345 (2011).

76. *Cf. Turner*, 131 S. Ct. at 2519.

77. For example, in November 2016, New Mexico voters may decide to enact a constitutional amendment with the following protections: "A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner." *Supra* note 34, at 1.

78. The use of bail schedules has been challenged through litigation in California, Georgia, and Mississippi. *See* Compl.*, Buffin, v. City and County of San Francisco*, 2015 WL 6530384 (N.D. Ca. Oct. 28, 2015) (order certifying class); *Walker v. City of Calhoun, Georgia*, 2016 WL 361580 (N.D. Ga. 2016); *Thompson v. Moss Point*, 2015 WL 10322003 (S.D. Miss. 2015) (declaratory judgment).

79. *See, e.g.*, Ga. Code Ann. § 17-6-1 (f)(1) ("Except as provided in subsection (a) of this Code section or as otherwise provided in this subsection, the judge of any court of inquiry may by written order establish a schedule of bails and unless otherwise ordered by the judge of any court, a person charged with committing any offense shall be released from custody upon posting bail as fixed in the schedule."); Utah Code of Judicial Administration, Rule 4-302 ("The Uniform Fine/Bail Schedule Committee shall establish a uniform fine/bail schedule setting forth recommended fine and bail amounts for all criminal and traffic offenses, pursuant to the Utah Code...[w]hen imposing fines and setting bail, courts should conform to the uniform fine/bail schedule except in cases where aggravating or mitigating circumstances warrant a deviation from the schedule.") Cal. Penal Code § 1269b(b) ("If a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information, the bail shall be in the amount fixed by the judge at the time of the appearance. If that appearance has not been made, the bail shall be in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear, previously fixed and approved as provided in subdivisions (c) and (d).").

80. Ala. Code § 15-13-103.

81. *Id*.

82. Ala. Rules of Crim. Proc., Rule 7.2(b).

83. *Jones v. City of Clanton*, No. 215CV34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. 2015).

84. Alaska Stat. Ann. § 12.30.016. Alaska is in the process of reviewing its bail practices as part of the Justice Reinvestment Initiative, and this provision may change. *See* Alaska Crim. Justice Comm'n., *Justice Reinvestment Initiative Report* 8 (Dec. 2015), *available at* http://www.ajc.state.ak.us/sites/default/files/imported/acjc/recommendations/ak_justice_reinvestment_intiative_report_to_acjc_12-9.pdf. (identifying "one of the likely contributors to pretrial length of stay in Alaska is the use of secured money bail").

85. Alaska Stat. Ann. § 12.30.016.

86. *Stack*, 342 U.S. at 4-5.

87. Amer. Bar Ass'n, *supra* note 5, at 17.

88. *Id*.

89. *Id*.

90. *See, e.g.*, Statement of Interest of the United States, *Jones v. City of Clanton*, 2:15-cv-34 (M.D. Ala. Feb. 13, 2015), at 14, *available at* https://www.justice.gov/file/340461/download ("The use of a more dynamic bail scheme...not only ensures adherence to constitutional principles of due process and equal protection, but constitutes better public policy. Individualized determinations, rather than fixed-sum schemes that unfairly target the poor, are vital to...providing equal justice for all."); *Walker v. City of Calhoun*, 2016 WL 361612 at *10 (N.D. Ga. 2016) (granting preliminary injunction) (holding "any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause").

91. Alysia Santo, *When Freedom Isn't Free*, The Marshall Project, (Feb. 23, 2015), https://www.themarshallproject.org/2015/02/23/buying-time#.hnv6qqKdO.

92. *See* International Ass'n. of Chiefs of Police, *Law Enforcement's Leadership Role in the Pretrial Release and Detention Process* 7 (Feb. 2011), *available at* http://www.theiacp.org/portals/0/pdfs/Pretrial_Booklet_Web.pdf.

93. *See, e.g.,* The Nat'l Ass'n. of Pretrial Services Agencies, *The Truth About Commercial Bail Bonding in America* (Aug. 2009) *available at* https://www.pretrial.org/download/pji-reports/Facts%20and%20Positions%201.pdf; Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, Mother Jones, May/June 2014, *available at* http://www.motherjones.com/politics/2014/06/bail-bond-prison-industry.

94. *See* Justice Policy Inst., *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice* 40-42 (Sept. 2012), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf.

95. *See* Brian R. Johnson & Ruth S. Stevens, *The Regulation and Control of Bail Recovery Agents: An Exploratory Study*, 38 Crim. Justice Rev. 190, 193 (2013); Brian Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. Times, Jan. 29, 2008. *See also* Schnacke, *supra* note 6, at 36-37 (examining the historical origins of the modern surety system, comprised of "what we might now call unsecured bonds using co-signors, with nobody required to pay any money up-front, and with the security on any particular bond coming from the sureties...who were willing to... acknowledge the amount potentially owed upon default.").

96. Ky. Rev. Stat. Ann. § 431.510 (West 1976); 725 Ill. Comp. Stat. 5/103-9 (1986); 725 Ill. Comp. Stat. 5/110-7 & -8.

97. Fred Contrada, *Bail Bondsmen are a thing of the Past in Mass.*, Mass Live (2014), http://www.masslive.com/news/index.ssf/2014/03/bail_bondsmen_are_a_thing_of_t.html.

98. The American Bar Association standards for pretrial release reflect these principles, noting that the "presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act and the District of Columbia release and pretrial detention statute, as well as in the laws and court rules of a number of states." Amer. Bar Ass'n, *supra* note 5, at 39-40.

99. Spurgeon Kennedy, *Freedom and Money – Bail in America*, *available at* https://www.psa.gov/?q=node/97.

100. *Id*.

101. Pretrial Services Agency for the District of Columbia, *Research and Data, Performance Measures*, *available at* https://www.psa.gov/?q=data/performance_measures.

102. *Id*.

103. *Id*.

104. *See, e.g.*, Ariz. St. Code of Jud. Admin. §5-201; Colorado Rev. Stat. Ann. §16-4-105; New Jersey P.L. 2014, Ch. 31, §1-20.

105. National Center for State Courts, *Pretrial Services and Supervision*, http://www.ncsc.org/Microsites/PJCC/Home/Topics/Pretrial-Services.aspx.

106. Colo. Rev. Stat. Ann. §16-4-105.

107. Kathy Rowings, Nat'l Ass'n of Counties, *County Jails at a Crossroads – Mesa County, CO*, (July 6, 2015), available at http://www.naco.org/resources/county-jails-crossroads-mesa-county-co.

108. *See* Pretrial Justice Inst., *Mesa County Pretrial SMART Praxis* (2013), *available at* http://www.pretrial.org/download/risk-assessment/Mesa%20County%20SMART%20Praxis.pdf.

109. *Id*.

110. Nat'l Ass'n of Pretrial Services Agencies, *Standards on Pretrial Release, Third Edition* 14 (Oct. 2004), *available at* https://drive.google.com/file/d/0B1YIoljVNUF5NmJkY0wzRHR1Tmc/view.

111. *Id*.

112. *See, e.g.*, Superior Court of Fulton County, *Pretrial Services – Savings to Taxpayers*, *available at* https://www.fultoncourt.org/pretrial/savings.php (cost-benefit analysis estimating a $51.8 million dollar savings in fiscal year 2011 comparing the pretrial services budget in Fulton County, Georgia to the cost of keeping defendants in jail); Alex Piquero, *Cost-Benefit Analysis for Jail Alternatives and Jail* 5 (Oct. 2010) *available at* http://criminology.fsu.edu/wp-content/uploads/Cost-Benefit-Analysis-for-Jail-Alternatives-and-Jail.pdf (comparing daily costs of jail and pretrial services in Broward County, Florida and concluding that "cost savings via pretrial (in lieu of jail) are over $100 million in both 2009 and 2010"); Marie VanNostrand, *Alternatives to Pretrial Detention: Southern District of Iowa* (2010), *available at* https://www.pretrial.org/download/risk-assessment/Alternatives%20to%20Pretrial%20Detention%20Southern%20District%20of%20Iowa%20-%20VanNostrand%202010.pdf (evaluating pretrial services programs in Iowa, showing pretrial services resulted in cost savings of $15,393 per defendant and a cost avoidance of $5.33 million in the 2008 and 2009 fiscal years).

113. *See United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006) ("[O]ne who has been released on pretrial bail does not lose his or her Fourth Amendment right to be free of unreasonable seizures.") (*quoting Cruz v. Kauai County*, 279 F.3d 1064, 1068 (9th Cir. 2002)).

114. *See, e.g.*, *id.* (holding that mandatory random drug testing as a condition of release constituted an unreasonable search under the Fourth Amendment where there was no showing that drug testing advanced goals of public safety of guaranteeing appearance at trial); *United States v. Karper*, 847 F. Supp. 2d 350 (N.D.N.Y. 2011) (finding that mandatory electronic monitoring conditions on defendants accused of certain sex offenses violates due process and constitutes excessive bail); *United States v. Polouizzi*, 697 F. Supp. 2d 381 (E.D.N.Y. 2010) (same).

115. *See* Timothy R. Schnacke, et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado FTA Pilot Project and Resulting Court Date Notification*, 48 Court Rev. 86 (2012); Wendy F. White, *Court Hearing Call Notification Project*, Coconino County, AZ: Criminal Coordinating Council and Flagstaff Justice Court (2006).

116. Matt O'Keefe, *Court Appearance Notification System: 2007 Analysis Highlights*, LPSCC (2007), *available at* http://www.pretrial.org/download/research/Multnomah%20County%20Oregon%20-%20CANS%20Highlights%202007.pdf.

117. Wendy F. White, *Court Hearing Call Notification Project*, Coconino County, AZ: Criminal Coordinating Council and Flagstaff Justice Court (2006) http://www.pretrial.org/download/supervision-monitoring/Coconino%20County%20AZ%20Court%20Hearing%20Notification%20Project%20(2006).pdf. (finding that advance phone calls to defendants reduced the percentage of failure to appear from over 25% to less than 13%).

118. Schnacke, *supra* note 115, at 86 (2012) (finding that phone calls from volunteers increased court appearance rates from 79% to 88%).

119. Pretrial Justice Inst., *Using Technology to Enhance Pretrial Services: Current Applications and Future Possibilities* 14-16, *available at* https://www.pretrial.org/download/pji-reports/PJI%20USING%20TECHNOLOGY%20TO%20ENHANCE%20PRETRIAL%20SERVICES.pdf (discussing the potential for implementation of new technologies like e-mail and text message reminders).

120. *See* Marie VanNostrand, et al., Pretrial Justice Inst., *State of the Science of Pretrial Release Recommendations and Supervision* 29 (2011), *available at* http://www.pretrial.org/download/research/PJI percent20State percent20of percent20the percent20Science percent20Pretrial percent20Recommendations percent20and percent20Supervision percent20(2011).pdf (finding that "review of supervision strategies in numerous pretrial services agencies nationally revealed disparate practices for what constitutes pretrial supervision. The frequency and types of contacts ranged from monthly phone contacts with an automated calling system to daily in-person reporting by defendants").

121. *Id*.

122. John S. Goldkamp & Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, 2 J. of Experimental Criminology 143 (2006).

123. Laura & John Arnold Found., *supra* note 20, at 6.

124. *Id*.

125. *Id*.

126. Sharon Aungst, ed., Partnership for Community Excellence, *Pretrial Detention and Community Supervision: Best Practices and Resources for California Counties*, 13 (2012), *available at* http://caforward.3cdn.net/7a60c47c7329a4abd7_2am6iyh9s.pdf.

127. Eric Markowitz, *Electronic Monitoring Has Become the New Debtors Prison*, Newsweek, Nov. 26, 2015, *available at* http://www.msn.com/en-us/news/us/electronic-monitoring-has-become-the-new-debtors-prison/ar-BBnlTfa?ocid=spartandhp.

128. *See* Aungst, *supra* note 126, at 13; Keith Cooprider & Judith Kerby, *Practical Application of Electronic Monitoring at the Pretrial Stage*, 1 Federal Probation 28, 33 (1990) (noting that "[t]he higher violation rate(s) of electronically monitored defendants is probably related to the fact that, as a rule, the riskier clients (serious charge in terms of felony class, recidivist, already on some other form of community supervision, FTA history, chemical dependency, etc.) are supervised with electronic monitoring"); Timothy P. Cadigan, *Electronic Monitoring in Federal Pretrial Release*, 55 Federal Probation 1, 26 (1991) (finding "the electronic monitoring defendants were charged more frequently with serious offenses" than average, which helps explain their higher rates of re-arrest) 29-30; Albert J. Lemke, *Institute for Court Management, Evaluation of the Pretrial Release Pilot Program in the Mesa Municipal Court* 50 (2009), *available at* https://www.ncsc.org/~/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2009/Lemke_EvalPretrialReleaseProg.ashx; Nat'l Inst. of Justice, Office

of Justice Programs, *Electronic Monitoring Reduces Recidivism* 2 (2011), *available at* https://www.ncjrs.gov/pdffiles1/nij/234460.pdf (discovering quantitatively "significant decreases in the failure rate for all groups of offenders, and the decreases were similar for all age groups").

129. VanNostrand, *supra* note 120, at 27.

130. *See generally* Avlana K. Eisenberg, *Mass Monitoring*, 90 S. Cal. L. Rev. __ (forthcoming 2017).

131. *See* Nat'l Inst. of Justice, *supra* note 128, at 1-4 (describing the results of a survey conducted by Florida State University's Center for Criminology and Public Policy Research comparing the experiences of more than 5,000 medium-and high-risk offenders who were monitored electronically to more than 266,000 offenders not placed on monitoring over six years). *See also* M.M., *Living With an Ankle Bracelet: Freedom, With Conditions*, The Marshall Project, (July 16, 2015), *available at* https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet#.th8stdccH.

132. Nat'l Inst. of Justice, *supra* note 128.

133. *Id.* at 2.

134. *Id*.

135. *Id*.

136. *See Polouizzi*, 697 F. Supp. 2d at 389 ("Required wearing of an electronic bracelet, every minute of every day, with the government capable of tracking a person not yet convicted as if he were a feral animal would be considered a serious limitation on freedom by most liberty-loving Americans.").

137. *See*, *e.g.*, *United States v. Karper*, 847 F. Supp. 2d 350 (N.D.N.Y. 2011) (finding that mandatory electronic monitoring conditions on defendants accused of certain sex offenses violates due process and constitutes excessive bail); *Polouizzi*, 697 F. Supp. 2d 381 (same). *But see*, *e.g.*, *United States v. Gardner*, 523 F. Supp. 2d 1025 (N.D. Cal. 2007) (rejecting due process and excessive bail challenges to mandatory electronic monitoring).

138. *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) ("In cases involving even short-term monitoring, some unique attributes of GPS surveillance...will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

139. All states, except Hawaii and the District of Columbia, charge fees to those who are under electronic monitoring. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR, (May 19, 2014), *available at* http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

140. Markowitz, *supra* note 127.

141. VanNostrand, *supra* note 120, at 24.

142. Pretrial Justice Inst., *Survey of Pretrial Programs* 47 (2009), *available at* http://www.pretrial.org/download/pji-reports/new-PJI%202009%20Survey%20of%20Pretrial%20Services%20Programs.pdf.

143. Stefan Kapsch & Louis Sweeny, Bureau of Just Assistance, *Multnomah County DMDA Project: Evaluation Final Report* (1990); *see also* VanNostrand, *supra* note 120, at 21-22 (discussing separate studies of Washington D.C. and Milwaukee which found, respectively, that drug testing pretrial did not reduce failure to appear and that increasingly severe judicial sanctions changed nothing); Michael R. Gottfredson, et al., U.S. Dept. of Justice, Nat'l. Inst. of Justice, *Evaluation of Arizona Pretrial Services Drug Testing Programs: Final Report to the National Institute of Justice* (1990) (finding that "knowledge of drug test results does not appreciably improve the ability to estimate pretrial misconduct"); Chester L. Britt, et al., *Drug Testing and Pretrial Misconduct: An Experiment on the Specific Deterrent Effect of Drug Monitoring Defendants on Pretrial Release*, J. of Crime and Delinquency (1992) (finding that drug testing only leads to a slight decrease in pretrial arrest but does not alter failure to appear).

144. VanNostrand, *supra* note 120, at 24.

145. A series of Supreme Court cases has addressed the Fourth Amendment considerations surrounding drug testing in a variety of settings. While government-ordered drug tests indisputably constitute searches for Fourth Amendment purposes, the Court has generally scrutinized the particular contexts in which such tests are imposed to determine whether they are constitutionally reasonable searches. *Compare Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding that mandatory urinalysis of pregnant mothers violates Fourth Amendment) *and Chandler v. Miller*, 520 U.S. 305 (1997) (striking down drug testing for candidates for designated state offices) *with Bd. of Educ. Of Independent Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822 (2002) (upholding mandatory drug testing of high school students participating in extracurricular activities) *and Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding drug and alcohol testing of railway operators).

146. *See Scott,* 450 F.3d at 870 ("Drug use during pretrial release may result in a defendant's general unreliability or, more nefariously, an increased likelihood of absconding. Whether this is plausible depends on whether drug use is a good predictor of these harms – a case that must be established empirically by the government when it seeks to impose the drug testing condition."); *Berry v. District of Columbia*, 833 F.2d 1031, (D.C. Cir. 1983) (holding that to justify mandatory pretrial drug testing "the District must proffer reliable evidence, statistical or otherwise, from which the trial court can reasonably conclude that drug testing makes it significantly more likely that an arrestee will commit crimes or fail to appear for scheduled court dates").

147. Markowitz, *supra* note 127.

148. *See* Jason Blalock, *Profiting from Probation: America's "Offender-funded" Probation Industry*, Human Rights Watch (2014), *available at* https://www.hrw.org/report/ 2014/02/05/profiting-probation/americas-offender-funded-probation-industry.

149. Charles Summers & Tim Willis, Bureau of Justice Assistance, *Pretrial Risk Assessment: Research Summary* 2 (2010), *available at* https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf.

150. Cynthia Mamalian, *State of the Science of Pretrial Risk Assessment* 7 (2011), *available at* http://www.pretrial.org/download/risk-assessment/PJI%20State%20of%20the%20Science%20Pretrial%20Risk%20Assessment%20 (2011).pdf; *see also*, Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 3 (2015), *available at* http://www.pretrial.org/download/advocacy/Issue%20Brief-Pretrial%20Risk%20Assessment%20(May%202015).pdf.

151. *See* Council of State Govts, *Risk and Needs Assessment and Race in the Criminal Justice System*, May 31, 2016, *available at* https://csgjusticecenter.org/reentry/posts/risk-and-needs-assessment-and-race-in-the-criminal-justice-system (discussing the ways in which a risk assessment tool must be used properly and accurately in order to ensure that it does not perpetuate racial biases in the criminal justice system).

152. *See* Timothy Cadigan, et al., *Implementing Risk Assessment in the Federal Pretrial Services System*, 75 Fed. Prob. 30, 31 (Sept. 2011) (noting that "[r]isk tools, while tremendously useful in improving agency decision making and ultimately release recommendations, have limitations...[and] the tool should not be followed blindly").

153. *See id*. at 32.

154. Jeff Larson et al., *How We Analyzed the COMPAS Recidivism*

Algorithm, May 23,2016, *available at* https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm

155. Samuel Wiseman, *Fixing Bail*, 84 Geo. Was. L. Rev. 417, 442 n. 145 (2016) (citing Charles Summers & Tim Willis, Bureau of Justice Assistance, *Pretrial Risk Assessment Research Summary* 2 (2010); Vera Inst. of Justice, *Evidence-Based Practices in Pretrial Screening and Supervision*, 2–3 (2010)). The use of risk assessment in the federal system has been limited: In 2011, there were an average of 26,000 pretrial defendants each quarter in the federal system, but only 4,000 reports with Pretrial Risk Assessment scores. Cadigan, *supra* note 152, at 30, 33.

156. For example, New Jersey has partnered with the Laura and John Arnold Foundation to implement a pretrial risk assessment tool as part of its bail reform efforts. *See* N.J. State Legis., *FY 2015-2016 Budget, Judiciary Response* 3, *available at* http://www.njleg.state.nj.us/legislativepub/budget_2016/JUD_response.pdf). New Mexico is also investigating the use of risk assessment. *See* N.M. Senate, *Joint Resolution 1, Fiscal Impact Report*, Feb. 16, 2016, *available at* http://www.nmlegis.gov/Sessions/16%20Regular/firs/SJR01.PDF.

157. *See*, *e.g.*, Pretrial Justice Inst., *The Colorado Pretrial Assessment Tool, Revised Report*, Oct. 19, 2012, *available at* http://www.pretrial.org/download/risk-assessment/CO%20Pretrial%20Assessment%20Tool%20Report%20Rev%20-%20PJI%202012.pdf; Ohio Dep't of Rehabilitation and Correction, *Ohio Risk Assessment System*, Nov. 17, 2014, *available at* http://www.drc.ohio.gov/web/oras.htm; Northpointe, *Northpointe Software Suite, available at* http://www.northpointeinc.com/products/northpointe-software-suite.

158. A 2011 report noted that the cost of validating a risk assessment instrument could range from $20,000 to $75,000, depending on the jurisdiction and the type of study that is being done. *See* Mamalian, *supra* note 150, at 35 n. 91.

159. Indeed, two of the most recent states to undertake major reform, New Jersey and New Mexico, have explored the use of national APRAI models. See N.J. State Legis., *supra* note 156 at 3; N.M. Senate, *supra* note 156 at 1.

160. The Arnold Foundation has funded the Criminal Justice Policy Program on work that is unrelated to this primer.

161. Laura & John Arnold Found., *Developing a National Model for Pretrial Risk Assessment* (Nov. 2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.

162. VanNostrand, *supra* note 120, at 29.

163. *See* Laura & John Arnold Found., *Results from the First Six Months of the Public Safety Assessment - Court in Kentucky* (July 2014), *available at* http://www.ncjp.org/pretrial/universal-risk-assessment#sthash.ZhtdTaoL.dpuf.

164. Laura & John Arnold Found, *Developing a National Model for Pretrial Risk Assessment*, (Nov. 2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.

165. *Id*.

166. *Id*.

167. *Id*.

168. *Id.*

169. *Id*.

170. *Id*.

171. *Id*.

172. Laura & John Arnold Found., *More Than 20 Cities and States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial*, June 26, 2015, *available at* http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/.

173. *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 Tex. L. Rev. 497, 553 (2012) (finding among pretrial defendants nationally that "almost exactly half of those held...in reality have a lower than 20% chance of rearrest, while an equivalent number of those *released* have a higher than 20% chance of committing a crime") (emphasis added).

174. Samuel Wiseman, *Fixing Bail*, 84 Geo. Was. L. Rev. 417, 467-68 (2016).

175. Vernon Lewis Quinsey, et al., *Violent Offenders: Appraising and Managing Risk* 171 (1998).

176. Baradaran & McIntyre, *supra* note 173, at 553.

177. *See, e.g.,* Justice Pol'y Inst., *supra* note 28, at 13-14 (discussing the potential interruption to jobs, housing, health insurance, familial and community well-being that can occur as a result of pretrial detention).

178. *See supra* note 25.

179. Even one of the scholars most critical of actuarial risk assessment tools has observed that the bail context constitutes "one instance of actuarial progress that unquestionably has benefited poor and minority communities." Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* 216 (2007).

180. *See* Laura & John Arnold Found., *supra* note 163.

181. Kenneth Rose, Virginia Dep't of Criminal Justice Services, *A "New Norm" for Pretrial Justice in the Commonwealth of Virginia* 6 (2013), *available at* https://www.dcjs.virginia.gov/corrections/documents/A%20New%20Norm%20for%20Pretrial%20Justice%20in%20the%20Commonwealth%20of%20Virginia.pdf.

182. *See* Mecklenburg County Criminal Justice Services Planning, *Jail Population Trend Report, January-March 2016*, *available at* http://charmeck.org/mecklenburg/county/CriminalJusticeServices/Documents/Jail%20Population/Population%20FY16%203Q.pdf. In 2008, the average pretrial jail population was 1,953 people but by December 2015 the daily population was reduced to 817 people. Nat'l. Ass'n. of Counties, *Effectively Framing the Pretrial Justice Narrative*, Webinar, April 14, 2016, *available at* http://www.naco.org/sites/default/files/event_attachments/Effectively%20Framing%20the%20Pretrial%20Justice%20Narrative.pdf.

183. Pretrial Justice Inst., *The Transformation of Pretrial Services in Allegheny County, Pennsylvania: Development of Best Practices and Validation of Risk Assessment*, vii (Oct. 9, 2007), *available at* http://www.pretrial.org/download/pji-reports/Allegheny%20County%20Pretrial%20Risk%20Assessment%20Validation%20Study%20-%20PJI%202007.pdf.

184. *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan. L. Rev. 803, 842 (2014) ("[In the sentencing context,] the models are designed to predict 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 an appropriate and large enough sample, then it might perform this task well. But because individuals vary much more than groups do, even a relatively precisely estimated model will often not do well at predicting individual outcomes in particular cases.").

185. Amer. Bar Ass'n, *supra* note 5.

186. Executive Office of the President, *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights* 21 (May 2016), *available at* https://www.whitehouse.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf.

187. *See*, *e.g.*, Angele Christin et al., *Courts and Predictive Algorithms*

7-8 (Oct. 27, 2015) (outlining ways that inputting and interpretation of data may result in shifting discretion rather than rationalizing decisions), *available at* http://www.datacivilrights.org/pubs/2015-1027/Courts_and_Predictive_Algorithms.pdf.

188. *See*, *e.g.*, Christopher Slobogin, *Risk Assessment and Risk Management in Juvenile Justice*, 27 Wtr. Crim. Justice 10, 16-17 (2013).

189. *See, e.g.,* Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 Fed. Sent. Rep. 167, 173 (2014) (concluding that reliance on criminal histories intertwined with socioeconomic factors, such as age at time of first arrest, custody status at time of first arrest, and total number of convictions, inherently disadvantage minority defendants).

190. *See*, *e.g.*, Marc Mauer & Ryan S. King, *The Sentencing Project, Uneven Justice: State Rates of Incarceration by Race and Ethnicity* 4 (July 2007) (finding that "[t]he American prison and jail system is defined by an entrenched racial disparity in the population of incarcerated people").

191. For example, the nine factors that the Virginia Pretrial Risk Assessment Instrument (VPRAI) considers include whether the defendant has lived at their current residence for a year or more and whether he or she has been employed continuously or served as a primary caretaker for children over the past two years. *Virginia Pretrial Risk Assessment Instrument (VPRAI) Instruction Manual*, 5-7 https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-instrument-vprai.pdf. Factors like these may systematically import racial bias. *See, e.g.,* Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 Am. J. of Sociology 88, 110 (July 2012) (explaining the structural reasons why black women are overrepresented in evictions in Milwaukee).

192. Atty. Gen. Eric Holder, *Remarks of Attorney General Eric Holder at National Association of Criminal Defense Lawyers 57th Annual Meeting* (Aug. 1, 2014), *available at* https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th.

193. *Id*.

194. *See* Harcourt, *supra* note 179, at 220 (2007) (discussing the "ratchet effect" that may occur when using risk assessment in the pretrial context).

195. *See* Atty. Gen. Eric Holder *supra* note 192 ("Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case, and the defendant's history of criminal conduct. They should not be based on unchangeable factors that a person cannot control.").

196. *See*, e.g., Sonja Starr, *Risk Assessment Era: An Overdue Debate*, 27 Fed. Sent'g Rep. 205 (Apr. 2015)

197. *See, e.g.*, *State v. Loomis*, 881 N.W.2d 749 (Wisc. 2016) (examining the use of risk assessment at sentencing); *State v. Duchay*, 647 N.W.2d 467, 2002 WL 862458, at *1-2 (Wis. Ct. App. May 7, 2002) (holding that a court's reliance on a risk assessment instrument in sentencing was not a due process violation because the defendant did not show that the information was inaccurate); *Malenchik v. State*, 928 N.E.2d 564, (Ind. 2010) (upholding the use of a risk assessment tool in the sentencing context).

198. *See*, *e.g.*, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 2419 (2013) (government policies that rely on "suspect classifications" will survive judicial scrutiny only if they are narrowly tailored to serve a compelling governmental interest).

199. *See United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

200. *See* Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. Gender Race & Justice 127 (2010) (discussing the "explicit commitment to ensuring that a defendant's sentence is not affected by the defendant's race or gender" present in "most modern sentencing systems" and the Equal Protection underpinnings of that practice). *See also* Starr, *supra* note 184, at 823-24 (arguing that risk assessment instruments in the sentencing context which rely on "statistical generalizations about groups" based on gender and socioeconomic status violate the Equal Protection Clause). Observers have reached competing conclusions about whether including sex as a variable in an actuarial risk assessment would survive equal protection scrutiny. *See* Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 Am. Crim. L. Rev. 231, 250-53 (2015) (outlining divergent views by scholars and commentators). The Wisconsin Supreme Court recently upheld the use of a risk assessment instrument in the sentencing context that included gender as a risk factor. *See Loomis*, 881 N.W.2d at 766. Significantly, however, the court in that case considered a claim based on due process, not equal protection. *Id*.

201. *See*, *e.g.*, *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

202. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

203. *See Mathews v. Edridge*, 424 U.S. 319 (1976).

204. *Salerno*, 481 U.S. at 751.

205. *Loomis*, 881 N.W.2d at 760.

206. *Id*. at 769.

207. *See generally Salerno*, 481 U.S. at 750-51; *Mathews*, 424 U.S. at 334-35.

208. See Hamilton, *supra* note 200, at 271 (2015) (considering potential due process requirements in various contexts).

209. *See* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. Crim. Justice & Criminology 1, 4 (1985) (listing five common objections to cash bail systems including that judges often set bond at a level without relation to the dangerousness of the defendant and which may handicap the defendant at later stages in the criminal procedure).

210. *See* Alaska Stat. Ann. § 12.30.011(d)(2); Arizona Rev. Stat. Ann. § 13-3961; Colorado Rev. Stat. Ann. § 16-4-101; D.C. Code §23-1322; Florida Const. Art. 1 § 14; Hawaii Rev. Stat. §804-3; Illinois 725 Ill. Comp. Stat. 5/110-6.1; Indiana Code Ann. §35-33-8-2 (only for murder charges where "the proof is evident or the presumption strong"); Louisiana Code Crim. Proc. Ann. art. 330.1; Maine Rev. Stat. Ann. tit. 15 § 1027, § 1029 (for crimes that are or were formerly capital offenses); Maryland Rules Crim. Proc. § 5-202; Massachusetts G. L. 276 § 58A; Michigan §765.5; Mississippi Const. Art. 3, §29; Mo. Const. Art. 1 § 32.2; New Jersey P.L. 2014, Ch. 31, §1-20; Ohio Rev. Code Ann. §2937.222; Oregon Rev. Stat. Ann. § 135.240; Pennsylvania Const. Art. 1 § 14; Rhode Island Gen. Laws Ann. § 12-13-1.1; Texas Const. Art. 1 § 11a; Washington Rev. Code Ann. § 10.21.040, § 10.21.060 (for capital offenses and offenses punishable by life in prison); Wisconsin Const. Art. 1 § 8.

211. *See, e.g.*, Shima Baradaran Baughman, *Restoring the Presumption of Innocence,* 72 Ohio State L.J. 723 (2011) (questioning bail and pretrial detention given the presumption of innocence); R.A. Duff, *Pre-trial Detention and the Presumption of Innocence* (2012), *available at* http://ssrn.com/abstract=2103303 (assessing whether pretrial detention can coexist with the presumption of innocence); Sandra G. Mayson, *Dangerous Defendants*, University of Pennsylvania Law School, Public Law Research Paper No. 16-30 (August 15, 2016), *available at* http://ssrn.com/abstract=2826600.

212. *Id*. at 746. *See also Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protections against deprivation of liberty without due process of law, we think the proper inquiry is whether those conditions amount to punishment of the detainee...[I]f a particular condition or restriction of pretrial detention is reasonably related to a

legitimate government objective, it does not, without more, amount to 'punishment.'").

213. *Salerno*, 481 U.S. at 747.

214. *Id.*

215. *Id*. at 750.

216. *Id.* at 750 (internal quotations and citations omitted).

217. *Id*. at 751.

218. *Id*. at 755.

219. *Id*. at 751.

220. *Id*.

221. *Id*. at 751–52.

222. The right to counsel at bail hearings is crucial not only to reduce unnecessary pretrial detention, but also to ensure that defendants are able to preserve their right to a fair trial. Having counsel involved at an early stage allows the attorney to begin a prompt investigation of the case and build trust with the client. *See* Colbert, *supra* note 74, at 6.

223. D.C. Code § 23-1322(h)(1). Significantly, the statute allows for 20 day extensions when good cause is shown if a judicial officer approves of the requested extension.

224. Vt. Stat. tit. 13, § 7553b.

225. *See* Thomas M. O'Brien, *The Undoing of Speedy Trial in New York: the "Ready Rule,"* N.Y. Law Journal (Jan. 14, 2014), *available at* http://www.newyorklawjournal.com/id=1202638065307/The-Undoing-of-Speedy-Trial-in-New-York-the-Ready-Rule?mcode=0&curindex=0&curpage=ALL (noting the case of Kalief Browder who was jailed for three years in Rikers Island awaiting trial); William Glaberson, *Justice Denied: Inside the Bronx's Dysfunctional Court System*, N. Y. Times, *available at* http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html?pagewanted=all&_r=0.

226. *Salerno*, 481 U.S. at 747.

227. *Id*. at 750.

228. *Id*.

229. Laura & John Arnold Found., *supra* note 20, at 4-5.

230. N.J.P.L. 2014, Ch. 31, § 1 (defining "eligible defendants" for the purpose of administering risk assessment based on the crime for which a defendant is charged).

231. *See* D.C.Code §23-1322; 18 U.S.C § 3142(e).

232. Cf. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420 (2008) (arguing that the federal sentencing guidelines have increased prosecutorial discretion, not only in charging decisions but also in sentencing).

233. D.C. Code §23-1322(b)(1); 18 U.S.C § 3142(f).

234. *Salerno*, 481 U.S. at 751.

235. D.C.Code § 23-1322(e).

236. *See*, *e.g.*, Ohio Rev. Code § 2937.222; Washington Rev. Code Ann. §10.21.050 (mirroring almost exactly the D.C. language); Mass. Gen. Laws Ann. ch. 276, § 58A ("The nature and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the 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, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge…"). New Jersey's preventative detention statute contains a discussion of similar factors in addition to the "release recommendation of the pretrial services program obtained using a risk assessment instrument under section 11 of P.L.2014, c.31 (C.2A:162-25)." N.J. P.L.2014, c.31 C.2A:162-20(6)(f).

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HARVARD LAW SCHOOL

Austin Hall, 1st floor | 1515 Massachusetts Ave | Cambridge, MA 02138
Phone: 617-495-4848 | cjpp.law.harvard.edu