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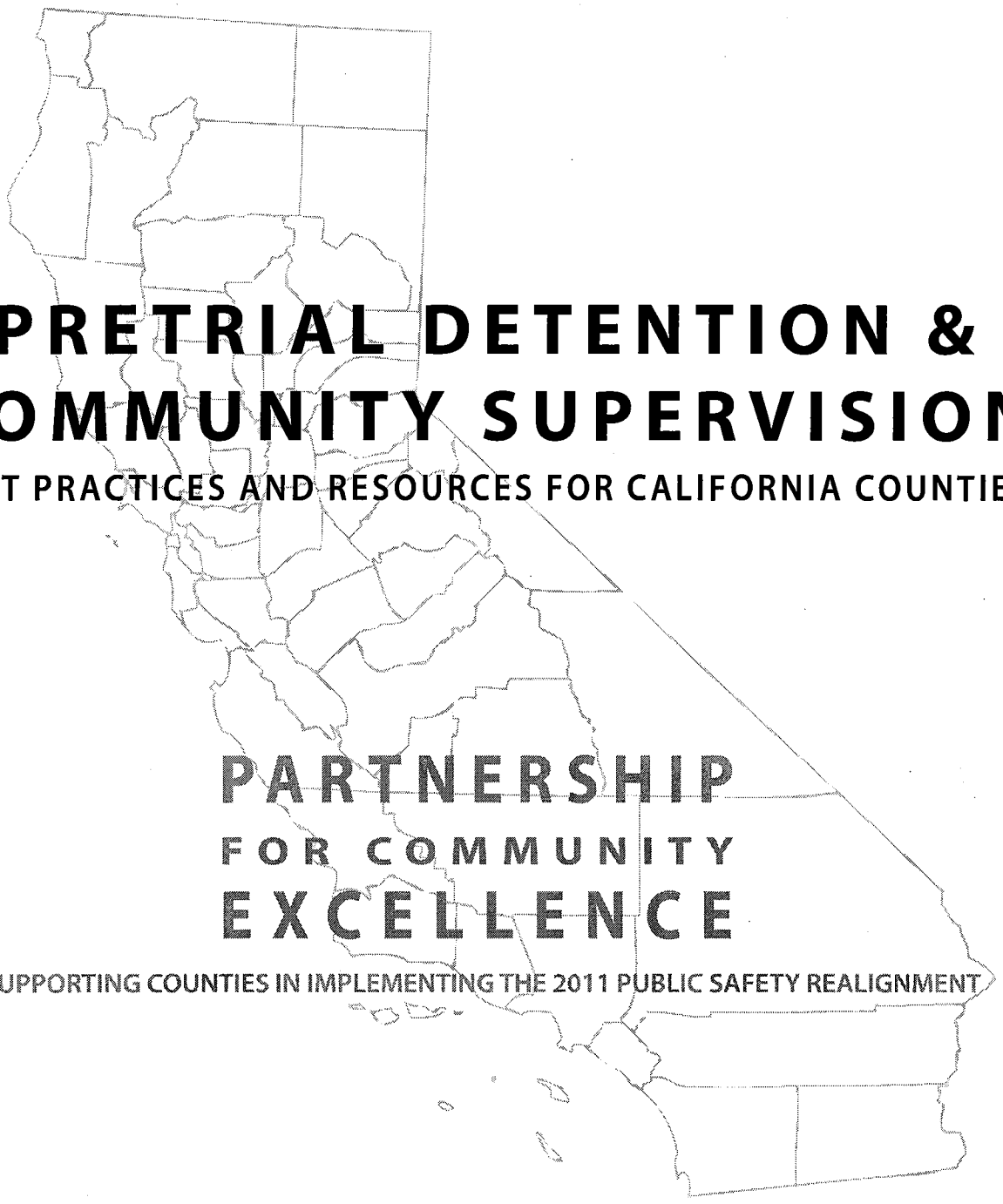

PRETRIAL DETENTION & COMMUNITY SUPERVISION

BEST PRACTICES AND RESOURCES FOR CALIFORNIA COUNTIES

PARTNERSHIP FOR COMMUNITY EXCELLENCE

SUPPORTING COUNTIES IN IMPLEMENTING THE 2011 PUBLIC SAFETY REALIGNMENT

September 2012

Sharon Aungst
Editor

cafwd.org/pce

PREFACE

California Forward launched the Partnership for Community Excellence (Partnership) in December 2011 to assist counties to envision, design and implement their own strategies to effectively implement new responsibilities related to the adult criminal justice Realignment under Assembly Bill 109 and related legislation. The Partnership's goal is to provide actionable information to local leaders and agencies so they can make smart decisions in building capacity, choosing evidence-based programs, and measuring and improving results.

Realignment also creates an opportunity for counties to examine new governance models that will help them achieve better outcomes in other areas of local government. Good governance is centered on collaborative planning, using models and services shown to work, and measuring and improving results. Given the diversity of California, these good governance practices can be expected to result in different strategies. There is no "one right way," yet government must be accountable to Californians for results. Adopting effective governance models will assist counties to improve transparency, accountability and results. Public leaders need accurate and up-to-date information in order to make good decisions and drive system change.

Effective pretrial practices are important to the success of Realignment and improving public safety, given that 71 percent of jail beds currently are occupied by pretrial detainees. Making pretrial release decisions based on a detainee's risk and needs, versus their ability to post bail, is key to improving public safety and offender outcomes. The purpose of this report is to provide a summary of best practices and practical information to assist county leaders in determining how pretrial programs could assist their local jurisdiction. The report includes the following:

- Summary of national pretrial best practices;
- Summary of five California counties' experiences in effectively implementing pretrial programs;
- Suggestions related to offender tracking and data collection and analysis;
- Issues for consideration in implementing a pretrial program; and,
- Resources including technical assistance available to counties.

We are grateful to the Partnership's team of collaborators for their expertise and efforts in developing this report. Members include:

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The Partnership strives to provide non-partisan, factual, actionable information and quality reports to those involved in implementing, or who have an interest in, Realignment. We want to improve the quality of our work over time so we welcome all suggestions and advice regarding this report as well as topics and other information to be included in future reports.

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The 2011 Public Safety Realignment (Realignment) is the most significant criminal justice legislation passed in three decades in California. Realignment moved authority, responsibility and accountability to counties for non-serious, non-violent and non-sex offenders formerly sentenced to state prisons. The State retained responsibility for serious, violent and sex offenders. This change allows counties to have more flexibility to develop local solutions to improve results. The legislation anticipates that counties would invest in community-based supervision and treatment to reduce long-term recidivism. This shift of state responsibilities to local government poses many challenges and opportunities.

One challenge of Realignment is the lack of jail beds available for locally sentenced offenders and parole and probation violators. In California, 32 out of 58 counties plan to add new jails or expand lockups, one of the most expensive ways to reduce risk other than prisons. Given the significant expense of constructing and operating jail beds, counties may want to consider alternatives that would reduce the demand for jail beds while maintaining public safety. Among the alternatives are pretrial programs that assess risk and manage in the community those defendants who are low risk for flight and committing a new crime.

In California, 71 percent of jail beds are filled with pretrial detainees, from very low risk to high risk. That compares to 61 percent nationally. Whether or not detainees are released often is based on their ability to pay bail versus their risk. As a result, many defendants who are considered low risk for flight and to commit a new crime are detained in jails because they cannot afford bail. The higher rate of pretrial detention coupled with plans to allocate considerable funds to build and operate new jail beds are reasons for counties to carefully consider whether establishing a pretrial program could reduce cost while maintaining public safety.

Many California counties have significantly reduced their need for expensive jail beds by implementing pretrial programs that use assessments to determine risk and then release detainees who are low risk for flight and committing new crimes on own recognizance (OR) or an OR bond with some form of supervision.

A review of the pretrial programs in five California counties (Marin, Santa Clara, Santa Cruz, San Francisco and Yolo) found that all had positive outcomes related to the number of pretrial detainees in jails, defendant court appearance rates, and new crimes committed. A recent study of Santa Clara County's pretrial program concluded that the program saves the county $32 million per year.

The American Bar Association and the National Association of Pretrial Services Agencies have promulgated standards for pretrial programs, which call for limiting the circumstances under which pretrial detention may be authorized and providing procedural safeguards to govern pretrial detention proceedings. This standard is based on the law which favors the release of defendants pending adjudication of charges.

Though the research on effective pretrial programming is not as robust as in some other areas of corrections, evidence does point to the benefit of pretrial risk assessment and the implementation of a continuum of pretrial supervision options.

Risk and needs assessment is a core component of any pretrial program. Objective risk and needs assessment tools that have been validated for the local population are

critical to determining which defendants are low risk for flight and committing a new crime and determining services needed to reduce risk (e.g. drug treatment/testing, intensive or non-intensive supervision).

It is critical that data are collected and analyzed to determine the impact of Realignment, both at the state and local level. Counties have agreed to provide some important, yet basic, data to assist in evaluating Realignment. Counties considering implementation of a pretrial program should collect and analyze data on individual defendants – failure to appear and commission of new crimes – and on system outcomes. Pretrial services is part of a system, requiring several entities (courts, probation, law enforcement , etc.) to work together and it is important that the pretrial programs help assist the system in achieving overall goals.

Issues to consider in implementing pretrial programs include:

1. Each part of the criminal justice system must rely on information and data from other entities to effectively implement its responsibilities. Officials should consider early on how best to share information and data systems.
2. Implementation of new programs requires changes at the staff level so it is critical to involve staff in the process and provide training so the change is well understood and accepted as a new way to do business.
3. For new programs to work, the necessary infrastructure must be in place. The lack of sufficient community programs in many counties hampers efforts to provide alternatives to detention and incarceration.
4. Misinformation and a lack of understanding of evidence-based alternatives continues to be a primary concern around Realignment. State and local elected officials, as well as the public, struggle with the complexity and the risks associated with various proposals and decisions. Counties should educate and involve their elected officials and the public in their planning if they are to garner support for innovative and evidence-based strategies.
5. Data and analysis are useful in informing policy at the state and local level and in demonstrating results to key stakeholders and the public.

A number of resources are available to counties that want to consider implementing a pretrial program. The Crime and Justice Institute will be working with two counties to implement pretrial programs. Californians for Safety and Justice, partnering with various experts, will be providing direct support to counties that are building innovative approaches to increase safety and reduce justice system costs. Pretrial services is one of their areas of focus. A bibliography of important resources also is provided.

The 2011 Public Safety Realignment (Realignment) is the most significant criminal justice legislation passed in three decades in California. This legislation resulted from the convergence of a poor economy and a resulting tight state budget with a federal court order, subsequently upheld by the U.S. Supreme Court, to reduce California's prison population from 170,000 inmates (2011) to 110,000 by June 2013 and to maintain an overcrowding rate of no more than 137.5 percent. A recent report shows that California has achieved two-thirds of the population reduction required by the court (Center on Juvenile and Criminal Justice [CJCJ], 2012a).

Realignment moved authority, responsibility and accountability to counties for non-serious, non-violent and non-sex offenders formerly sentenced to state prisons The State retained responsibility for serious, violent and sex offenders. This change allows counties to have more flexibility to develop local solutions to improve results. Realignment contemplated that counties would invest in community-based supervision and treatment to reduce long-term recidivism. This shift in the state and local relationship poses many challenges and opportunities.

71 percent of jail beds are filled with pretrial detainees, from very low risk to high risk. Whether or not detainees are released is based on their ability to pay bail versus their risk.

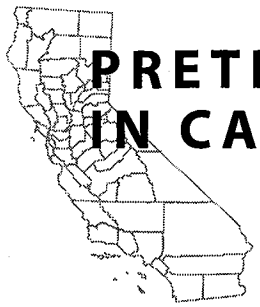
One challenge of Realignment is the lack of jail beds available for locally sentenced offenders and parole and probation violators. There are a number of ways to address this problem and each county has important choices to make.

In California, 32 out of 58 counties plan to add new jails or expand lockups, one of the most expensive ways to reduce risk other than prisons. Interestingly, 71 percent of jail beds are filled with pretrial detainees, from very low risk to high risk. Whether or not detainees are released is based on their ability to pay bail versus their risk. Many counties have significantly reduced their need for expensive jail beds by implementing pretrial programs that use risk assessments to determine risk and then release detainees who are low risk for flight and reoffending, on an own recognizance (OR) bond, or under some form of supervision.

The purpose of this report is to provide an overview of pretrial models and practices so counties can make informed decisions about how pretrial services could cost-effectively improve public safety outcomes.

THIS REPORT HIGHLIGHTS:

1. **Best practices in safe and cost-effective pretrial practices**
2. **Examples of pretrial programs from select California counties**
3. **Lessons learned by counties currently implementing pretrial services**
4. **Issues for consideration by local leaders in adopting and implementing pretrial services**
5. **A list of publications that provide a more thorough analysis of pretrial issues and best practices**
6. **Technical assistance that will be available to counties**



PRETRIAL ISSUES IN CALIFORNIA COUNTIES

HIGH RATES OF PRETRIAL DETENTION ACROSS CALIFORNIA

Data from the Board of State and Community Corrections shows that the percentage of individuals awaiting trial in California's county has risen 12 points from 1995 through the third quarter of 2011 (Board of State and Community Corrections [BSCC], 2011). That proportion was 71 percent for most of 2011 and the same in 2010, above the national average of 61 percent (Bureau of Justice Statistics, 2011) comprising roughly 50,000 of the 71,000 jail inmates in the state.

Many factors affect whether or not a defendant is detained prior to trial. One of the most prominent factors is whether or not the defendant can make bail. The current bail system is intended to ensure that defendants who have been determined not to pose a public safety risk appear for their scheduled court dates. In practice, however, individualized assessment of defendants' public safety and flight risk are routinely forgone, making pretrial release less a question of public safety and more a question of defendants' financial ability (Center on Juvenile and Criminal Justice, 2012b). The lack of individualized risk assessment at the time of arraignment has contributed to the high rates of pretrial detention. Individuals with financial means, such as a home to use as collateral, can secure release and return to their jobs, families, and communities. Others who cannot raise the necessary collateral must stay in jail, for several months in some cases, and may more readily accept a plea bargain as a result (Patterson & Lynch, 1991) (Clark & Kurtz, 1983) (Rankin, 1964) (Foote, 1954) as cited in (ACLU of California [ACLU], 2012). Disproportionate outcomes also have occurred as a result of an defendant's race and ethnicity. Latino and black defendants are more likely than white defendants to be held in custody because of an inability to post bail (Demuth, 2003) as cited in (ACLU, 2012).

The lack of individualized risk assessment at the time of arraignment has contributed to the high rates of pretrial detention.

Public defenders and private defense counsel across the state report that a substantial number of the pretrial detainees in county jails have bail set, but cannot afford to post bail. Few, if any, counties currently track specific information about their jail populations. Data reported to and maintained by the State combines all unsentenced prisoners without identifying who among them had bail set, and many remain in jail pending trial because they cannot post the court ordered bail amount. Better data collection by counties indicating who is held in lieu of bail and the reason(s) would greatly facilitate the implementation of improvements (ACLU, 2012).

PRESUMPTIVE BAIL AND ABSENCE OF INDIVIDUALIZED RISK ASSESSMENT

The California Penal Code requires judges to consider a number of factors when setting bail and deciding the terms of pretrial release, including the defendant's history of criminal convictions, past failure to appear in court, and the impact of pretrial release on victims (California Constitution) (California Penal Code) (Administrative Office of the Courts [AOC], 2011) (Clark v. Superior Court, 1992) (Ex Parte Ruef, 1908) (In re Christie, 2001) (In re Burnette, 1939) (People v. Gilliam, 1974) as cited in (ACLU, 2012). Despite this, counties have gradually transitioned to a presumptive bail system, where judges set bail according to the figure listed in the county bail schedule, without meaningful consideration of the specific circumstances of the defendant or the alleged

offense. As a result, many people who present no public safety or flight risk remain in jail prior to trial, while others who do present a public safety risk are released because they can afford to post the scheduled bail amount.

Bail schedules also vary widely from county to county. Presumptive bail for possession of a controlled substance under California Health and Safety Code section 11350 can range from $5,000 in San Diego to $25,000 in San Bernardino (California County Superior Courts, 2011). Relying solely on a county schedule to set bail raises serious due process concerns. The lack of individualized pretrial risk assessment has already led some courts outside of California to hold that presumptive bail practices violate defendants' due process rights (Carlson, 2011) as cited in (ACLU, 2012).

The increased cost of bail has resulted in the advancement of the commercial bond industry in California and significant statewide losses. According to a 2010 investigative series by National Public Radio, bail bond companies routinely fail to pay counties when their clients fail to appear for court. The series reported that in California bond companies owe counties $150 million (NPR, 2010).

The information discussed above evidences incongruence with regard to bail issues. There is, however, a great deal of research on individualized risk assessment. According to an extensive review by the Vera Institute (which includes ample national models and sample risk assessment inventories), much of the research on pretrial release has focused on risk assessment and supervision practices that help reduce pretrial failure while protecting the rights of the individual (Vera Institute of Justice, 2010).

NATIONAL BEST PRACTICES IN MANAGING PRETRIAL ARESTEES

As the public safety system moves towards greater collaboration across agencies (often referred to as a systems approach), the pretrial stage of the criminal justice process is gaining increasing attention as the first opportunity to focus on risk reduction of offenders. Though the research on effective pretrial programming is not as robust as in some other areas of corrections, evidence does point to the benefit of pretrial risk assessment and the implementation of a continuum of pretrial supervision options. Below is a brief discussion of the national pretrial landscape, as well as references to more in-depth explorations of the subject.

PRETRIAL SERVICES PROGRAMS

Pretrial release programs generally serve two primary functions:

1. They supply information to the court on which to base pretrial release decisions; and,
2. They provide a range of supervision options for defendants who are released to the community with terms of release.

Pretrial programs focus on a defendant's risk to re-offend and to fail to appear. These programs can supplement a bail system that includes surety bonds. They also can replace bonds with a system based solely on risk as recommended in the American Bar Association's (ABA) national pretrial standards. When used effectively, pretrial programs can uphold the presumption of release as outlined in federal law, reduce unnecessary incarceration, and help maintain public safety.

The pretrial stage of the criminal justice process is gaining increasing attention as the first opportunity to focus on risk reduction of offenders.

PRETRIAL INVESTIGATIONS

Pretrial investigations generally include an interview with the defendant, a review of court records and other collateral information, and a formal report presented to the court. The types of information collected in pretrial investigations can vary widely from jurisdiction to jurisdiction. Federal law allows judges to consider a number of factors, including the nature of the alleged offense, drug and alcohol use, mental health, employment, and ties to the community; state statute or court rule may refine the list of elements for local courts. As part of the overall pretrial investigation, evidence-based pretrial agencies also conduct an objective pretrial risk assessment to evaluate risk of flight and re-offense. The data elements that are predictive of risk often are only a subset of the information considered by a judge. (See pretrial risk assessment discussion below.)

The supervision function of pretrial programs varies widely. It is important to highlight that pretrial programs can be administered by probation departments, sheriffs, the courts, or independent agencies, public or private, and statute may dictate who can be supervised and in what manner. Evidence suggests that the intensity of supervision should be linked to risk, with low risk offenders receiving passive supervision, or none at all, and high risk offenders receiving active supervision (Latessa, 2012). Passive supervision, which is reported back to the court, includes periodic reviews of defendant's terms of release to identify changes in eligibility such as a change in employment status. More active interventions include court date reminders, electronic monitoring, or home confinement. Additionally, pretrial services programs may assist defendants by addressing needs such as employment and medical care. National standards are available to provide guidance for how programs should operationalize these goals.

NATIONAL STANDARDS

Two organizations have promulgated standards for pretrial: the ABA and the National Association of Pretrial Services Agencies (NAPSA). The ABA standards, updated in 2007 and currently under revision, provide guidance on pretrial decision-making from arrest through the court process. The ABA states that "[t]he purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference. The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings" (American Bar Association [ABA], Criminal Justice Section, 2007a).

Taken together, the ABA and NAPSA standards present details for introducing effective practices into all facets of pretrial decision making.

In principle, the standards favor maintaining defendants in the least restrictive environment necessary to ensure public safety and a return to court, as well as balancing due process rights with objective risk assessment and placement decisions. The ABA also advocates for the abolition of commercial surety systems (i.e. bail bondsmen) (ABA, 2007).

The following standards on pretrial release were approved by the ABA in 2002 and were published with commentary in ABA Standards for Criminal Justice: Pretrial Release, Third Edition, 2007. (American Bar Association [ABA], Criminal Justice Section, 2007b). Counties can find more details on the individual standards from the ABA website at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc.html.

The NAPSA standards purposefully align with the ABA standards, but also provide additional detail on the operation of effective pretrial services agencies, from the structure and management of a supervision program to responses to violations (National Association of Pretrial Services Agencies [NAPSA], 2004). Taken together, the two documents present details for introducing effective practices into all facets of pretrial decision making. This begins with risk assessment.

ABA STANDARDS ON PRETRIAL RELEASE

PART I. GENERAL PRINCIPLES

Standard 10-1.1	Purposes of the pretrial release decision
Standard 10-1.2	Release under least restrictive conditions; diversion and other alternative release options
Standard 10-1.3	Use of citations and summonses
Standard 10-1.4	Conditions of release
Standard 10-1.5	Pretrial release decision may include diversion and other adjudication alternatives supported by treatment programs
Standard 10-1.6	Detention as an exception to policy favoring release
Standard 10-1.7	Consideration of the nature of the charge in determining release options
Standard 10-1.8	Pretrial release decision should not be influenced by publicity or public opinion
Standard 10-1.9	Implication of policy favoring release for supervision in the community
Standard 10-1.10	The role of the pretrial services agency

ABA STANDARDS ON PRETRIAL RELEASE (CONT.)

PART II. RELEASE BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

- Standard 10-2.1 Policy favoring issuance of citations
- Standard 10-2.2 Mandatory issuance of citation for minor offenses
- Standard 10-2.3 Permissive authority to issue citations in all cases
- Standard 10-2.4 Lawful searches

PART III. ISSUANCE OF SUMMONS IN LIEU OF ARREST

- Standard 10-3.1 Authority to issue summons
- Standard 10-3.2 Mandatory issuance of summons
- Standard 10-3.3 Application for an arrest warrant or summons

PART IV. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE OR ARRAIGNMENT

- Standard 10-4.1 Prompt first appearance
- Standard 10-4.2 Investigation prior to first appearance: development of background information to support release or detention determination
- Standard 10-4.3 Nature of first appearance

PART V. THE RELEASE AND DETENTION DECISIONS

- Standard 10-5.1 Release on defendant's own recognizance
- Standard 10-5.2 Conditions on release
- Standard 10-5.3 Release on financial conditions
- Standard 10-5.4 Release order provisions
- Standard 10-5.5 Willful failure to appear or to comply with conditions
- Standard 10-5.6 Sanctions for violations of conditions of release, including revocation of release
- Standard 10-5.7 Basis for temporary pretrial detention for defendants on release
- Standard 10-5.8 Grounds for pretrial detention
- Standard 10-5.9 Eligibility for pretrial detention and initiation of the detention hearing
- Standard 10-5.10 Procedures governing pretrial detention hearings: judicial orders for detention and appellate review
- Standard 10-5.11 Requirement for accelerated trial for detained defendants
- Standard 10-5.12 Re-examination of the release or detention decision: status reports regarding pretrial detention
- Standard 10-5.13 Trial
- Standard 10-5.14 Credit for pre-adjudication detention
- Standard 10-5.15 Temporary release of a detained defendant for compelling necessity
- Standard 10-5.16 Circumstances of confinement of defendants detained pending adjudication

PART VI. NOTICE TO VICTIMS OF CRIME

- Standard 10-6.1 Judicial assurance of notice to victims

RISK ASSESSMENT FOR PRETRIAL ARRESTEES

The goals of pretrial detention are to ensure that defendants return to court, and to protect public safety. The challenge lies in successfully predicting who is at risk to fail to appear or to commit a new crime, and setting release terms that mitigate that risk, all while protecting a defendant's rights. Many jurisdictions use a bond schedule that links the severity of the alleged offense to a dollar amount, but there is no research to indicate whether or not this accurately predicts or mitigates risk. Conversely, research does show that certain elements of a defendant's past and current behavior and circumstances are predictive of risk, and can be accurately measured. For more information on assessing pretrial risk, see State of the Science of Pretrial Risk Assessment, published by the Pretrial Justice Institute (Mamalian, 2011).

A 2011 analysis identifies factors that have been shown to relate to pretrial risk, including criminal history, prior failures to appear, alcohol and transportation. Items that are generally not correlated with risk include age, family, and length of time at current residence.

Pretrial risk assessment tools function by considering a number of factors about the defendant and assigning points for each factor that increases the defendant's risk. The points are then translated into a risk level (usually low, moderate, or high), and used to inform a supervision recommendation to the court. Pretrial risk tools are not designed to assist in assigning an amount of surety bond, since there is no research to support such a tie, and since the ability to pay a bond is more closely linked to economic circumstances than to risk.

A 2011 analysis identifies factors that have been shown to relate to pretrial risk, including criminal history, prior failures to appear, alcohol and transportation. Items that are generally not correlated with risk include age, family, and length of time at current residence. However, the study does caution that significant factors can vary between jurisdictions, and each jurisdiction needs to complete its own analysis when either developing a new tool or adopting an existing one. Fortunately, the brevity of these types of instruments and the volume of cases going before the court often makes this validation analysis relatively quick and feasible. Engaging in a validation study ensures that the risk assessment instrument being used in a jurisdiction is predictive and achieves desired public safety goals (Bechtel, Lowenkamp, & Holsinger, 2011).

NATIONAL EXAMPLES OF THE USE OF PRETRIAL BEST PRACTICES

The body of research on effective pretrial programs is growing steadily, and provides lessons learned from around the country. The following examples are drawn from the State of the Science of Pretrial Release Recommendations and Supervision (VanNostrand, Rose, & Weibrecht, 2011).

Court Notification

A low-cost, highly effective intervention to ensure return to court is simply to remind defendants of their court dates, either by mail or phone, using an automated system or a person. VanNostrand, Rose and Weibrecht (2011) reviewed numerous evaluations and studies conducted in six different states over nearly 30 years. All the studies examined the effectiveness of court date notification programs. The target populations among the studies varied and ranged from defendants issued a citation/summons for minor offenses to those charged with felony offenses. Different approaches of notifying defendants were utilized and included (1) "live" callers such as volunteers or paid staff to call defendants to remind them of upcoming court dates, (2) an automated calling system, (3) notification letters or post cards, and (4) a combination of notification letters and phone calls. All of the studies concluded that court date notifications in some form are effective in reducing failures to appear in court.

In Multnomah County, Oregon, a randomized study compared defendants receiving automated reminders by phone to those who did not receive calls. The study found that those who received the reminders had a 16 percent failure to appear rate, compared to 28 percent in the comparison group. Coconino County (Flagstaff), Arizona implemented a telephone reminder system using volunteers. Results of a randomized trial found that 25.4 percent of the control group failed to appear, while the rate for the reminder group was 12.9 percent.

Electronic Monitoring

As an alternative to incarceration, electronic monitoring (EM) provides a way to closely track offender movement while ideally serving as a deterrent to committing crime or leaving town. When EM became available, many in the criminal justice system saw opportunities to reduce jail crowding by electronically monitoring offenders in lieu of incarceration. EM has been used as an alternative to detention for pretrial defendants for over 20 years. Although much of the EM research focuses on the application of EM for post-conviction offenders, there is a body of research that examines the efficacy of EM applied in pretrial settings. Results of EM are mixed, likely due to the fact that increased monitoring makes it more likely that the defendant will be caught violating. For example, U.S. Federal Pretrial Services found that defendants on EM were slightly more likely to fail to appear, and to be rearrested. More research is necessary to accurately assess the effectiveness of electronic monitoring tools with treatment and other targeted interventions used for pretrial release.

Pretrial Supervision

The practices known collectively as "pretrial supervision" are diverse, so it is difficult to capture their efficacy with examples. It is known, though, that basing a system on objective risk with interventions targeted to higher risk offenders is effective with other criminal justice populations. A randomized study conducted in Philadelphia, Pennsylvania, tested two different intervention models with moderate and high risk offenders. Though there was no variation in outcomes depending on the type of interventions received, the two groups did lower their risk score as compared to baseline after participating in an intervention consisting of an orientation, phone reporting, and in some cases, in-person reporting. More research is needed in this area to identify the relative impact of risk and the type of supervision received (Goldkamp & White, 2006).

As a field, pretrial services still has a long way to go to realize its potential in risk reduction, population management and public safety. However, the fundamental elements for success have been proven through research, and pioneers have discovered ways to translate those elements into successful operations. As more criminal justice systems adopt these approaches and measure their results, counties and their courts will have better information to make choices that cost-effectively improve public safety.

THE USE OF PRETRIAL SERVICES PROGRAMS IN CALIFORNIA

Several California counties have implemented pretrial services programs, some of which have been independently evaluated and have demonstrated positive results. Generally the goals associated with the county pretrial programs we reviewed are:

1. Reduced number of jail beds used for pretrial detainees who are low risk for failure to appear and re-offend so beds are available for sentenced offenders;
2. Reduced rates of re-offense;
3. Reduced rates of failure to appear; and,
4. For some, reduced recidivism.

Each county collected and analyzed data on their pretrial programs to determine their effectiveness.

Although all of the counties reviewed have the same goals, they have used different strategies in designing and implementing their pretrial programs. Most importantly, they have all collected and analyzed data on their pretrial programs to determine their effectiveness. However, each jurisdiction used different metrics to measure outcomes so direct comparisons of outcomes should not be made among these counties. These counties' pretrial programs are models for how to effectively implement good governance strategies. Each county:

1. Brought together leaders from all county agencies that had a stake in the pretrial program and worked together to develop and implement their agreed upon strategies;
2. Chose practices that have demonstrated success;
3. Collected and analyzed data to measure progress (some had independent evaluations);
4. Used effective quality improvement processes to improve results; and,
5. Achieved positive outcomes.

MARIN COUNTY

In 2011 the Adult Services Division of the Marin County Probation Department, , contracted with Leaders in Community Alternatives (LCA) to provide pretrial services. The objective of the Pretrial Release Program is to determine which defendants can be successfully released in the community while awaiting sentencing. The decision rationale includes: utilizing an evidence-based risk assessment to evaluate eligibility for community release and supervision; addressing the economic discriminatory nature of the bail system; establishing additional validated decision-making criteria in preparation for the impact of Realignment and AB109; and, saving costs by contracting with a community based organization (Daly, 2012).

LCA Pretrial Services staff is based in the Marin County Probation Department, working in cooperation with the Marin County Sheriff's Department and the courts. Detainees are excluded from pretrial release evaluation if they have: an U.S. Immigration and Customs Enforcement (ICE) hold, probation violation, zero bail, or are charged with committing a heinous crime, or if they have already been released on bail. Utilizing the Ohio Risk Assessment System - Pretrial Assessment Tool (ORAS-PAT), LCA Pretrial Services staff assess all eligible defendants including new arrestees and those who have been arrested for conditional violations of probation. The ORAS-PAT consists of seven risk variables in three dimensions (criminal history, employment and residential stability,

and drug use) and is administered in 10 to 15 minutes involving a face-to-face interview with the defendant in custody, with some questions verified through official records or otherwise. Based on the scores of these items, cut-points differentiate between groups that are low, medium, and high risk to violate pretrial supervision (failure to appear or new arrest) (Connelly, 2012).

LCA Pretrial Services staff prepares the Pretrial Release Report following additional evaluation of verified community ties, flight risk, and danger to self or others. There is an override option, based on information gained. The risk assessment score is the primary criterion for pretrial release recommendation. Detainees with low risk scores are generally recommended for release without conditions (OR); however Continuous Alcohol Monitoring (CAM) is considered for alcohol-related incidents. Arrestees with medium risk scores are generally recommended for release with conditions of appropriate electronic technology; home detention and/or CAM. Arrestees with high risk scores are typically not recommended for release, but release may be considered with conditions of the appropriate electronic technology – GPS and/or CAM. The LCA report with recommendation to deny or to approve release, without or with varying levels of supervision, is then submitted to Marin County Probation for review and approval, and subsequently to the court (Daly, 2012).

LCA Pretrial Services staff only supervises defendants who have been released on electronic supervision. Pretrial Services had no up front cost. The ongoing cost to Marin County Probation is $25,000 annually for .5 FTE staff to conduct assessments and prepare the reports. On average, six to eight assessments are completed each day. The cost of supervision is paid by program participants, based on their ability to pay (sliding scale). An indigent fund is available which is funded through AB109 (Daly, 2012).

The outcomes measured are: failure to appear, re-offense, and failing to abide by the conditions of the electronic monitoring program during pretrial status. This information is tracked through the court's database system.

Below are the results for January through May 2012 for all pretrial releases under this program:

- 79 percent successfully appeared at their next court date with no further incidents;
- 9 percent had new charges filed;
- 3 percent were remanded due to program violations related to electronic monitoring; and,
- 9 percent failed to appear.

These results are based on 116 total releases, a relatively small sample (Connelly, 2012).

SANTA CLARA COUNTY

Santa Clara's Office of Pretrial Services was established as a separate agency in 1971. According to Garry Herceg, director of the Office of Pretrial Services, it remains the only such independent agency in California, although San Francisco may have a comparable agency, (Herceg, 2012). The agency has an annual budget of about $5 million, and a recent study concluded that the agency saves the County about $32 million per year (Santa Clara County, Board of Supervisors, Management Audit Division, 2012).

Pretrial Services has a station in the jail booking area, staffed by a 7 FTE court team. The team has phone and computer access to the courts, so there is no need to wait until court is in session to make release recommendations. The program also reviews in-custody defendants regularly for probable cause, to make recommendations regarding release and bail setting. Total FTEs for the agency, including supervision staff, is 47.

Pretrial cases also are assessed for substance abuse, employment, and housing by other appropriate county agencies.

Santa Clara policy is that no misdemeanors are booked except domestic violence cases (which according to California law must be booked). Most of the work is done with low end felonies. The Virginia Pretrial Release Risk Assessment Instrument (VPRAI) is used for initial screening; a local validation study will be completed very soon. The instrument measures the likelihood of appearance in court and likelihood of new offenses. The VPRAI examines a defendant's status at the time of the arrest as it relates to the current charges, pending charges, criminal history, residence, employment, primary caregiver, and history of drug abuse. Initial indications from the validation study suggest that information on mitigation factors, such as education, should be added to the instrument.

Pretrial Services staffs Own Recognizance (OR) and Supervised OR and, reflecting the fact that most of their cases are low level felonies, the agency is seeking to establish an Electronic Monitoring Program (EMP). EMP currently is not operative, pending a grant for equipment. Field supervision of cases includes weekly meetings and frequent drug testing. Currently, there are 390 defendants in OR and 660 in Supervised OR. The average length of supervision in 2011 was 120 days. Pretrial cases also are assessed for substance abuse, employment, and housing (especially for transients) by other appropriate county agencies. According to Director Herceg (2012) there is no memorandum of understanding for coordination with these agencies.

Defendant outcomes and program performance are tracked in two distinct systems. The County Justice Information system tracks recidivism and the Pretrial On-line Production System (POPS) for case managers addresses need factors such as substance abuse. Outcomes data for the justice-related variables for the first quarter of 2012 (January through March) show that 88 percent of defendants in the pretrial program appeared for their court date and 98 percent had no new offenses (Herceg, 2012).

SANTA CRUZ COUNTY

Santa Cruz County, a mid-sized central coast county, has initiated several reform efforts in the last ten years to improve services for youths and adults under their supervision. As result of deliberate interventions through a collaborative effort between the Probation Department and the Sheriff's Department, Santa Cruz County's non-sentenced jail population remains significantly below the state average of 71 percent (BSCC, 2011) with a non-sentenced jail population of 53.8 percent in 2010 (Smith & Penny, 2012).

Santa Cruz County historically faced the challenge of jail overcrowding after the construction of its main jail in 1981. In 2004 justice administrators formed a strategic task force in response to a county grand jury report that highlighted unsafe and crowded conditions in the jail facilities. Shortly thereafter, a comprehensive study was conducted of the Probation Department's practices (Center on Juvenile and Criminal Justice, 2012c) This study led to an expansion of the county's pretrial services program, housed in the probation department.

The expansion included stationing four deputy probation officers in the jail booking area, forming a new unit within the department. This created a streamlined process of conducting best practice risk assessments. The process was enhanced because of the probation department's well-established relationship with the Sheriff's Department. The pretrial services staff does not provide services on a 24-hour basis; however, the officers are stationed in the jail from 7 a.m. to 6 p.m. seven days a week.

Staff from the Pretrial Services Unit (PTS Unit) utilize the Virginia Pretrial Release Risk Assessment Instrument (VPRAI), which is built into the development of their report for the court. This risk assessment tool is connected to the Sheriff's booking case management system (CMS). This interconnection is essential as information will generate into the risk assessment if already contained in the CMS.

Pre-arraignment release is the unit's first priority. If not eligible for this release, the probation officer will conduct a full interview for further eligibility assessment. During this process, the officer verifies the individual's residence and employment. Additionally, if it is relevant, the probation officer will contact the victim. The report is then submitted to the court for the judge's decision. To determine eligibility, the probation officer determines whether or not the individual will remain law abiding and appear for scheduled court dates.

The probation department utilizes the standards of the California Association of Pretrial Services as a guide. A low risk score does not automatically result in release. The probation officer can override a score and provide reasons for the override to the court. In Santa Cruz County, to be eligible for pretrial services individuals must be under county jurisdiction. Therefore, individuals who are from out-of-state or who have out-of-county warrants are not eligible.

A low risk score does not automatically result in release. The probation officer can override a score and provide reasons for the override to the court.

The PTS Unit is internally responsible for collecting and analyzing data. The unit is most interested in two indexes, appearance rates and new violation and/or technical violations.

The unit is held in high regard among local law enforcement. Its success is due, in part, to its well-established relationship with the courts and the sheriff's department. This allows the PTS Unit staff access to additional information with ease and efficiency (Smith & Penny, 2012).

SAN FRANCISCO COUNTY

The San Francisco Pretrial Diversion Project, Inc. (SFPDP) was established in 1976 through a collaborative effort with the San Francisco Bar Association, a contingent of judges from the Municipal Courts, and a group of citizen-advocates concerned about un-sentenced incarcerated individuals. SFPDP has an annual budget of $3.4 million and operates nine different pretrial best practice programs that have significantly reduced San Francisco's un-sentenced population over the last 35 years. These programs have provided rehabilitation and mental health programming for thousands of individuals (Rodriguez & McCovey, 2012).

Pretrial services in San Francisco are almost entirely managed by a single non-profit agency that is funded directly through contracts with the San Francisco Sheriff's Department. Memorandums of understanding are not formally established with local criminal justice agencies, but rather with partnering organizations through contracts. A significant portion of SFPDP's contracts are established through a local Request for Proposal (RFP) process managed by the San Francisco Sheriff's Department. The signed contracts clearly delineate expectations and accountability measurements.

Of SFPDP's nine programs, three demonstrate an innovative approach to both the real needs of their clients as well as the realities and gaps that exist within the San Francisco judicial system. The Supervised Pretrial Release program (SPR) and the Own Recognizance program (OR) are both designed to serve felony defendants and provide judges with real alternatives to detention pending trial. Both programs involve thorough risk assessments and considerations of criminal history, "OR work-ups," that are provided to judges during pre-arraignment and pre-booking. In the OR program, duty judges review cases before arraignment to determine whether or not the individual qualifies for an OR release. The conditions of an OR release are relatively minimal, with the main requirement being a daily check-in with the SFPDP, the supervising agency.

In those cases where judges determine a greater need for structure and programming support for the individual, a judge can provide for release to the SPR program through the agency. Through this program, judges can mandate a broad spectrum of classes and group sessions for individuals, based on the determined needs. Through the agency's Court-Accountable Case Management Center, individuals on SPR take classes and participate in group sessions focused on substance

abuse, mental health concerns (including dual diagnosis), anger management, domestic violence, as well as groups for the specific needs of women and youth.

A third program focuses specifically on homeless felony defendants. The San Francisco judicial system had traditionally struggled with a large number of homeless persons who were spending long periods of time as pretrial detainees in local jails. The SFPDP adapted a program started by the Center on Juvenile and Criminal Justice (CJCJ) that provided intensive one-on-one case management to homeless defendants currently in custody. Case managers develop a treatment plan that includes a range of counseling and life skills options. Positive results are seen in the large drops of homeless defendants using jail beds that could be used for more high-risk defendants or sentenced offenders (Rodriguez & McCovey, 2012).

Using the FileMaker Pro database system, the agency tracks both failure to appear (FTA) rates, as well as successful and unsuccessful completion of the court-mandated programming. The data provided by SFPDP are as follows:

1. For defendants with both felony and misdemeanor charges, the Structured Pretrial Release program (SPR) has only a 3 percent failure to appear rate, and that rate has been trending downwards over the past several years.
2. The Pretrial Diversion Program, which focuses exclusively on defendants with misdemeanor charges, showed a 73 percent successful completion rate in 2010 with another 12 percent of cases successfully completing the program in the following years. The program had a 15 percent failure rate of defendants failing to comply with the court-ordered components of the program.
3. The agency's No Violence Program (NoVA), a collaborative effort established by the San Francisco Sheriff's Department, is the only program that tracks long-term recidivism. NoVA is specifically geared for offenders with violent histories, and showed a 0 percent recidivism rate from two to five years after detainees left the program. The only individual to recidivate did so five years after exiting the program.

One of the ongoing struggles the agency faces is how to maintain up-to-date technology to most effectively track clients, process results, and disseminate that information to their partnering agencies.

San Francisco has the fourth lowest rate of jail incarceration in the state. The city relies heavily on alternatives to incarceration for its sentenced population; therefore the remaining jail population has a higher concentration of unsentenced inmates – 83 percent – well above the state and national averages. Although San Francisco's pretrial jail population percentage is high, overall use of incarceration is very low, as reflected in the surplus of empty jail bed spaces, even with the newly realigned non-serious, non-violent, non-sex offender population.

The SFPDP describes several key elements as essential to their success with pretrial populations. They commended the ability of the criminal justice system to be able to collaborate with an outside agency such as theirs. Agency staff emphasizes the important of trust between the various public agencies and their non-profit, including the public defender's office, the sheriff's department, the district attorney's office, the courts, and the health department. One staff commented that "a chain is only as good as its weakest link" and their agency strives hard to ensure strong collaborations and open communication among agencies. The degree of trust and collaboration is a testament to agency's 35-year history and track record of success.

One of the ongoing struggles the agency faces is how to maintain up-to-date technology to most effectively track clients, process results, and disseminate that information to their partnering agencies. Staff are regularly trained on the various technology tools, but there is a sense that the agency is "always running to catch up" with new demands. The Chief Operating Officer indicated the agency is impacted by limited fiscal resources as city contracts are being cut by as much as 20 percent. Contracts cover salaries and some fringe benefits, but costs such as rent, travel, and employee benefits present threats to the long-term sustainability of the program (Rodriguez & McCovey, 2012).

YOLO COUNTY

In August 2009 the Yolo County Probation Department was awarded a $2.76 million Byrne Grant from the federal government for a two-year implementation of a new pretrial services program. The program started in February 2010 and the grant funding will end on September 30, 2012. The chief of probation is hopeful that AB 109 or other funding will be forthcoming to continue this highly successful program (Rist & Fruchtenicht, 2012).

The pretrial program was intended to help relieve overcrowding, which has historically been an issue for the Yolo County Jail given the federally mandated population cap. The program also was built to assess the value of utilizing a validated risk assessment and to provide direct supervision and services to pretrial defendants in the community. As a part of the grant, ongoing data has been collected and analyzed.

The high level of supervision and accountability has led to success for defendants in the program. The success of these defendants has resulted in greater support from stakeholders.

Funds for the program were used for all operations including staffing, equipment and electronic monitoring (GPS and SCRAM alcohol monitoring).

The Pretrial Services Unit (PSU) collaborates closely with criminal justice stakeholders in the county including the district attorney, public defender, sheriff, and the court. These stakeholders were very involved in establishing the initial criteria for the program and have met every three months since the inception of the program for updates. Due to the great cooperation and support among the stakeholders, there is no formal memorandum of understanding.

There are eight probation officers and a supervisor who manage Yolo County's PSU seven days a week. The jail booking roster is reviewed daily, and those eligible for release are interviewed. Exclusion criteria are set by law and by policy established by stakeholders. Generally those with specific holds (ICE, parole, etc.) are not eligible. Once the hold is removed those defendants are interviewed. The criteria for inclusion in the program has expanded over the past two years as the program has demonstrated success and garnered credibility with its judicial partners.

The ORAS-PAT risk assessment tool has been utilized for all eligible defendants. Full reports are prepared for the court for the date of arraignment or own recognizance (OR) hearings, usually the next day. This allows time for the Probation Department to check criminal history, contact victims, and confirm release addresses and community ties. On average, six to ten reports are completed each day. A PSU officer is present at each arraignment hearing.

PSU officers provide community supervision for each defendant released on Supervised OR (SOR). "High risk" defendants are seen weekly in face-to-face meetings or home contacts. Low and moderate risk defendants are seen less often. Clients who perform well are rewarded with reduced office visits and lessened sanctions. All defendants are required to call the office every day. The high level of supervision and accountability has led to success for defendants in the program. The success of these defendants has resulted in greater support from stakeholders.

An outside consultant's analysis found that defendants in the pretrial program had a 92 percent court appearance rate and 95 percent did not commit new offenses. The court accepted 90 percent of all recommendations from the program. According to the court, those released on SOR would not have been released at arraignment without the program. Pretrial services has acted as a relief valve in certain instances where defendants could not be held at the jail for medical reasons (Luminosity, Inc., 2012).

Over the past two years, the PSU has learned the following:

1. A data analyst is needed from the start. It is important for establishing credibility and to assure timely and appropriate changes are made in procedures.
2. Terms and conditions for each defendant should be specifically tailored to their criminogenic needs.
3. A graduated sanctions program with built in rewards for good behavior should be implemented.
4. The unit has to be willing to step outside of established comfort zones to fulfill their purpose (Rist & Fruchtenicht, 2012).

TRACKING THE NON-NON-NON (N3) POPULATION

The Chief Probation Officers of California (CPOC) released their first report regarding Realignment in July 2012 (Chief Probation Officers of California [CPOC], 2012). They are tracking data related to "non-serious, non-violent, non-sex offenders" (from here on referred to as the "N3" population) on Post Release Community Supervision (PRCS) and "1170(h)" offenders or felons ineligible for state prison who are sentencing to local jails, probation or both (split sentence). CPOC currently is collecting 13 data elements.

13 DATA ELEMENTS COLLECTED BY EACH COUNTY,
CHIEF PROBATION OFFICERS OF CALIFORNIA

DATA ELEMENTS	TYPE OF NUMBER
Post Release Community Supervision (PRCS)	
PRCS offenders released	Count
PRCS warrant-before	Count
PRCS closures (6-12 months)	Count
PRCS closures (1 year)	Count
PRCS closures (18 months +)	Count
PRCS recidivism	Count
Active PRCS offenders population	Snapshot
Active PRCS warrant-after population	Snapshot
1170h (Felons ineligible for state prison who are sentenced)	
1170h (a) jail only sentences	Count
1170h (b) split sentences	Count
1170h (b) no jail sentences	Count
Active 1170 (b) offenders Population	Snapshot
Context Variables	
New felony probation grants	Count

(CPOC, 2012)

All 58 counties agreed to report specific data elements and there was 100 percent participation for the period from October 2011 to March 2012. CPOC's early data and report reveal positive results for both the State and counties. Although there are no specific outcome measures at this point, CPOC has committed to reporting on outcomes in a future report. Much more data and analysis is needed to draw any specific conclusions but the data shows that Realignment is moving in the right direction (CPOC, 2012).

The Center on Juvenile and Criminal Justice (CJCJ) has analyzed significant Realignment data and suggests that the courts would be an appropriate collection entity for N3 information. Court records document the final conviction offense codes and sentencing information in a centralized

location. Some adaptation would be required to track N3s at the sentencing phase of the court proceedings. This could involve a "flag" on the offender's record so that as the offender moves through the system and are tracked by other agencies, they can be identified as a N3 (CJCJ, 2012a).

It is important that all county criminal justice agencies are involved in designing the right system for data collection and organization and offender tracking for the county as well as to assist broader statewide efforts to evaluate the effectiveness of Realignment.

DATA ON PRETRIAL POPULATIONS

The Department of Justice data shows the aggregate unsentenced population in county jails. However, this number could include detainees who were determined a flight or public safety risk, inmates awaiting transfer to federal ICE facilities, inmates who were eligible but could not afford to post bail, and so on. To fully assess the eligible pretrial population, these data would have to be disaggregated at the county level to better determine the demographics of the unsentenced jail population. In addition, information regarding defendants who successfully post bail and defendants who qualify for pretrial services could be collected.

The Department of Justice provides data regarding unsentenced inmates by county online at http://stats.doj.ca.gov/cjsc_stats/prof09/index.htm.

All 58 sheriffs provide monthly data, including the number of unsentenced inmates, to the Board of State and Community Corrections. (See Jail Profile Surveys at http://www.bscc.ca.gov/resources.)

In addition, CJCJ lists the unsentenced county jail populations on its interactive sentencing map at http://casi.cjcj.org.

COUNTY PRETRIAL DATA ANALYSIS

To analyze pretrial data and to compare the effectiveness of interventions, specifically with the realigned N3 population, counties would need to collect and track the following data (CJCJ, 2012a).

1. Establishing a baseline:
    a. Who comprises the unsentenced jail population in the county?
        i. Demographic information (race, gender, socio-economic status)
        ii. How many are determined to be a flight risk?
        iii. How many are determined as a danger to the community?
        iv. How many are eligible for pretrial services?
        v. How many cannot afford to post bail?
        vi. How many are detained for transfer to other agencies/facilities?
        vii. What are the needs of those individuals (mental health, drug use, etc.)?
        viii. How many are N3s? Cross-tab N3s with above data elements.
    b. Who comprises the unsentenced, released population in the county?
        i. Demographic information (race, gender, socio-economic status).
        ii. How many pretrial individuals are out on bail?
        iii. How many pretrial individuals are out on own recognizance (OR)?
        iv. How many pretrial individuals are out on home detention?
        v. How many pretrial individuals are out on pretrial services?
        vi. How many are N3s? Cross-tab N3s with above data elements.

2. Measuring outcomes:
    a. Of those on bail, in home detention, or on OR release:
        i. What percentage of each type of release show up for their court date?
        ii. What percentage of each type of release committed a new law violation?
    b. Of those in pretrial detention:
        i. What are the long-term outcomes of reintegration to society versus recidivism?
        ii. What are the collateral consequences of extended pretrial detention.
        iii. Are there significant increases or reductions in the county un-sentenced jail population ? This requires long-term tracking over time.
        iv. What caused those increases or reductions?
        v. Did any of the following play a role: Increased use of risk-assessment tools? Increased availability for pretrial services? Changes to bail schedules?
        vi. Is the N3 population overwhelming the county justice system?

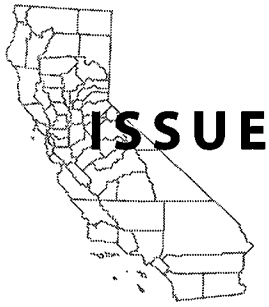
STATEWIDE DATA ANALYSIS

It would be helpful for the State or researchers to track offender N3 outcomes for counties that have extensive pretrial services versus those that do not. Two examples of data collection and outcome tracking are discussed below.

Santa Cruz County found that 92 percent of supervised pretrial participants did not re-offend, and 89 percent made all of their court appearances. Ninety jail beds a day were saved.

Washington D.C.: Over a period of four decades, the D.C. Pretrial Services Agency instituted a comprehensive pretrial policy including: validated risk assessments reported to courts in preparation for bail decisions, programming for those released pending trial, and effective pretrial supervision. As a result, by 2008, 80 percent of all defendants were released without a money bond (as opposed to the previous rate of 80 percent being held in jail, as is the case in many California counties). Fifteen percent are typically held by the court without bail. Only 5 percent have financial bail (ACLU, 2012).

Santa Cruz County, CA: In 2005, the Santa Cruz probation department began working with the sheriff's detention staff to introduce a validated risk assessment tool to identify whether pretrial defendants posed public safety risks to the community. After two years, Santa Cruz County found that 92 percent of supervised pretrial participants did not re-offend, and 89 percent made all of their court appearances. Ninety jail beds a day were saved (a 25 percent reduction in average daily population), thus amounting to significant cost savings to the county. In 2011, Santa Cruz's pretrial detention rate was 56 percent, far below the state-wide average of 67 percent for the fourth quarter of 2011 and 71 percent for the third quarter of 2011. None were released on commercial surety bail. Furthermore, the high non-financial release rate has been accomplished without sacrificing the safety of the public or the appearance of defendants in court. Agency data show that 88 percent of released defendants make all court appearances, and 88 percent complete the pretrial release period without any new arrests (ACLU, 2012).



ISSUES FOR CONSIDERATION

ASSESSING PRETRIAL POPULATIONS AND APPLYING DATA TO POLICY

The following discussion identifies offender-based individual data and system performance data that is useful in justice systems' ongoing decisions and operations and in justice system planning.

The most important offender-specific data concerning pretrial issues is derived from offenders' risk and needs assessments. Pretrial risk and need assessments, conducted by pretrial release or pretrial services officials for individual defendants, serve several purposes. A major goal of pretrial assessment is, most importantly, to balance considerations of public safety and fair, consistent treatment and protection of the rights of defendants. Pretrial risk and needs assessments assist the courts in determining whether or not to release detainees from incarceration, and with what bail or other conditions, if release is granted. Pretrial risk assessment instruments generate information about the risk to public safety and the likelihood of appearing as required in court if the defendant is released.

A sound pretrial detention/release strategy also can benefit justice system operations, reducing or forestalling court congestion and jail overcrowding. Also, a valid risk assessment process can, by scoring levels of risk, assist probation agencies in guiding supervision resources to cases in which supervision is most needed and effective. In addition to risk-avoidance concerns regarding defendant behavior, pretrial risk assessment instruments can and typically should consider responses to offender needs for treatment or other assistance. "[T]these tools aid the decision-maker in choosing which arrestees should receive available services and perhaps just as important, which individuals do not need those services." (Lowenkamp, Lemke, & Latessa, 2008). Excessive intervention with low risk offenders has been found to be counterproductive, because offender contacts with antisocial peers may increase, while contacts with prosocial peer and family influences may be hindered (Lowenkamp, Lemke, & Latessa, 2008).

A valid risk assessment process can assist probation agencies in guiding supervision resources to cases in which supervision is most needed and effective.

There is a large body of literature documenting the need for objective instruments to reduce the variability of traditionally subjective pretrial release decisions. The literature also documents the need to identify the most important and reliable data elements to capture in the assessment instrument. The assessment instrument should be validated by analyzing its predictive performance in specific local settings. An objective risk assessment also provides sound rationales for release decisions, easing officials' concerns about the criticism which often arises when released defendants do commit new crimes.

The particular risk factors measured "...need to be demonstrably related to FTA and rearrest rates, not solely to recidivism or general criminogenic factors" (Summers & Willis, 2010). One risk assessment instrument used in California, the Virginia Pretrial Risk Assessment, identified nine such risk factors, six of which address the defendant's individual criminal history and three of which included factors related to living circumstances. Risk assessments also may include demographic variables, such as age, gender, citizenship and, in some cases, peer or family relationships.

To compile a fuller profile of defendants in the system, the risk assessment can be supplemented with information related to case management activities that agencies

in the justice system will be called upon to provide. For example, Santa Clara County's pretrial defendants are released for full substance abuse and mental health assessments. When aggregated, the risk assessment data can provide a picture of the proportions of defendants who are low, medium, and high risk, informing decisions regarding jail capacity needs and community supervision resource needs. Likewise, supplementing the risk profile with aggregated data regarding defendant treatment or support needs is pertinent to planning for appropriate rehabilitative resources (CJCJ, 2012).

JUSTICE SYSTEM DATA

Planning the response to pretrial population management must consider not only the profile of defendants involved but also the efficiency and effectiveness of the justice system itself. For example, questions to address might include whether defendants remain in custody longer than necessary because the response time of the system is slow. Transferring detainees to suitable pretrial alternatives may be impeded because court practice is slow, transfer procedures are impeded, or the alternatives are simply not available. In the long term, these delays affect not only immediate, but also projected, future jail capacity requirements.

One source of data is what might be called an intake/release analysis. In this exercise, defendant releases from jail during a sample time period—weeks or months, as deemed representative—are analyzed. Typically, data on the defendant, the date of booking, charge at booking, and the date of release and the release mechanism, is compiled. This data is used to identify how long defendants arrested on various charge categories or released in various ways stay in jail, with particular attention to identifying factors that may unduly delay release. For example, do particular charge categories have longer lengths of stay? Is this because of the severity of the charge or because of technical probation violations? Are particular release options, such as transfers to other jurisdictions, associated with longer stays? When the data on each release is aggregated, an agenda of possible changes in practice or policy can be developed, for discussion among local officials.

The intake/release analysis also can be enhanced by case tracking, i.e., following cases through the adjudication process. This analysis would review such variables as the number of appearances and the elapsed time between appearances or specific decision points. With regard specifically to pretrial releases, analysis of bail schedules and procedures for informing the court of pretrial release recommendations could be included.

In summary, analysis of adjudication issues also can provide an agenda for policy discussions. It is worth noting that such policy discussions are most productive when informed by data such as that summarized here and when all involved officials or agencies are represented in the discussions.

CHALLENGES TO IMPLEMENTATION

Lessons from other jurisdictions demonstrate that implementing new strategies to manage pretrial defendants can be challenging. The process requires investment from a wide range of local stakeholders and intensive work to change the culture of local systems. For counties interested in new pretrial strategies, first and foremost, it is important to recognize that the process takes extensive time and energy. Below are some challenges that counties may experience:

1. **Lack of support across and throughout criminal justice agencies**: Any significant change in practices in local criminal justice systems has to be supported and understood by all of the partners in the criminal justice system. Leaders implementing change can encounter problems when individual agencies refrain from supporting the change or

instruct their staff to disregard the change. Additionally, problems can arise when agency leaders support changes that staff within their agencies are either unfamiliar with or do not support. Internal education and dialogue is key.

2. **Lack of understanding among local elected officials**: Criminal justice agencies often understand details of criminal justice policies and practices but much of it can go beyond the knowledge base of local elected officials. If local elected officials are not familiar with the reasons for the policy shift, they may not provide the support necessary to finance the change or build public support for the change.
3. **Lack of integrated data systems**: Advancing a new pretrial approach requires that systems across agencies talk to each other and share relevant data. Counties run into implementation problems when their data systems and data sharing approaches are in silos.
4. **Lack of community infrastructure**: Managing pre-trial defendants in the community can be enhanced with community programs that help ensure pretrial defendants avoid problems before trial. Many jurisdictions lack substantive community programs. This can make it difficult for criminal justice agencies to partner with existing organizations.
5. **Lack of community support**: Residents want and deserve safety. Without sufficient information and access to dialogue with public safety leaders, they can misunderstand the intent behind changes in criminal justice system practices and policies. They need to be a part of the process to develop support for more effective strategies to manage pre-trial defendants.

GARNERING LOCAL SUPPORT FOR REFORM

Garnering local support is crucial to ensure the success of reforms. Given that each jurisdiction is unique, there is no one size fits all approach to building the support necessary to effectively implement new pretrial strategies and programs.

The challenges to implementation point to some steps county leaders can consider to build local support for pretrial reform:

1. **Bringing all stakeholders to the table**: Many jurisdictions have had success implementing changes by bringing all of the stakeholders together from the beginning of the process. This provides the opportunity for a broader group of key stakeholder to have ownership in the success of the reform. This means that instead of a few individuals responding to concerns raised, the broader group can participate in identifying concerns and creating solutions to address them. In this way potential problems are identified early on and strategies to address them are integrated into the plan and its implementation.
2. **Providing training for local elected officials and the public**: It is important to help decision-makers and community leaders understand the evidence base for the change, expected outcomes, data that will be collected and analyzed to measure results, and quality improvement efforts to improve results. This will assist in gaining the political support that may be needed to adopt and implement the new program.
3. **Educating the local media**: Giving local media outlets a briefing on the issues related to pretrial services and strategies to improve pretrial practices may help them accurately cover the issue and ask the right questions as the implementation process begins.

Many jurisdictions have had success implementing changes by bringing all of the stakeholders together from the beginning of the process.

Key persons in the criminal justice system need additional education and training to recognize the effectiveness of evidence-based risk assessments for pretrial (and other evidence-based criminal justice programs and processes), including considerations of public safety and costs to the public and the individuals involved. This is critical to achieve optimal utilization of this valuable resource.

RESOURCES FOR CALIFORNIA COUNTIES

A SAMPLING OF PRETRIAL RISK ASSESSMENT TOOLS

- Service Planning Instrument (SPIn). Orbis Partners. Pre-screening instrument; approximately 30 questions.
- Correctional Offender Management Profiling for Alternative Sanctions (COMPAS). Northpointe Institute for Public Management, Inc. Pre-screening instrument; approximately 30 questions.
- Ohio Risk Assessment System – Pretrial Assessment Tool (ORAS-PAT). University of Cincinnati. Available in the public domain; 7 questions.
- Virginia Department of Criminal Justice Services: Virginia Pretrial Risk Assessment Instrument. Available in the public domain; 8 questions.

Note: Other tools exist, but those listed above are the primary tools being used around the country.

PRETRIAL ASSISTANCE TO CALIFORNIA COUNTIES (PACC) PROJECT

Realignment requires innovative strategies for managing local correctional populations. Pretrial is emerging as a key area of focus, given the pretrial population's impact on court and jail resources. The Crime and Justice Institute (CJI) at Community Resources for Justice has received a grant from the Public Welfare Foundation (PWF) to provide technical assistance at the pretrial decision point to support overall criminal justice Realignment efforts in California counties. In May 2012, CJI began working with a group of national advisors to develop a framework for pretrial technical assistance, with a focus on public safety, effective population management, and evidence-based approaches. That framework will then be piloted in two counties, which will receive 10 months of intensive assistance. Throughout this process, CJI will disseminate technical assistance tools and lessons learned within California and nationally.

PACC Timeline

2012	
May - August	Work with National Advisory Group on Technical Assistance Framework
May - July	Select two California counties as technical assistance recipients
2012 to 2013	
September - June	Provide pretrial technical assistance to selected counties
Ongoing	Dissemination of tools and lessons learned

Site Selection

Sites will be selected through an informal vetting process that will involve conversations with key stakeholders, discussions of current pretrial practices, and review of local population data. Two sites will be selected to receive technical assistance; this is not a cash grant. Final selections will be made by CJI and PWF. Criteria for selection will include the commitment of key stakeholders, evidence of need, existing community partnerships, and specific goals for pretrial system change.

Technical Assistance

Though the technical assistance framework is still under development, it will likely include components related to pretrial risk assessment, diversion, pretrial supervision, bonding, population analysis and data collection. A lead technical assistance provider will work closely with lead local agency/agencies and county stakeholders to assess local needs, develop and implement a pretrial plan, and access additional expertise as needed.

For more information, or to express interest in participating in PACC, please contact Meghan Guevara at 303-975-6801 or mguevara@crj.org.

About the Crime and Justice Institute at CRJ: The Crime and Justice Institute (CJI) at CRJ strives to make criminal and juvenile justice systems more efficient and cost effective, and to promote accountability for achieving better outcomes. CJI provides nonpartisan policy analysis, capacity and sustainability-building technical assistance, research and program evaluation, and educational activities throughout the country. We take pride in our ability to improve evidence-based practices in courts and corrections; to gain organizational acceptance in difficult work environments; to create realistic implementation plans; to put these efforts into practice; to evaluate their effectiveness; and, to enhance the capacity and sustainability of corrections agencies. A key CJI strength lies in our ability to work with researchers, practitioners, academics, and those affected by crime to bridge the gap between research and practice in corrections. We have a reputation built over many decades for innovative thinking, unbiased issue analysis, and our ability to translate research into practice. CJI has provided technical assistance in more than two dozen states to stakeholders at multiple criminal justice decision points. For more information on our current projects and staff, please see our website, www.crjustice.org.

For more information, or to express interest in participating in PACC, please contact Meghan Guevara at 303-975-6801 or mguevara@crj.org.

CALIFORNIANS FOR SAFETY AND JUSTICE, THE LOCAL SOLUTIONS PROJECT

Partnering with experts from across the country, Californians for Safety and Justice's Local Safety Solutions Project aims to give direct support to counties building innovative approaches to increase safety and reduce justice system costs. The organization will provide:

1. Toolkits on topics that can help counties identify areas to enhance risk management and save resources;
2. Training on developing low cost strategies to enhance justice system effectiveness; and
3. Education for local leaders and community members to help counties adopt best practices and to expand support for best practices among diverse stakeholders.

Pretrial services will be one area of focus for this project. Additional information will be provided as the project is launched.

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Also see:

Pretrial Justice Institute website at http://pretrial.org/Pages/Default.aspx.

California Association of Pretrial Services website at http://pretrialservicesca.org.

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NOTES

PARTNERSHIP FOR COMMUNITY EXCELLENCE

SUPPORTING COUNTIES IN IMPLEMENTING THE 2011 PUBLIC SAFETY REALIGNMENT

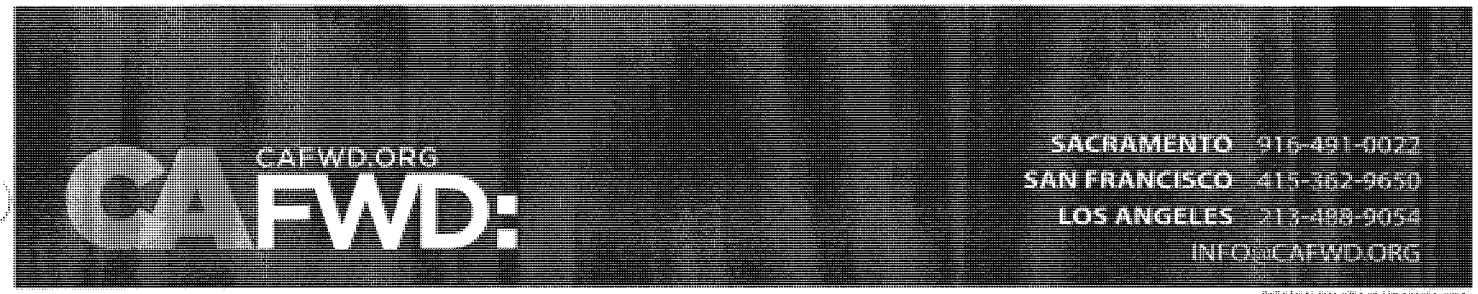
For more information regarding realignment:

The Partnership for Community Excellence cafwd.org/pce

CALRealignment.org calrealignment.org

California Department of Corrections and Rehabilitation www.cdcr.ca.gov/realignment

Chief Probation Officers of California cpoc.org/php/realign/ab109home.php



DESIGN BY STACY DANIELSON

TAB 40

Fundamentals of Bail

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

NIC
National Institute of Corrections

U.S. Department of Justice
National Institute of Corrections

Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform

Authors: Timothy R. Schnacke

August 2014

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ACCESSION NUMBER

NIC Accession Number: 028360

NIC's mission is to provide training, information and technical assistance to the nation's jails, prisons, and community corrections facilities. More information can be found at www.nicic.gov.

NIC
National Institute of Corrections

Table of Contents

Preface

Achieving pretrial justice is like sharing a book – it helps when everyone is on the same page. So this document, "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Justice," is primarily designed to help move America forward in its quest for pretrial reform by getting those involved in that quest on the same page. Since I began studying, researching, and writing about bail I (along with others, including, thankfully, the National Institute of Corrections) have seen the need for a document that figuratively steps back and takes a broader view of the issues facing America when it comes to pretrial release and detention. The underlying premise of this document is that until we, as a field, come to a common understanding and agreement about certain broad fundamentals of bail and how they are connected, we will see only sporadic rather than widespread improvement. In my opinion, people who endeavor to learn about bail will be most effective at whatever they hope to do if their bail education covers each of the fundamentals – the history, the law, the research, the national standards, and its terms and phrases.

Timothy R. Schnacke

Executive Director

Center for Legal and Evidence-Based Practices

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

Cherise Fanno Burdeen and the National Association of Pretrial Services Agencies, through the helpful assistance of John Clark and Ken Rose, provided invaluable input on the draft, and Spurgeon Kennedy saved the day with his usual excellent editorial assistance. Also, I am especially grateful to my friend Dan Cordova and his staff at the Colorado Supreme Court Law Library. Their extraordinary expertise and service has been critical to everything I have written for the past seven years. Special thanks, as well, go to my friend and mentor, Judge Truman Morrison, who continues daily to teach and inspire me on issues surrounding bail and pretrial justice.

I would also like to thank my dear friend and an extraordinary criminal justice professor, Eric Poole, who patiently listened and helped me to mold the more arcane concepts from the paper. Moreover, I am also indebted to my former boss, Tom Giacinti, whose foresight and depth of experience in criminal justice allowed him to forge a path in this generation of American bail reform.

Finally, I give my deepest thanks and appreciation to Claire Brooker (Jefferson County, Colorado) and Mike Jones (Pretrial Justice Institute), who not only inspired most of the paper, but also acted (as usual) as my informal yet indispensable editors. It is impossible to list all of their contributions to my work, but the biggest is probably that Claire and Mike have either conceived or molded – through their intellectual and yet practical lenses – virtually every thought I have ever had concerning bail. If America ever achieves true pretrial justice, it will be due to the hard work of people like Claire Brooker and Mike Jones.

Executive Summary

Pretrial justice in America requires a common understanding and agreement on all of the component parts of bail. Those parts include the need for pretrial justice, the history of bail, the fundamental legal principles underlying bail, the pretrial research, the national standards on pretrial release and detention, and how we define our basic terms and phrases.

Why Do We Need Pretrial Improvements?

If we can agree on why we need pretrial improvements in America, we are halfway toward implementing those improvements. As recently as 2007, one of the most frequently heard objections to bail reform was the ubiquitous utterance, "If it ain't broke, don't fix it." That has changed. While various documents over the last 90 years have consistently pointed toward the need to improve the administration of bail, literature from this current generation of pretrial reform gives us powerful new information from which we can articulate exactly why we need to make changes, which, in turn, frames our vision of pretrial justice designed to fix what is most certainly broken.

Knowing that our understanding of pretrial risk is flawed, we can begin to educate judges and others on how to embrace risk first and mitigate risk second so that our foundational American precept of equal justice remains strong. Knowing that the traditional money-based bail system leads both to unnecessary pretrial detention of lower risk persons and the unwise release of many higher risk persons, we can begin to craft processes that are designed to correct this illogical imbalance. Knowing and agreeing on each issue of pretrial justice, from infusing risk into police officer stops and first advisements to the need for risk-based bail statutes and constitutional right-to-bail language, allows us as a field to look at each state (or even at all states) with a discerning eye to begin crafting solutions to seemingly insoluble problems.

The History of Bail

Knowing the history of bail is critical to understanding why America has gone through two generations of bail reform in the 20th century and why it is currently in a third. History provides the contextual answers to virtually every question raised at bail. Who is against pretrial reform and why are they against it? What makes this generation of pretrial reform different from previous generations? Why did America move from using unsecured bonds administered through a personal surety system to using mostly secured bonds administered through a commercial surety system and when, exactly, did that happen? In what ways are our current constitutional and statutory bail provisions flawed? What are historical solutions to the dilemmas we currently see in the pretrial field? What is bail, and what is the purpose of bail? How do we achieve pretrial justice? All of these questions, and more, are answered through knowledge of the history of bail.

For example, the history tells us that bail should be viewed as "release," just as "no bail" should be viewed as detention. It tells us that whenever (1) bailable defendants (or those whom we feel should be bailable defendants) are detained, or (2) unbailable defendants (or those whom we feel should be unbailable defendants) are released, history demands a correction to ensure that, instead, bailable defendants are released and unbailable defendants are detained. Knowledge of this historical need for correction, by itself, points to why America is currently in a third generation of pretrial reform.

The history also tells us that it is the collision of two historical threads – the movement from an unsecured bond/personal surety system to a secured bond/commercial surety system colliding with the creation and nurturing of a "bail/no bail" dichotomy, in which bailable defendants are released and unbailable defendants are detained – that has led to the acute need for bail reform in the last 100 years. Thus, the history of bail instructs us not only on relevant older practices, but also on the important lessons from more recent events, including the first two generations of bail reform in America in the 20th century. It tells us how we can change state laws, policies, and practices so that bail can be administered in a lawful and effective manner, thereby greatly diminishing, if not avoiding altogether, the need for future reform.

The Legal Foundations of Pretrial Justice

The history of bail and the law underlying the administration of bail are intertwined (with the law in most cases confirming and solidifying the history), but the law remains as the framework and boundary for all that we do in the pretrial field. Unfortunately, however, the legal principles underlying bail are uncommon in our court opinions; rarely, if ever, taught in our law schools and colleges; and have only recently been resurrected as subjects for continuing legal education. Nevertheless, in a field such as bail, which strives to follow "legal and evidence-based practices," knowledge of the fundamental legal principles and why they matter to the administration of bail is crucial to pretrial justice in America. Knowing "what works" – the essence of following the evidence in any particular field – is not enough in bail. We must also know the law and how the fundamental legal principles apply to our policies and practices.

Each fundamental principle of national applicability, from probable cause and individualization to excessiveness, due process, and equal protection, is thus a rod by which we measure our daily pretrial practices so that they further the lawful goals underlying the bail process. In many cases, the legal principles point to the need for drastic changes to those practices. Moreover, in this generation of bail reform we are beginning to learn that our current state and local laws are also in need of revision when held up to the broader legal foundations. Accordingly, as changing concepts of risk are infused into our knowledge of bail, shedding light on practices and local laws that once seemed practical but now might be considered irrational, the fundamental legal principles rise up to instruct us on how to change our state constitutions and bail statutes so that they again make sense.

Pretrial Research

The history of bail and the law intertwined with that history tell us that the three goals underlying the bail process are to maximize release while simultaneously maximizing court appearance and public safety. Pretrial social research that studies what works to effectuate all three of these goals is superior to research that does not, and as a field we must agree on the goals as well as know the difference between superior and inferior research.

Each generation of bail reform in America has had a body of literature supporting pretrial improvements, and while more research is clearly needed (in

all genres, including, for example, social, historical, and legal research) this generation nonetheless has an ample supply from which pretrial practitioners can help ascertain what works to achieve our goals. Current research that is highly significant to today's pretrial justice movement includes research used to design empirical risk assessment instruments and to gauge the effectiveness of release types or specific conditions on pretrial outcomes.

The National Standards on Pretrial Release

The pretrial field benefits significantly from having sets of standards and recommendations covering virtually every aspect of the administration of bail. In particular, the American Bar Association Standards, first promulgated in 1968, are considered not only to contain rational and practical "legal and evidence-based" recommendations, but also to serve as an important source of authority and have been used by legislatures and cited by courts across the country.

As a field we must recognize the importance of the national standards and stress the benefits from jurisdictions holding up their practices against what most would consider to be "best" practices. On the other hand, we must recognize that the rapidly evolving pretrial research may ultimately lead to questioning and possibly even revising those standards.

Pretrial Terms and Phrases

A solid understanding of the history of bail, the legal foundations of bail, the pretrial research, and the national standards means, in many jurisdictions, that even such basic things as definitions of terms and phrases are in need of reform. For example, American jurisdictions often define the term "bail" in ways that are not supported by the history or the law, and these improper definitions cause undue confusion and distraction from significant issues. As a field seeking some measure of pretrial reform, we must all first agree on the proper and universally true definitions of our key terms and phrases so that we speak with a unified voice.

Guidelines for Pretrial Reform

Pretrial justice in America requires a complete cultural change from one in which we primarily associate bail with money to one in which we do not. But cultural change starts with individuals making individual decisions to act. It may seem daunting, but it is not; many persons across America have decided to follow the

research and the evidence to assess whether pretrial improvements are necessary, and many of those same persons have persuaded entire jurisdictions to make improvements to the administration of bail. What these persons have in common is their knowledge of the fundamentals of bail. When they learn the fundamentals, light bulbs light, the clouds of confusion part, and what once seemed impossible becomes not only possible, but necessary and seemingly long overdue.

This document is designed to help people come to the same epiphany that has led so many to focus on pretrial reform as one of the principle criminal justice issues facing our country today. It is a resource guide written at a time when the resources are expanding exponentially and pointing in a single direction toward reform. More importantly, however, it represents a mental framework – a slightly new and interconnected way of looking at things – so that together we can finally and fully achieve pretrial justice in America.

Introduction

It is a paradox of criminal justice that bail, created and molded over the centuries in England and America primarily to facilitate the release of criminal defendants from jail as they await their trials, today often operates to deny that release. More unfortunate, however, is the fact that many American jurisdictions do not even recognize the paradox; indeed, they have become gradually complacent with a pretrial process through which countless bailable defendants are treated as unbailable through the use of money. To be paradoxical, a statement must outwardly appear to be false or absurd, but, upon closer examination, shown to be true. In many jurisdictions, though, a statement such as, "The defendant is being held on $50,000 bail," a frequent tagline to any number of newspaper articles recounting a criminal arrest, seems to lack the requisite outward absurdity to qualify as paradoxical. After all, defendants are "held on bail" all the time. But the idea of being held or detained on bail is, in fact, absurd. An equivalent statement would be that the accused has been freed and is now at liberty to serve time in prison.

Recognizing the paradox is paramount to fully understanding the importance of bail, and the importance of bail cannot be overstated. Broadly defined, the study of bail includes examining all aspects of the non-sentence release and detention decision during a criminal defendant's case.[1] Internationally, bail is the subject of numerous treaties, conventions, rules, and standards. In America, bail has been the focus of two significant generations of reform in the 20th century, and appears now to be firmly in the middle of a third. Historically speaking, bail has existed since Roman times and has been the catalyst for such important criminal jurisprudential innovations as preliminary hearings, habeas corpus, the notion of "sufficient sureties," and, of course, prohibitions on pretrial detention without charge and on "excessive" bail as foundational to our core constitutional rights. Legally, decisions at bail trigger numerous foundational principles, including

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[1] A broad definition of the study of criminal bail would thus appropriately include, and has in the past included, discussion of issues occasionally believed to be outside of the bail process, such as the use of citations in order to avoid arrest altogether or pretrial diversion as a dispositional alternative to the typical pretrial release or detention/trial/adjudication procedure. A broad definition would certainly include discussions of post-conviction bail, but because of fundamental differences between pretrial defendants and those who have been convicted, that subject is beyond the scope of this paper. For purposes of this paper, "bail" will refer to the pretrial process.

due process, the presumption of innocence, equal protection, the right to counsel, and other key elements of federal and state law. In the realm of criminal justice social science research, bail is a continual source of a rich literature, which, in turn, helps criminal justice officials as well as the society at large to decide the most effective manner in which to administer the release and detention decision. And finally, the sheer volume and resulting outcomes of the decisions themselves – decisions affecting over 12 million arrestees per year – further attest to the importance of bail as a topic that can represent either justice or injustice on a grand scale.

Getting Started – What is Bail? What is Bond?

Later in this paper we will see how the history, the law, the social science research, and the national best practice standards combine to help us understand the proper definitions of terms and phrases used in the pretrial field. For now, however, the reader should note that the terms "bail" and "bond" are used differently across America, and often inaccurately when held up to history and the law. In the 1995 edition to his Dictionary of Modern Legal Usage, Bryan Garner described the word "bail" as a "chameleon-hued" legal term, with strikingly different meanings depending on its overall use as a noun or a verb. And indeed, depending on the source, one will see "bail" defined variously as money, as a person, as a particular type of bail bond, and as a process of release. Occasionally, certain definitions will conflict with other definitions or word usage even within the same source. Accordingly, to reflect an appropriate legal and historical definition, the term "bail" will be used in this paper to describe a process of releasing a defendant from jail or other governmental custody with conditions set to provide reasonable assurance of court appearance or public safety.

The term "bond" describes an obligation or a promise, and so the term "bail bond" is used to describe the agreement between a defendant and the court, or between the defendant, a surety (commercial or noncommercial), and the court that sets out the details of the agreement. There are many types of bail bonds – secured and unsecured, with or without sureties, and with or without other conditions – that fall under this particular definition. Later we will also see how defining types of bonds primarily based on their use of money in the process (such as a "cash" bond or a "personal recognizance bond") is misleading and inaccurate.

This paper occasionally mentions the terms "money bail," and the "traditional money bail system." "Money bail" is typically used as a shorthand way to describe the bail process or a bail bond using secured financial conditions (which

necessarily includes money that must be paid up-front prior to release). The two central issues concerning money bail are: (1) its tendency to cause unnecessary incarceration of defendants who cannot afford to pay secured financial conditions either immediately or even after some period of time; and (2) its tendency to allow for, and sometimes foster, the release of high-risk defendants, who should more appropriately be detained without bail.

The "traditional money bail system" typically describes the predominant American system (since about 1900) of primarily using secured financial conditions on bonds administered through commercial sureties. More broadly, however, it means any system of the administration of bail that is over-reliant on money, typically when compared to the American Bar Association's National Standards on Pretrial Release. Some of its hallmarks include monetary bail bond schedules, overuse of secured bonds, a reliance on commercial sureties (for-profit bail bondsmen), financial conditions set to protect the public from future criminal conduct, and financial conditions set without consideration of the defendant's ability to pay, or without consideration of non-financial conditions or other less-restrictive conditions that would likely reduce risk.

Sources and Resources: Black's Law Dictionary (9th ed. 2009); Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press, 2nd ed. 1995); Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011).

The importance of bail foreshadows the significant problems that can arise when the topic is not fully understood. Those problems, in turn, amplify the paradox. A country founded upon liberty, America leads the world in pretrial detention at three times the world average. A country premised on equal justice, America tolerates its judges often conditioning pretrial freedom based on defendant wealth – or at least on the ability to raise money – versus important and constitutionally valid factors such as the risk to public and victim safety. A country bound by the notion that liberty not be denied without due process of law, America tolerates its judges often ordering de-facto pretrial detention through brief and perfunctory bail hearings culminating with the casual utterance of an arbitrary and often irrational amount of money. A country in which the presumption of innocence is "axiomatic and elementary"[2] to its administration of criminal justice and foundational to the right to bail,[3] America, instead, often projects a presumption of guilt. These issues are exacerbated by the fact that the type of pretrial justice a person gets in this country is also determined, in large part, on where he or she is, with some jurisdictions

[2] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

[3] *See Stack v. Boyle*, 342 U.S. 1, 4 (1951).

endeavoring to follow legal and evidence-based pretrial practices but with others woefully behind. In short, the administration of bail in America is unfair and unsafe, and the primary cause for that condition appears simply to be: (1) a lack of bail education that helps to illuminate solutions to a number of well-known bail problems; and (2) a lack of the political will to change the status quo.

> *"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."*
>
> Nelson Mandela, 1995

Fortunately, better than any other time in history, we have now identified, and in many cases have actually illustrated through implementation, solutions to the most vexing problems at bail. But this knowledge is not uniform. Moreover, even where the knowledge exists, we find that jurisdictions are in varying stages of fully understanding the history of bail, legal foundations of bail, national best practice recommendations, terms and phrases used at bail, and legal and evidence-based practices that fully implement the fair and transparent administration of pretrial release and detention. Pretrial justice requires that those seeking it be consistent with both their vision and with the concept of pretrial best practices, and this document is designed to help further that goal. It can be used as a resource guide, giving readers a basic understanding of the key areas of bail and the criminal pretrial process and then listing key documents and resources necessary to adopt a uniform working knowledge of legal and evidence-based practices in the field.

Hopefully, however, this document will serve as more than just a paper providing mere background information, for it is designed, instead, to also provide the intellectual framework to finally achieve pretrial justice in America. As mentioned previously, in this country we have undertaken two generations of pretrial reform, and we are currently in a third. The lessons we have learned from the first two generations are monumental, but we have not fully implemented them, leading to the need for some "grand unifying theory" to explore how this third generation can be our last. In my opinion, that theory comes from a solid consensus understanding of the fundamentals of bail, why

they are important, and how they work together toward an idea of pretrial justice that all Americans can embrace.

The paper is made up of seven chapters designed to help jurisdictions across America to reach consensus on a path to pretrial justice. In the first chapter, we will briefly explore the need for pretrial improvements as well as the reasons behind the current generation of reform. In the second chapter, we will examine the evolution of bail through history, with particular emphasis on why the knowledge of certain historical themes is essential to reforming the pretrial process. In the third chapter, we will list and explain fundamental legal foundations underpinning the pretrial field. The fourth chapter will focus on the evolution of empirical pretrial research, looking primarily at research associated with each of the three generations of bail reform in America in the 20th and 21st centuries.

The fifth chapter will briefly discuss how the history, law, and research come together in the form of national pretrial standards and best practice recommendations. In the sixth chapter, we will further discuss how bail's history, law, research, and best practice standards compel us to agree on certain changes to the way we define key terms and phrases in the field. In the seventh and final chapter, we will focus on practical application – how to begin to apply the concepts contained in each of the previous sections to lawfully administer bail based on best practices. Throughout the document, through sidebars, the reader will also be introduced to other important but sometimes neglected topics relevant to a complete understanding of the basics of bail.

Direct quotes are footnoted, and other, unattributed statements are either the author's own or can be found in the "additional sources and resources" sections at the end of most chapters. In the interest of space, footnoted sources are not necessarily listed again in those end sections, but should be considered equally important resources for pretrial practitioners. Throughout the paper, the author occasionally references information that is found only in various websites. Those websites are as follows:

The American Bar Association: http://www.americanbar.org/aba.html;

The Bureau of Justice Assistance: https://www.bja.gov/;

The Bureau of Justice Statistics: http://www.bjs.gov/;

The Carey Group: http://www.thecareygroup.com/;

The Center for Effective Public Policy: http://cepp.com/;

The Crime and Justice Institute: http://www.crj.org/cji;

The Federal Bureau of Investigation Crime Reports: http://www.fbi.gov/about-us/cjis/ucr/ucr;

Human Rights Watch: http://www.hrw.org/;

Justia: http://www.justia.com/;

The Justice Management Institute: http://www.jmijustice.org/;

The Justice Policy Institute: http://www.justicepolicy.org/index.html;

NACo Pretrial Resources, http://www.naco.org/programs/csd/Pages/PretrialJustice.aspx;

The National Association of Pretrial Services Agencies: http://napsa.org/;

The National Criminal Justice Reference Service: https://www.ncjrs.gov/;

The National Institute of Corrections, http://nicic.gov;

The National Institute of Justice: http://www.nij.gov/Pages/welcome.aspx;

The Pretrial Justice Institute: http://www.pretrial.org/;

The Pretrial Services Agency for the District of Columbia, http://www.psa.gov/;

The United States Census Bureau, http://www.census.gov/;

The Vera Institute of Justice: http://www.vera.org/;

The Washington State Institute for Public Policy: http://www.wsipp.wa.gov/.

Chapter 1: Why Do We Need Pretrial Improvements?

The Importance of Understanding Risk

Of all the reasons for studying, identifying, and correcting shortcomings with the American system of administering bail, two overarching reasons stand out as foundational to our notions of freedom and democracy. The first is the concept of risk. From the first bail setting in Medieval England to any of a multitude of bail settings today, pretrial release and detention has always been concerned with risk, typically manifested by the prediction of pretrial misbehavior based on the risk that any particular defendant will not show up for court or commit some new crime if released. But often missing from our discussions of pretrial risk are the reasons for why we allow risk to begin with. After all, pretrial court appearance rates (no failures to appear) and public safety rates (no new crimes while on pretrial release) would most certainly hover near 100% if we could simply detain 100% of defendants.

The answer is that we not only allow for risk in criminal justice and bail, we demand it from a society that is based on liberty. In his Commentaries on the Laws of England (the eighteenth century treatise on the English common law used extensively by the American Colonies and our Founding Fathers) Sir William Blackstone wrote, "It is better that ten guilty persons escape than that one innocent suffer,"[4] a seminal statement of purposeful risk designed to protect those who are governed against unchecked despotism. More specifically related to bail, in 1951, Justice Robert H. Jackson succinctly wrote, "Admission to bail always involves a risk . . . a calculated risk which the law takes as the price of our system of justice."[5] That system of justice – one of limited government powers and of fundamental human rights protected by the Constitution, of defendants cloaked with the presumption of innocence, and of increasingly arduous evidentiary hurdles designed to ensure that only the guilty suffer punishment at the hands of the state – inevitably requires us to *embrace* risk at bail as fundamental to maintaining our democracy. Our notions of equality, freedom, and the rule of law demand that we embrace risk, and embracing risk requires us

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[4] William Blackstone, *Commentaries on the Laws of England*, Book 4, ch. 27 (Oxford 1765-1769).

[5] *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

to err on the side of release when considering the right to bail, and on "reasonable assurance," rather than complete assurance, when limiting pretrial freedom.

Despite the fact that risk is necessary, however, many criminal justice leaders lack the will to undertake it. To them, a 98% court appearance rate is 2% too low, one crime committed by a defendant while on pretrial release is one crime too many, and detaining some large percentage of defendants pretrial is an acceptable practice if it avoids those relatively small percentage failures. Indeed, the fears associated with even the smallest amount of pretrial failure cause those leaders to focus first and almost entirely on mitigating perceived risk, which in turn leads to unnecessary pretrial detention.

> *"All too often our current system permits the unfettered release of dangerous defendants while those who pose minimal, manageable risk are held in costly jail space."*
>
> Tim Murray, Pretrial Justice Institute, 2011

But these fears misapprehend the entire concept of bail, which requires us first to embrace the risk created by releasing defendants (for the law presumes and very nearly demands the release of bailable defendants) and then to seek to mitigate it only to reasonable levels. Indeed, while the notion may seem somewhat counterintuitive, in this one unique area of the law, everything that we stand for as Americans reminds us that when court appearance and public safety rates are high, we must at least consider taking the risk of releasing more defendants pretrial. Accordingly, one answer to the question of why pretrial improvements are necessary, and the first reason for correcting flaws in the current system, is that criminal justice leaders must continually take risks in order to uphold fundamental precepts of American justice; unfortunately, however, many criminal justice leaders, including those who administer bail today, often fail to fully understand that connection and have actually grown risk averse.

The Importance of Equal Justice

The second foundational reason for studying and correcting the administration of bail in America is epitomized by a quote from Judge Learned Hand uttered during a keynote address for the New York City Legal Aid Society in 1951. In his

speech, Judge Hand stated, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[6] Ten years later, the statement was repeated by Attorney General Robert Kennedy when discussing the need for bail reform, and it became a foundational quote in the so-called "Allen Committee" report, the document from the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice that provided a catalyst for the first National Conference on Bail and Criminal Justice in 1964. Judge Hand's quote became a rallying cry for the first generation of American bail reform, and it remains poignant today, for in no other area of criminal procedure do we so blatantly restrict allotments of our fundamental legal principles. Like our aversion to risk, our rationing of justice at bail is something to which we have grown accustomed. And yet, if Judge Hand is correct, such rationing means that our very form of government is in jeopardy. Accordingly, another answer for why pretrial improvements are necessary, and a second reason for correcting flaws in the current system, is that allowing justice for some, but not all Americans, chips away at the founding principles of our democracy, and yet those who administer bail today have grown content with a system in which justice capriciously eludes persons based on their lack of financial resources.

Arguably, it is America's aversion to risk that has led to its complacency toward rationing pretrial justice. That is because bail, and therefore the necessary risk created by release, requires an in-or-out, release/no release decision. As we will see later in this paper, since at least 1275, bail was meant to be an in-or-out proposition, and only since about the mid to late 1800s in America have we created a process that allows judges to delegate that decision by merely setting an amount of up-front money. Unfortunately, however, setting an amount of money is typically not a release/no release decision; indeed, it can often cause both unintended releases and detentions. Setting money, instead, creates only the illusion of a decision for when money is a precondition to release, the actual release (or, indeed, detention) decision is then made by the defendant, the defendant's family, or perhaps some third party bail bondsman who has analyzed the potential for profit. This illusion of a decision, in turn, has masked our aversion to risk, for it appears to all that some decision has been made. Moreover, it has caused judges across America to be content with the negative outcomes of such a non-decision, in which pretrial justice appears arbitrarily rationed out only to those with access to money.

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[6] *See* The Legal Aid Society website at http://www.legal-aid.org/en/las/thoushaltnotrationjustice.aspx.

Negative Outcomes Associated with the Traditional Money Bail System

Those negative outcomes have been well-documented. Despite overall drops in total and violent crime rates over the last twenty years, jail incarceration rates remain high – so high, in fact, that if we were to jail persons at the 1980 incarceration rate, a rate from a time in which crime rates were actually higher than today, our national jail population would drop from roughly 750,000 inmates to roughly 250,000 inmates. Moreover, most of America's jail inmates are classified as pretrial defendants, who today account for approximately 61% of jail populations nationally (up from approximately 50% in 1996). As noted previously, the United States leads the world in numbers of pretrial detainees, and detains them at a rate that is three times the world average.

Understanding Your Jail Population

Knowing who is in your jail as well as fundamental jail population dynamics is often the first step toward pretrial justice. Many jurisdictions are simply unaware of who is in the jail, how they get into the jail, how they leave the jail, and how long they stay, and yet knowing these basic data is crucial to focusing on particular jail populations such as pretrial inmates.

A jail's population is affected not only by admissions and lengths of stay, but also by the discretionary decisionmaking by criminal justice officials who, whether on purpose or unwittingly, often determine the first two variables. For example, a local police department's policy of arresting and booking (versus release on citation) more defendants than other departments or to ask for unusually high financial conditions on warrants will likely increase a jail's number of admissions and can easily add to its overall daily population. As another example, national data has shown that secured money at bail causes pretrial detention for some defendants and delayed release for others, both increasing the lengths of stay for that population and sometimes creating jail crowding. Accordingly, a decision by one judge to order mostly secured (i.e., cash or surety) bonds will increase the jail population more than a judge who has settled on using less-restrictive means of limiting pretrial freedom while mitigating pretrial risk.

Experts on jail population analysis thus advise jurisdictions to adopt a systems perspective, create the infrastructure to collect and analyze system data, and collect and track trend data not only on inmate admissions and lengths of stay, but also on criminal justice decisionmaking for policy purposes.

Sources and Resources: David M. Bennett & Donna Lattin, *Jail Capacity Planning Guide: A Systems Approach* (NIC, Nov. 2009); Cherise Fanno Burdeen, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* (NACo/BJA/PJI, 2009); Mark A. Cunniff, *Jail Crowding: Understanding Jail Population Dynamics,* (NIC, Jan. 2002); Robert C. Cushman, *Preventing Jail Crowding: A Practical Guide* (NIC, 2nd ed., May 2002); Todd D. Minton, *Jail Inmates at Midyear- 2012 Statistical Tables,* (BJS, 2013 and series). **Policy Documents Using Jail Population Analysis:** Jean Chung, *Baltimore Behind Bars, How to Reduce the Jail Population, Save Money and Improve Public Safety* (Justice Policy Institute, Jun. 2010); Marie VanNostrand, *New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population* (Luminosity/Drug Policy Alliance, Mar. 2013).

These trends are best explained by the justice system's increasing use of secured financial conditions on a population that appears less and less able to afford them. In 2013, the Census Bureau announced that the poverty rate in America was 15%, about one in every seven persons and higher than in 2007, which was

just before the most recent recession. Nevertheless, according to the Bureau of Justice Statistics, the percentage of cases for which courts have required felony defendants to post money in order to obtain release has increased approximately 65% from 1990 to 2009 (from 37% to 61% of cases overall, mostly from the large increase in use of surety bonds), and the amounts of those financial conditions have steadily risen over the same period.

Unnecessary Pretrial Detention

The problem highlighted by these data comes from the fact that secured financial conditions at bail cause unnecessary pretrial detention. In a recent and rigorous study of 2,000 Colorado cases comparing the effects between defendants ordered to be released on secured financial conditions (requiring either money or property to be paid in advance of release) and those ordered released on unsecured financial conditions (requiring the payment of either money or property only if the defendant failed to appear and not as a precondition to release), defendants with unsecured financial conditions were released in "statistically significantly higher" numbers no matter how high or low their individual risk.[7] Essentially, defendants ordered to be released but forced to pay secured financial conditions: (1) took longer to get out of jail (presumably for the time needed to gather the necessary money or to find willing sureties); and (2) in many cases did not get out at all. In short, using secured bonds leads to the detention of bailable defendants by delaying or preventing pretrial release. These findings are consistent with comparable national data; indeed, the federal government has estimated the percentage of felony defendants detained for the duration of their pretrial period nationally to be approximately 38%, and the percentage of those defendants detained simply due to the lack of money to be approximately 90% of that number.

There are numerous reasons to conclude that anytime a bailable defendant is detained for lack of money (rather than detained because of his or her high risk for pretrial misbehavior), that detention is unnecessary. First, secured money at bail is the most restrictive condition of release – it is typically the only precondition to release itself – and, in most instances, other less-restrictive alternatives are available to respond to pretrial risk without the additional financial condition. Indeed, starting in the 1960s, researchers have demonstrated that courts can use alternatives to release on money bonds that have acceptable

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[7] Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, 12 (PJI 2013).

outcomes concerning risk to public safety and court appearance. Second, the money itself cannot serve as motivation for anything until it is actually posted. Until then, the money merely detains, and does so unequally among defendants resulting in the unnecessary detention of releasable inmates. This problem is exacerbated by the fact that the financial condition of a bail bond is typically arbitrary; even when judges are capable of expressing reasons for a particular amount, there is often no rational explanation for why a second amount, either lower or higher, might not arguably serve the same purposes. Third, money set with a purpose to detain is likely unlawful under numerous theories of law, and is also unnecessary given the Supreme Court's approval of a lawful detention scheme that uses no money whatsoever. Financial conditions of release are indicators of decisions to release, not to detain; accordingly, any resulting detention due to money bonds used outside of a lawful detention process makes that money-based detention unnecessary or potentially unlawful. Fourth, no study has ever shown that money can protect the public. Indeed, in virtually every American jurisdiction, financial conditions of bail bonds cannot even be forfeited for new crimes or other breaches in public safety, making the setting of a money bond for public safety irrational. Given that irrationality, any pretrial detention resulting from that practice is per se unnecessary.

Fifth, ever since 1968, when the American Bar Association openly questioned the basic premise that money serves as a motivator for court appearance, no valid study has been conducted to refute that uncertainty. Instead, the best research to date suggests what criminal justice leaders have long suspected: secured money does not matter when it comes to either public safety or court appearance, but it is directly related to pretrial detention. This hypothesis was supported most recently by the Colorado study, mentioned above, which compared outcomes for defendants released on secured bonds with outcomes for defendants released on unsecured bonds. In 2,000 cases of defendants from all risk categories, this research showed that while having to pay the money up-front led to statistically significantly higher detention rates, whether judges used secured or unsecured money bonds did not lead to any differences in court appearance or public safety rates.

A sixth reason for concluding that bailable defendants held on secured financial conditions constitutes unnecessary pretrial detention is that we know of at least one jurisdiction, Washington D.C., that uses virtually no money at all in its bail setting process. Instead, using an "in or out," "bail/no bail" scheme of the kind contemplated by American law, the District of Columbia releases 85-88% of all defendants – detaining the rest through rational, fair, and transparent detention

procedures – and yet maintains high court appearance (no FTA) and public safety (no new crime) rates. Moreover, that jurisdiction does so day after day, with all types of defendants charged with all types of crimes, using almost no money whatsoever.

Unnecessary pretrial detention is also suggested whenever we look at the adjudicatory outcomes of defendants' cases to see if they are the sorts of individuals who must be absolutely separated from society. When we look at those outcomes, however, we see that even though we foster a culture of pretrial detention, very few persons arrested or admitted to jail are ultimately sentenced to significant incarceration post-trial. Indeed, only a small fraction of jail inmates nationally (from 3-5%, depending on the source) are sent to prison. In one statewide study, only 14% of those defendants detained for the *entire duration* of their case were sentenced to prison. Thirteen percent had their cases dismissed (or the cases were never filed), and 37% were sentenced to noncustodial sanctions, including probation, community corrections, or home detention. Accordingly, over 50% of those pretrial detainees were released into the community once their cases were done. In another study, more than 25% of felony pretrial detainees were acquitted or had their cases dismissed, and approximately 20% were ultimately sentenced to a noncustodial sentence. Clearly, another disturbing paradox at bail involves the dynamic of releasing presumptively innocent defendants back into the community only after they have either pleaded or been found guilty of a particular crime.

In addition, and as noted by the Pretrial Justice Institute (PJI), these statistics vary greatly across the United States, and that variation itself hints at the need for reform. According to PJI:

> Looking at the counties individually shows the great disparity in pretrial release practices and outcomes. In 2006, pretrial release rates ranged from a low of 31% in one county to a high of 83% in another. Non-financial release rates ranged from lows of zero in one county, 3% in another, and 5% in a third to a high of 68%.[8]

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[8] *Important Data on Pretrial Justice* (PJI 2011).

Different Laws/Different Practices

Bail laws are different among the states, often due to the extent to which those states have fully embraced the principles and practices evolving out of the two previous generations of bail reform in the 1960s and 1980s. Even in states with similar laws, however, pretrial practices can nonetheless vary widely. Indeed, local practices can vary among jurisdictions under the same state laws, and, given the great discretion often afforded at bail, even among judges within individual jurisdictions. Disparity beyond that needed to individualize bail settings can rightfully cause concerns over equal justice, through which Americans can be reasonably assured that the laws will not have widely varying application depending on their particular geographical location, court, or judge.

Normally, state and federal constitutional law would provide adequate benchmarks to maintain equal justice, but with bail we have an unfortunate scarcity of language and opinions from which to gauge particular practices or even the laws from which those practices derive. Fortunately, however, we have best practice standards on pretrial release and detention that take fundamental legal principles and marry them with research to make recommendations concerning virtually every issue surrounding pretrial justice. In this current generation of pretrial reform, we are realizing that both bail practices and the laws themselves – from court rules to constitutions – must be held up to best practices and the legal principles underlying them to create bail schemes that are fair and applied somewhat equally among the states.

The American Bar Association's (ABA's) Criminal Justice Standards on Pretrial Release can provide the benchmarks that we do not readily find in bail law. When followed, those Standards provide the framework from which pretrial practices or even laws can be measured, implemented, or improved. For example, the use of monetary bail schedules (a document assigning dollar amounts to particular charges regardless of the characteristics of any individual defendant) are illegal in some states but actually required by law in others. There is very little law on the subject, but the ABA standards (using fundamental legal principles, such as the need for individuality in bail setting as articulated by the United States Supreme Court), research (indicating that release or detention based on individual risk is a superior practice to any mechanism based solely on charge and wealth), and logic (the standards call schedules "arbitrary and inflexible") reject the use of monetary bail schedules, thus suggesting that any state that either mandates or permits their use should consider statutory amendment.

Sources and Resources: *American Bar Association Standards for Criminal Justice – Pretrial Release* (3rd ed. 2007).

Pretrial detention, whether for a few days or for the duration of the case, imposes certain costs, and unnecessary pretrial detention does so wastefully. In a purely monetary sense, these costs can be estimated, such as the comparative cost of incarceration (from $50 to as much as $150 per day) versus community supervision (from as low as $3 to $5 per day). Given the volume of defendants and their varying lengths of stays, individual jails can incur costs of millions of dollars per year simply to house lower risk defendants who are also presumed innocent by the law. Indeed, the United States Department of Justice estimates that keeping the pretrial population behind bars costs American taxpayers roughly 9 billion dollars per year. Jails that are crowded can create an even more costly scenario for taxpayers, as new jail construction can easily reach $75,000 to $100,000 per inmate bed. Added to these costs are dollars associated with lost wages, economic mobility (including intergenerational effects), possible welfare costs for defendant families, and a variety of social costs, including denying the defendant the ability to assist with his or her own defense, the possibility of imposing punishment prior to conviction, and eroding justice system credibility due to its complacency with a wealth-based system of pretrial freedom.

Perhaps more disturbing, though, is research suggesting that pretrial detention alone, all other things being equal, leads to harsher treatment and outcomes than pretrial release. Relatively recent research from both the Bureau of Justice Statistics and the New York City Criminal Justice Agency continues to confirm studies conducted over the last 60 years demonstrating that, controlling for all other factors, defendants detained pretrial are convicted and plead guilty more often, and are sentenced to prison and receive harsher sentences than those who are released. Moreover, as recently as November 2013, the Laura and John Arnold Foundation released a study of over 150,000 defendants finding that – all other things being equal – defendants detained pretrial were over four times more likely to be sentenced to jail (and with longer sentences) and three times more likely to be sentenced to prison (again with longer sentences) than defendants who were not detained.[9]

While detention for a defendant's entire pretrial period has decades of documented negative effects, the Arnold Foundation research is also beginning to demonstrate that even small amounts of pretrial detention – perhaps even the few days necessary to secure funds to pay a cash bond or fee for a surety bond – have negative effects on defendants and actually makes them more at risk for

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[9] *See* Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, at 10-11 (Laura & John Arnold Found. 2013).

pretrial misbehavior.[10] Looking at the same 150,000 case data set, the Arnold researchers found that low- and moderate-risk defendants held only 2 to 3 days were more likely to commit crimes and fail to appear for court before trial than similar defendants held 24 hours or less. As the time in jail increased, the researchers found, the likelihood of defendant misbehavior also increased. The study also found similar correlations between pretrial detention and long-term recidivism, especially for lower risk defendants. In a field of paradoxes, the idea that a judge setting a condition of bail intending to protect public safety might be unwittingly *increasing* the danger to the public – both short and long-term – is cause for radically rethinking the way we administer bail.

Other Areas in Need of Pretrial Reform

Unnecessary pretrial detention is a deplorable byproduct of the traditional money bail system, but it is not the only part of that system in need of significant reform. In many states, the overreliance on money at bail takes the place of a transparent and due-process-laden detention scheme based on risk, which would allow for the detention of high-risk defendants with no bail. Indeed, the traditional money bail system fosters processes that allow certain high-risk defendants to effectively purchase their freedom, often without being assessed for their pretrial risk and often without supervision. These processes include using bail schedules (through which defendants are released by paying an arbitrary money amount based on charge alone), a practice of dubious legal validity and counter to any notions of public safety. They include using bail bondsmen, who operate under a business model designed to maximize profit based on getting defendants back to court but with no regard for public safety. And they include setting financial conditions to help protect the public, a practice that is both legally and empirically flawed. In short, the use of money at bail at the expense of risk-based best practices tends to create the two main reasons cited for the need for pretrial reform: (1) it needlessly and unfairly keeps lower risk defendants in jail, disproportionately affecting poor and minority defendants and at a high cost to taxpayers; and (2) it too often allows higher risk defendants out of jail at the expense of public safety and integrity of the justice system. Both of these reasons were illustrated by the Colorado study, cited above, which documented that when making bail decisions without the benefit of an empirical risk instrument, judges often set financial conditions that not only

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[10] *See* Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013).

kept lower risk persons in jail, but also frequently allowed the highest risk defendants out.

While the effect of money at bail is often cited as a reason for pretrial reform, research over the last 25 years has also illuminated other issues ripe for pretrial justice improvements. They include the need for (1) bail education among all criminal justice system actors; (2) data-driven policies and infrastructure to administer bail; (3) improvements to procedures for release through citations and summonses; (4) better prosecutorial and defense attorney involvement at the front-end of the system; (5) empirically created pretrial risk assessment instruments; (6) traditional (and untraditional) pretrial services functions in jurisdictions without those functions; (7) improvements to the timing and nature of first appearances; (8) judicial release and detention decision-making to follow best practices; (9) systems to allocate resources to better effectuate best practices; and (10) changes in county ordinances, state statutes, and even state constitutions to embrace and facilitate pretrial justice and best practices at bail.

> *"What has been made clear . . . is that our present attitudes toward bail are not only cruel, but really completely illogical. . . . '[O]nly one factor determines whether a defendant stays in jail before he comes to trial [and] that factor is, simply, money."*
>
> Attorney General Robert Kennedy, 1962
>
> *Many pretrial inmates "are forced to remain in custody . . . because they simply cannot afford to post the bail required – very often, just a few hundred dollars."*
>
> Attorney General Eric Holder, 2011

The Third Generation of Bail/Pretrial Reform

The traditional money bail system that has existed in America since the turn of the 20th century is deficient legally, economically, and socially, and virtually every neutral and objective bail study conducted over the last 90 years has called for its reform. Indeed, over the last century, America has undergone two generations of bail reform, but those generations have not sufficed to fully achieve what we know today constitutes pretrial justice. Nevertheless, we are

entering a new generation of pretrial reform with the same three hallmarks seen in previous generations.

First, like previous generations, we now have an extensive body of research literature – indeed, we have more than previous generations – pointing uniformly in a single direction toward best practices at bail and toward improvements over the status quo. Second, we have the necessary meeting of minds of an impressive number of national organizations – from police chiefs and sheriffs, to county administrators and judges – embracing the research and calling for data-driven pretrial improvements. Third, and finally, we are now seeing jurisdictions actually changing their laws, policies, and practices to reflect best practice recommendations for improvements. Fortunately, through this third generation of pretrial reform, we already know the answers to most of the pressing issues at bail. We know what changes must be made to state laws, and we know how to follow the law and the research to create bail schemes in which pretrial practices are rational, fair, and transparent.

A deeper understanding of the foundations of bail makes the need for pretrial improvements even more apparent. The next three parts of this paper are designed to summarize the evolution and importance of three of the most important foundational aspects of bail -- the history, the law, and the research.

Additional Sources and Resources: American Bar Association Standards for Criminal Justice – Pretrial Release (3rd ed. 2007); Spike Bradford, *For Better or for Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice* (JPI 2012); E. Ann Carson & William J. Sabol, *Prisoners in 2011* (BJS 2012); *Case Studies: the D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth* (PJI), found at http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf; Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006* (BJS 2010); Jean Chung, *Bailing on Baltimore: Voices from the Front Lines of the Justice System* (JPI 2012); Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts* (BJS 2007); Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (Human Rights Watch 2010); *Frequently Asked Questions About Pretrial Release Decision Making* (ABA 2012); Robert F. Kennedy, *Address by Attorney General Robert F. Kennedy to the American Bar Association House of Delegates, San Francisco, Cal.*, (Aug. 6, 1962) available at http://www.justice.gov/ag/rfkspeeches/1962/08-06-1962%20Pro.pdf; Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* (Laura & John Arnold Found. 2013); Barry

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

Chapter 2: The History of Bail

According to the American Historical Association, studying history is crucial to helping us understand ourselves and others in the world around us. There are countless quotes on the importance of studying history from which to draw, but perhaps most relevant to bail is one from philosopher Soren Kierkegaard, who reportedly said, "Life must be lived forward, but it can only be understood backward." Indeed, much of bail today is complex and confusing, and the only way to truly understand it is to view it through a historical lens.

The Importance of Knowing Bail's History

Understanding the history of bail is not simply an academic exercise. When the United States Supreme Court equated the right to bail to a "right to release before trial," and likened the modern practice of bail with the "ancient practice of securing the oaths of responsible persons to stand as sureties for the accused,"[11] the Court was explaining the law by drawing upon notions discernible only through knowledge of history. When the commercial bail insurance companies argue that pretrial services programs have "strayed" beyond their original purpose, their argument is not fully understood without knowledge of 20th century bail, and especially the improvements gained from the first generation of bail reform in the 1960s. Some state appellate courts have relied on sometimes detailed accounts of the history of bail in order to decide cases related to release under "sufficient sureties," a term fully known only through the lens of history.

> *"This difference [between the U.S. and the Minnesota Constitution] is critical to our analysis and to fully understand this critical difference, some knowledge of the history of bail is necessary. Therefore, it is important to examine the origin of bail and its development in Anglo-American jurisprudence."*
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> *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000)

In short, knowledge of the history of bail is necessary to pretrial reform, and therefore it is crucial that this history be shared. Indeed, the history of bail is the

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[11] *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951).

starting point for understanding all of pretrial justice, for that history has shaped our laws, guided our research, helped to mold our best practice standards, and forced changes to our core definitions of terms and phrases. Fundamentally, though, the history of bail answers two pressing questions surrounding pretrial justice: (1) given all that we know about the deleterious effects of money at bail, how did America, as opposed to the rest of the world, come to rely upon money so completely?; and (2) does history suggest solutions to this dilemma, which might lead to American pretrial justice?

Civil Rights, Poverty, and Bail

Anyone who has read the speeches of Robert F. Kennedy while he was Attorney General knows that civil rights, poverty, and bail were three key issues he wished to address. Addressing them together, as he often did, was no accident, as the three topics were, and continue to be, intimately related.

In 1961, philanthropist Louis Schweitzer and magazine editor Herbert Sturz took their concerns over the administration of bail in New York City (a system "that granted liberty based on income") to Robert Kennedy and Daniel Freed, Department of Justice liaison to the newly created Committee on Poverty and the Administration of Federal Criminal Justice, known as the "Allen Committee." Schweitzer's and Sturz's efforts ultimately led to the creation of the Vera Foundation (now the Vera Institute of Justice), whose pioneering work on the Manhattan Bail Project heavily influenced the first generation of bail reform by finding effective alternatives to the commercial bail system. Freed, in turn, took the Vera work and incorporated it into an entire chapter of the Allen Committee's report, leading to the first National Conference on Bail and Criminal Justice in 1964.

At the same time that these bail and poverty reformers were working to change American notions of equal justice, civil rights activists were taking on a traditionally difficult hurdle for Southern blacks – the lack of money to bail themselves and others out of jail – and using it to their advantage. Through the "jail, no bail" policy, activists refused to pay bail or fines after being arrested for sit-ins, opting instead to have the government incarcerate them, and sometimes to force them to work hard labor, to bring more attention to their cause.

The link between civil rights, poverty, and bail was probably inevitable, and Kennedy set out to rectify overlapping injustices seen in all three areas. But despite promising improvements encompassed in the war on poverty, the civil rights movement, and the first generation of bail reform in the 1960s, we remain unfortunately tolerant of a bail process inherently biased against the poor and disproportionately affecting persons of color. Studies continue to demonstrate that bail amounts are empirically related to increased (and typically needless)

pretrial detention, and other studies are equally consistent in demonstrating racial disparity in the application of bail and detention.

Fortunately, however, just like those persons pursuing civil rights and equal justice in the 20th century, the current generation of pretrial reform is fueled by committed individuals urging cultural changes to a system manifested by disparate state laws, unfair practices, and irrational policies that negatively affect the basic human rights of the most vulnerable among us. The commitment of those individuals, stemming from the success of past reformers, remains the catalyst for pretrial justice across the nation.

Sources and Resources: Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts, 1990-2004* (BJS Nov. 2007); Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. Legis. & Pub. Pol'y 919 (2013); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI Oct. 2013); Besiki Kutateladze, Vanessa Lynn, & Edward Liang, *Do Race and Ethnicity Matter in Prosecution? Review of Empirical Studies* (1st Ed.) (Vera Institute of Justice 2012) at 11-12; *National Symposium on Pretrial Justice: Summary Report of Proceedings* at 35-35 and citations therein (PJI/BJA 2011) (statement of Professor Cynthia Jones).

Origins of Bail

While bail can be traced to ancient Rome, our traditional American understanding of bail derives primarily from English roots. When the Germanic tribes the Angles, the Saxons, and the Jutes migrated to Britain after the fall of Rome in the fifth century, they brought with them the blood feud as the primary means of settling disputes. Whenever one person wronged another, the families of the accused and the victim would often pursue a private war until all persons in one or both of the families were killed. This form of "justice," however, was brutal and costly, and so these tribes quickly settled on a different legal system based on compensation (first with goods and later with money) to settle wrongs. This compensation, in turn, was based on the concept of the "wergeld," meaning "man price" or "man payment" and sometimes more generally called a "bot," which was a value placed on every person (and apparently on every person's property) according to social rank. Historians note the existence of detailed tariffs assigning full wergeld amounts to be paid for killing persons of various ranks as well as partial amounts payable for injuries, such as loss of limbs or other wrongs. As a replacement to the blood feud between families, the wergeld system was also initially based on concepts of kinship and private justice, which

meant that wrongs were still settled between families, unlike today, where crimes are considered to be wrongs against all people or the state.

With the wergeld system as a backdrop, historians agree on what was likely a prototypical bail setting that we now recognize as the ancestor to America's current system of release. Author Hermine Meyer described that original bail process as follows:

> Since the [wergeld] sums involved were considerable and could rarely be paid at once, the offender, through his family, offered sureties, or *wereborh*, for the payment of the *wergeld*. If accepted, the injured party met with the offender and his surety. The offender gave a *wadia*, a *wed*, such as a stick, as a symbol or pledging or an indication of the assumption of responsibility. The creditor then gave it to the surety, indicating that he recognized the surety as the trustee for the debt. He thereby relinquished his right to use force against the debtor. The debtor's pledge constituted a pledging of person and property. Instead of finding himself in the hands of the creditor, the debtor found himself, up to the date when payment fell due, in the hands of the surety.[12]

This is, essentially, the "ancient practice of securing the oaths" referred to by the Supreme Court in *Stack v. Boyle*, and it has certain fundamental properties that are important to note. First, the surety (also known as the "pledge" or the "bail") was a person, and thus the system of release became known as the "personal surety system." Second, the surety was responsible for making sure the accused paid the wergeld to avoid a feud, and he did so by agreeing in early years to stand in completely for the accused upon default of his obligations ("body for body," it was reported, meaning that the surety might also suffer some physical punishment upon default), and in later years to at least pay the wergeld himself in the event of default. Thus, the personal surety system was based on the use of recognizances, which were described by Blackstone as obligations or debts that would be voided upon performance of specified acts. Though not completely the same historically, they are essentially what we might now call unsecured bonds using co-signors, with nobody required to pay any money up-front, and with the

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[12] Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L. J. 1139, 1146 (1971-1972) (citing and summarizing Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275*, 3-15 (NY, AMS Press, 1966).

security on any particular bond coming from the sureties, or persons, who were willing to take on the role and acknowledge the amount potentially owed upon default.

Third, the surety was not allowed to be repaid or otherwise profit from this arrangement. As noted above, the wadia, or the symbol of the suretyship arrangement, was typically a stick or what historians have described as some item of trifling value. In fact, as discussed later, even reimbursing or merely promising to reimburse a surety upon default – a legal concept known as indemnification – was declared unlawful in both England and America and remained so until the 1800s.

Fourth, the surety's responsibility over the accused was great and was based on a theory of continued custody, with the sureties often being called "private jailers" or "jailers of [the accused's] own choosing."[13] Indeed, it was this great responsibility, likely coupled with the prohibition on reimbursement upon default and on profiting from the system, which led authorities to bestow great powers to sureties as jailers to produce the accused – powers that today we often associate with those possessed by bounty hunters under the common law. Fifth, the purpose of bail in this earliest of examples was to avoid a blood feud between families. As we will see, that purpose would change only once in later history. Sixth and finally, the rationale behind this original bail setting made sense because the amount of the payment upon default was identical to the amount of the punishment. Accordingly, because the amount of the promised payment was identical to the wergeld, for centuries there was never any questioning whether the use of that promised amount for bail was arbitrary, excessive, or otherwise unfair.

The administration of bail has changed enormously from this original bail setting, and these changes in America can be attributed largely to the intersection during the 20th century of two historical phenomena. The first was the slow evolution from the personal surety system using unsecured financial conditions to a commercial surety system (with profit and indemnification) primarily using secured financial conditions. The second was the often misunderstood creation and nurturing of a "bail/no bail" or "release/no release" dichotomy, which continues to this day.

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[13] *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869).

The Evolution to Secured Bonds/Commercial Sureties

The gradual evolution from a personal surety system using unsecured bonds to the now familiar commercial surety system using secured bonds in America began with the Norman Invasion. When the Normans arrived in 1066, they soon made changes to the entire criminal justice system, which included moving from a private justice system to a more public one through three royal initiatives. First, the crown initiated the now-familiar idea of crimes against the state by making certain felonies "crimes of royal concern." Second, whereas previously the commencement of a dispute between families might start with a private summons based upon sworn certainty, the crown initiated the mechanism of the presentment jury, a group of individuals who could initiate an arrest upon mere suspicion from third parties. Third, the crown established itinerant justices, who would travel from shire to shire to exert royal control over defendants committing crimes of royal concern. These three changes ran parallel to the creation of jails to hold various arrestees, although the early jails were crude, often barbaric, and led to many escapes.

These changes to the criminal justice process also had a measurable effect on the number of cases requiring bail. In particular, the presentment jury process led to more arrests than before, and the itinerant justice system led to long delays between arrest and trial. Because the jails at the time were not meant to hold so many persons and the sheriffs were reluctant to face the severe penalties for allowing escapes, those sheriffs began to rely more frequently upon personal sureties, typically responsible (and preferably landowning) persons known to the sheriff, who were willing to take control of the accused prior to trial. The need for more personal sureties, in turn, was met through the growth of the parallel institutions of local government units known as tithings and hundreds – a part of the overall development of the frankpledge system, a system in which persons were placed in groups to engage in mutual supervision and control.

While there is disagreement on whether bail was an inherent function of frankpledge, historians have frequently documented sheriffs using sureties from within the tithings and hundreds (and sometimes using the entire group), indicating that that these larger non-family entities served as a safety valve so that sheriffs or judicial officials rarely lacked for "sufficient" sureties in any particular case. The fundamental point is that in this period of English history, sureties were individuals who were willing to take responsibility over defendants – for no money and with no expectation of indemnification upon default – and the sufficiency of the sureties behind any particular release on bail

came from finding one or more of these individuals, a process that was made exceedingly simpler through the use of the collective, non-family groups.

All of this meant that the fundamental purpose of bail had changed: whereas the purpose of the original bail setting process of providing oaths and pledges was to avoid a blood feud between families while the accused met his obligations, the use of more lengthy public processes and jails meant that the purpose of bail would henceforth be to provide a mechanism for release. As before, the purpose of conditioning that release by requiring sureties was to motivate the accused to face justice – first to pay the debt but now to appear for court – and, indeed, court appearance remained the sole purpose for limiting pretrial freedom until the 20th century.

Additional alterations to the criminal process occurred after the Norman Invasion, but the two most relevant to this discussion involve changes in the criminal penalties that a defendant might face as well as changes in the persons, or sureties, and their associated promises at bail. At the risk of being overly simplistic, punishments in Anglo-Saxon England could be summed up by saying that if a person was not summarily executed or mutilated for his crime (for that was the plight of persons with no legal standing, who had been caught in the act, or persons of "ill repute" or long criminal histories, etc.), then that person would be expected to make some payment. With the Normans, however, everything changed. Slowly doing away with the wergeld payments, the Normans introduced first afflictive punishment, in the form of ordeals and duels, and later capital and other forms of corporal punishment and prison for virtually all other offenses.

The changes in penalties had a tremendous impact on what we know today as bail. Before the Norman Invasion, the surety's pledge matched the potential monetary penalty perfectly. If the wergeld was thirty silver pieces, the surety was expected to pay exactly thirty silver pieces upon default of the primary debtor. After the Invasion, however, with increasing use of capital punishment, corporal punishment, and prison sentences, it became frequently more difficult to assign the amount that ought to be pledged, primarily because assigning a monetary equivalent to either corporal punishment or imprisonment is largely an arbitrary act. Moreover, the threat of these seemingly more severe punishments led to increasing numbers of defendants who refused to stay put, which created additional complexity to the bail decision. These complexities, however, were not enough to cause society to radically change course from its use of the personal surety system. Instead, that change came when both England and America began running out of the sureties themselves.

As noted previously, the personal surety system generally had three elements: (1) a reputable person (the surety, sometimes called the "pledge" or the "bail"); (2) this person's willingness to take responsibility for the accused under a private jailer theory and with a promise to pay the required financial condition on the back-end – that is, only if the defendant forfeited his obligation; and (3) this person's willingness to take the responsibility without any initial remuneration or even the promise of any future payment if the accused were to forfeit the financial condition of bail or release. This last requirement addressed the concept of indemnification of sureties, which was declared unlawful by both England and America as being against the fundamental public policy for having sureties take responsibility in the first place. In both England and America, courts repeatedly articulated (albeit in various forms) the following rationale when declaring surety indemnification unlawful: once a surety was paid or given a promise to be paid the amount that could potentially be forfeited, that surety lost all interest and motivation to make sure that the condition of release was performed. Thus, a prohibition on indemnifying sureties was a foundational part of the personal surety system.

And indeed, the personal surety system flourished in England and America for centuries, virtually ensuring that those deemed bailable were released with "sufficient sureties," which were designed to provide assurance of court appearance. Unfortunately, however, in the 1800s both England and America began running out of sureties. There are many reasons for this, including the demise of the frankpledge system in England, and the expansive frontier and urban areas in America that diluted the personal relationships necessary for a personal surety system. Nevertheless, for these and other reasons, the demand for personal sureties gradually outgrew supply, ultimately leading to many bailable defendants being unnecessarily detained.

It is at this point in history that England and the United States parted ways in how to resolve the dilemma of bailable defendants being detained for lack of sureties. In England (and, indeed, in the rest of the world), the laws were amended to allow judges to dispense with sureties altogether when justice so required. In America, however, courts and legislatures began chipping away at the laws against surety indemnification. This transformation differed among the states. In the end, however, across America states gradually allowed sureties to demand re-payment upon a defendant's default and ultimately to profit from the bail enterprise itself. By 1898, the first commercial surety was reportedly opened for business in America. And by 1912, the United States Supreme Court wrote, "The distinction between bail [i.e., common law bail, which forbade

indemnification] and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary."[14]

Looking at court opinions from the 1800s, we see that the evolution from a personal to a commercial surety system (in addition to the states gradually increasing defendants ability to self-pay their own financial conditions, a practice that had existed before, but that was used only rarely) was done in large part to help release bailable defendants who were incarcerated due only to their inability to find willing sureties. However, that evolution ultimately virtually assured unnecessary pretrial incarceration because bondsmen began charging money up-front (and later requiring collateral) to gain release in addition to requiring a promise of indemnification. While America may have purposefully moved toward a commercial surety system from a personal surety system to help release bailable defendants, perhaps unwittingly, and certainly more importantly, it moved to a secured money bail system (requiring money to be paid before release is granted) from an unsecured system (promising to pay money only upon default of obligations). The result has been an increase in the detention of bailable defendants over the last 100 years.

The "Bail/No Bail" Dichotomy

The second major historical phenomenon involved the creation and nurturing of a "bail/no bail" dichotomy in both England and America. Between the Norman Invasion and 1275, custom gradually established which offenses were bailable and which were not. In 1166, King Henry II bolstered the concept of detention based on English custom through the Assize of Clarendon, which established a list of felonies of royal concern and allowed detention based on charges customarily considered unbailable. Around 1275, however, Parliament and the Crown discovered a number of abuses, including sheriffs detaining bailable defendants who refused or could not pay those sheriffs a fee, and sheriffs releasing unbailable defendants who were able to pay some fee. In response, Parliament enacted the Statute of Westminster in 1275, which hoped to curb abuses by establishing criteria governing bailability (largely based on a prediction of the outcome of the trial by examining the nature of the charge, the weight of the evidence, and the character of the accused) and, while doing so, officially categorized presumptively bailable and unbailable offenses.

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[14] *Leary v. United States*, 224 U.S. 567, 575 (1912).

Importantly, this statutory enactment began the legal tradition of expressly articulating a bail/no bail scheme, in which a right to bail would be given to some, but not necessarily to all defendants. Perhaps more important, however, are other elements of the Statute that ensured that bailable defendants would be released and unbailable defendants would be detained. In 1275, the sheriffs were expressly warned through the Statute that to deny the release of bailable defendants or to release unbailable defendants was against the law; all defendants were to be either released or detained (depending on their category), and without any additional payment to the sheriff. Doing otherwise was deemed a criminal act.

> *"And if the Sheriff, or any other, let any go at large by Surety, that is not replevisable . . . he shall lose his Fee and Office for ever. . . . And if any withhold Prisoners replevisable, after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King; and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall [be in the great mercy of] the King."*
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> Statute of Westminster 3 Edward I. c. 15, *quoted in* Elsa de Haas, Antiquities of Bail, Origin and Historical Development in Criminal Cases to the Year 1275 (NY AMS Press 1966).

Accordingly, in 1275 the right to bail was meant to equal a right to release and the denial of a right to bail was meant to equal detention, and, generally speaking, these important concepts continued through the history of bail in England. Indeed, throughout that history any interference with bailable defendants being released or with unbailable (or those defendants whom society deemed unbailable) defendants being lawfully detained, typically led to society recognizing and then correcting that abuse. Thus, for example, when Parliament learned that justices were effectively detaining bailable defendants through procedural delays, it passed the Habeas Corpus Act of 1679, which provided procedures designed to prevent delays prior to bail hearings. Likewise, when corrupt justices were allowing the release of unbailable defendants, thus causing what many believed to be an increase in crime, it was rearticulated in 1554 that unbailable defendants could not be released, and that bail decisions be held in open session or by two or more justices sitting together. As another example, when justices began setting financial conditions for bailable defendants in prohibitively high amounts, the abuse led William and Mary to consent to the

English Bill of Rights in 1689, which declared, among other things, that "excessive bail ought not to be required."[15]

"Bail" and "No Bail" in America

Both the concept of a "bail/no bail" dichotomy as well as the parallel notions that "bail" should equal release and "no bail" should equal detention followed into the American Colonies. Generally, those Colonies applied English law verbatim, but differences in beliefs about criminal justice, customs, and even crime rates led to more liberal criminal penalties and bail laws. For example, in 1641 the Massachusetts Body of Liberties created an unequivocal right to bail to all except for persons charged with capital offenses, and it also removed a number of crimes from its list of capital offenses. In 1682, Pennsylvania adopted an even more liberal law, granting bail to all persons except when charged with a capital offense "where proof is evident or the presumption great," adding an element of evidentiary fact finding so as to also allow bail even for certain capital defendants. This provision became the model for nearly every American jurisdiction afterward, virtually assuring that "bail/no bail" schemes would ultimately find firm establishment in America.

Even in the federal system – despite its lack of a right to bail clause in the United States Constitution – the Judiciary Act of 1789 established a "bail/no bail," "release/detain" scheme that survived radical expansion in 1984 and that still exists today. Essentially, any language articulating that "all persons shall be bailable . . . unless or except" is an articulation of a bail/no bail dichotomy. Whether that language is found in a constitution or a statute, it is more appropriately expressed as "release (or freedom) or detention" because the notion that bailability should lead to release was foundational in early American law.

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[15] English Bill of Rights, 1 W. & M., 2nd Sess., Ch. 2 (1689).

"Bail" and "No Bail" in the Federal and District of Columbia Systems

Both the federal and the District of Columbia bail statutes are based on "bail/no bail" or "release/no release" schemes, which, in turn, are based on legal and evidence-based pretrial practices such as those found in the American Bar Association's Criminal Justice Standards on Pretrial Release. Indeed, each statute contains general legislative titles describing the process as either "release" or "detention" during the pretrial phase, and each starts the bail process by providing judges with four options: (1) release on personal recognizance or with an unsecured appearance bond; (2) release on a condition or combination of conditions; (3) temporary detention; or (4) full detention. Each statute then has provisions describing how each release or detention option should function.

Because they successfully separate bailable from unbailable defendants, thus allowing the system to lawfully and transparently detain unbailable defendants with essentially none of the conditions associated with release (including secured financial conditions), both statutes are also able to include sections forbidding financial conditions that result in the preventive detention of the defendant – an abuse seen frequently in states that have not fully incorporated notions of a release/no release system.

The "bail" or "release" sections of both statutes use certain best practice pretrial processes, such as presumptions for release on recognizance, using "least restrictive conditions" to provide reasonable assurance of public safety and court appearance, allowing supervision through pretrial services entities for both public safety and court appearance concerns, and prompt review and appeals for release and detention orders.

The "no bail" or "detention" sections of both statutes are much the same as when the United States Supreme Court upheld the federal provisions against facial due process and 8th Amendment claims in *United States v. Salerno* in 1987. The *Salerno* opinion emphasized key elements of the existing federal statute that helped it to overcome constitutional challenges by "narrowly focusing" on the issue of pretrial crime. Moreover, the Supreme Court wrote, the statute appropriately provided "extensive safeguards" to further the accuracy of the judicial determination as well as to ensure that detention remained a carefully limited exception to liberty. Those safeguards included: (1) detention was limited to only "the most serious of crimes;" (2) the arrestee was entitled to a prompt hearing and the maximum length of pretrial detention was limited by stringent speedy trial time limitations; (3) detainees were to be housed separately from those serving sentences or awaiting appeals; (4) after a finding of probable cause, a "fullblown adversary hearing" was held in which the government was required to convince a neutral decision maker by clear and convincing evidence that no condition or combination of conditions of release would reasonably assure court appearance or the safety of the community or any person; (5) detainees had a

right to counsel, and could testify or present information by proffer and cross-examine witnesses who appeared at the hearing; (6) judges were guided by statutorily enumerated factors such as the nature of the charge and the characteristics of the defendant; (7) judges were to include written findings of fact and a written statement of reasons for a decision to detain; and (8) detention decisions were subject to immediate appellate review.

While advances in pretrial research are beginning to suggest the need for certain alterations to the federal and D.C. statutes, both laws are currently considered "model" bail laws, and the Summary Report to the National Symposium on Pretrial Justice specifically recommends using the federal statute as a structural template to craft meaningful and transparent preventive detention provisions.

Sources and Resources: District of Columbia Code, §§ 23-1301-09, 1321-33; Federal Statute, 18 U.S.C. §§ 3141-56; *United States v. Salerno*, 481 U.S. 739 (1987); *National Symposium on Pretrial Justice: Summary Report of Proceedings*, at 42 (PJI/BJA 2011).

Indeed, given our country's foundational principles of liberty and freedom, it is not surprising that this parallel notion of bailable defendants actually obtaining release followed from England to America. William Blackstone, whose Commentaries on the Laws of England influenced our Founding Fathers as well as the entire judicial system and legal community, reported that denying the release of a bailable defendant during the American colonial period was considered itself an offense. In examining the administration of bail in Colonial Pennsylvania, author Paul Lermack reported that few defendants had trouble finding sureties, and thus, release.

This notion is also seen in early expressions of the law derived from court opinions. Thus, in the 1891 case of *United States v. Barber*, the United States Supreme Court articulated that in criminal bail, "it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time."[16] Four years later, in *Hudson v. Parker*, the Supreme Court wrote that the laws of the United States "have been framed upon the theory that [the accused] shall not, until he has been finally adjudged guilty . . . be absolutely compelled to undergo imprisonment or punishment."[17] Indeed, it was *Hudson* upon which the Supreme

[16] *United States v. Barber*, 140 U.S. 164, 167 (1891).

[17] *United States v. Hudson*, 156 U.S. 277, 285 (1895).

Court relied in *Stack v. Boyle* in 1951, when the Court wrote its memorable quote equating the right to bail with the right to release and freedom:

> From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[18]

In his concurring opinion, Justice Jackson elaborated on the Court's reasoning:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . providing: 'A person arrested for an offense not punishable by death shall be admitted to bail' . . . before conviction.[19]

And finally, in perhaps its best known expression of the right to bail, the Supreme Court did not explain that merely having one's bail set, whether that setting resulted in release or detention, was at the core of the right. Instead, the Court wrote that "liberty" – a state necessarily obtained from actual release – is the American "norm."[20]

Nevertheless, in the field of pretrial justice we must also recognize the equally legitimate consideration of "no bail," or detention. It is now fairly clear that the

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[18] 342 U.S. 1, 4 (1951) (internal citations omitted).

[19] *Id.* at 7-8.

[20] *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception").

federal constitution does not guarantee an absolute right to bail, and so it is more appropriate to discuss the right as one that exists when it is authorized by a particular constitutional or legislative provision. The Court's opinion in *United States v. Salerno* is especially relevant because it instructs us that when examining a law with no constitutionally-based right-to-bail parameters (such as, arguably, the federal law), the legislature may enact statutory limits on pretrial freedom (including detention) so long as: (1) those limitations are not excessive in relation to the government's legitimate purposes; (2) they do not offend due process (either substantive or procedural); and (3) they do not result in a situation where pretrial liberty is not the norm or where detention has not been carefully limited as an exception to release.

It is not necessarily accurate to say that the Court's opinion in *Salerno* eroded its opinion in *Stack,* including *Stack's* language equating bail with release. *Salerno* purposefully explained *Stack* and another case, *Carlson v. Landon,* together to provide cohesion. And therefore, while it is true that the federal constitution does not contain an explicit right to bail, when that right is granted by the applicable statute (or in the various states' constitutions or statutes), it should be regarded as a right to pretrial freedom. The *Salerno* opinion is especially instructive in telling us how to create a fair and transparent "no bail" side of the dichotomy, and further reminds us of a fundamental principle of pretrial justice: both bail and no bail are lawful if we do them correctly.

Liberalizing American bail laws during our country's colonial period meant that these laws did not always include the English "factors" for initially determining bailability, such as the seriousness of the offense, the weight of the evidence, and the character of the accused. Indeed, by including an examination of the evidence into its constitutional bail provision, Pennsylvania did so primarily to allow bailability despite the defendant being charged with a capital crime. Nevertheless, the historical factors first articulated in the Statute of Westminster survived in America through the judge's use of these factors to determine *conditions* of bail.

Thus, technically speaking, bailability in England after 1275 was determined through an examination of the charge, the evidence, and the character or criminal history of the defendant, and if a defendant was deemed bailable, he or she was required to be released. In America, bailability was more freely designated, but judges would still typically look at the charge, the evidence, and the character of the defendant to set the only limitation on pretrial freedom available at that time – the amount of the financial condition. Accordingly, while bailability in America was still meant to mean release, by using those factors traditionally used to

determine bailability to now set the primary condition of bail or release, judges found that those factors sometimes had a determining effect on the actual release of bailable defendants. Indeed, when America began running out of personal sureties, judges, using factors historically used to determine bailability, were finding that these same factors led to unattainable financial conditions creating, ironically, a state of unbailability for technically bailable defendants.

> *"Bail is a matter of confidence and personal relation. It should not be made a matter of contract or commercialism. . . . Why provide for a bail piece, intended to promote justice, and then destroy its effect and utility? Why open the door to barter freedom from the law for money?"*
>
> *Carr v Davis* 64 W. Va. 522, 535 (1908) (Robinson, J. dissenting).

Intersection of the Two Historical Phenomena

The history of bail in America in the 20th century represents an intersection of these two historical phenomena. Indeed, because it involved requiring defendants to pay money up-front as a prerequisite to release, the blossoming of a secured bond scheme as administered through a commercial surety system was bound to lead to perceived abuses in the bail/no bail dichotomy to such an extent that history would demand some correction. Accordingly, within only 20 years of the advent of commercial sureties, scholars began to study and critique that for-profit system.

In the first wave of research, scholars focused on the inability of bailable defendants to obtain release due to secured financial conditions and the abuses in the commercial surety industry. The first generation of bail reform, as it is now known, used research from the 1920s to the 1960s to find alternatives to the commercial surety system, including release on recognizance and nonfinancial conditional release. Its focus was on the "bail" side of the dichotomy and how to make sure bailable defendants would actually obtain release.

The second generation of bail reform (from the 1960s to the 1980s) focused on the "no bail" side, with a wave of research indicating that there were some defendants whom society believed should be detained without bail (rather than by using money) due to their perceived dangerousness through documented instances of defendants committing crime while released through the bail process. That generation culminated with the United States Supreme Court's

approval of a federal detention statute, and with states across America changing their constitutions and statutes to reflect not only a new constitutional purpose for restricting pretrial liberty – public safety – but also detention provisions that followed the Supreme Court's desired formula.

Three Generations of Bail Reform: Hallmarks and Highlights

Since the evolution from a personal surety system using unsecured bonds to primarily a commercial surety system using secured bonds, America has seen two generations of bail or pretrial reform and is currently in a third. Each generation has certain elements in common, such as significant research, a meeting of minds, and changes in laws, policies, and practices.

The First Generation – 1920s to 1960s: Finding Alternatives to the Traditional Money Bail System; Reducing Unnecessary Pretrial Detention of Bailable Defendants

Significant Research – This generation's research began with Roscoe Pound and Felix Frankfurter's *Criminal Justice in Cleveland* (1922) and Arthur Beeley's *The Bail System in Chicago* (1927), continued with Caleb Foote's study of the Philadelphia process found in *Compelling Appearance in Court: Administration of Bail in Philadelphia* (1954), and reached a peak through the research done by the Vera Foundation and New York University Law School's Manhattan Bail Project (1961) as well as similar bail projects such as the one created in Washington D.C. in 1963.

Meeting of Minds – The meeting of minds for this generation culminated with the 1964 Attorney General's National Conference on Bail and Criminal Justice and the Bail Reform Act of 1966.

Changes in Laws, Policies and Practices – The Supreme Court's ruling in *Stack v. Boyle* (1951) had already guided states to better individualize bail determinations through their various bail laws. The Bail Reform Act of 1966 (and state statutes modeled after the Act) focused on alternatives to the traditional money bail system by encouraging release on least restrictive, nonfinancial conditions as well as presumptions favoring release on recognizance, which were based on information gathered concerning a defendant's community ties to help assure court appearance. The American Bar Association's Criminal Justice Standards on Pretrial Release in 1968 made legal and evidence-based recommendations for all aspects of release and detention decisions. Across America, though, states have not fully incorporated the full panoply of laws, policies, and practices designed to reduce unnecessary pretrial detention of bailable defendants

The Second Generation – late 1960s to 1980s: Allowing Consideration of Public Safety as a Constitutionally Valid Purpose to Limit Pretrial Freedom; Defining the Nature and Scope of Preventive Detention

Significant Research – Based on discussions in the 1960s, the American Bar Association Standards on Pretrial Release first addressed preventive detention (detaining a defendant with no bail based on danger and later expressly encompassing risk for failure to appear) in 1968, a position later adopted by other organizations' best practice standards. Much of the "research" behind this wave of reform focused on: (1) philosophical debates surrounding the 1966 Act's inability to address public safety as a valid purpose for limiting pretrial freedom; and (2) judges' tendencies to use money to detain defendants due to the lack of alternative procedures for defendants who pose high risk to public safety or for failure to appear for court. The research used to support Congress's finding of "an alarming problem of crimes committed by persons on release" (noted by the U.S. Supreme Court in *United States v. Salerno)* is contained in the text and references from Senate Report 98-225 to the Bail Reform Act of 1984. Other authors, such as John Goldkamp (*see Danger and Detention: A Second Generation of Bail Reform*, 76 J. Crim. L. & Criminology 1 (1985)) and Senator Ted Kennedy (*see A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 Fordham L. Rev. 423 (1980)), also contributed to the debate and relied on a variety of empirical research in their papers.

Meeting of Minds – Senate Report 98-225 to the Bail Reform Act of 1984 cited broad support for the idea of limiting pretrial freedom up to and including preventive detention based on public safety in addition to court appearance. This included the fact that consideration of public safety already existed in the laws of several states and the District of Columbia, the fact that the topic was addressed by the various national standards, and the fact that it also had the support from the Attorney General's Task Force on Violent Crime, the Chief Justice of the United States Supreme Court, and even the President.

Changes in Laws, Policies and Practices – Prior to 1970, court appearance was the only constitutionally valid purpose for limiting a defendant's pretrial freedom. Congress first allowed public safety to be considered equally to court appearance in the District of Columbia Court Reform and Criminal Procedure Act of 1970, and many states followed suit. In 1984, Congress passed the Bail Reform Act of 1984 (part of the Comprehensive Crime Control Act), which included public safety as a valid purpose for limiting pretrial freedom and procedures designed to allow preventive detention without bail for high-risk defendants. In 1987, the United States Supreme Court upheld the Bail Reform Act of 1984 against facial due process and excessive bail challenges in *United States v, Salerno*. However, as in the first generation of bail reform, states across America have not fully implemented the laws, policies, and practices needed to adequately and lawfully detain defendants when necessary.

The Third Generation – 1990 to present: Fixing the Holes Left by States Not Fully Implementing Improvements from the First Two Generations of Bail Reform; Using Legal and Evidence-Based Practices to Create a More Risk-Based System of Release and Detention

Significant Research – Much of the research in this generation revisits deficiencies caused by the states not fully implementing adequate "bail" and "no bail" laws, policies, and practices developed in the previous two generations. Significant legal, historical, and empirical research sponsored by the Department of Justice, the Pretrial Justice Institute, the New York City Criminal Justice Agency, the District of Columbia Pretrial Services Agency, the Administrative Office of the U.S. Courts, various universities, and numerous other public, private, and philanthropic entities across America have continued to hone the arguments for improvements as well as the solutions to discreet bail issues. Additional groundbreaking research involves the creation of empirical risk assessment instruments for local, statewide, and now national use, along with research focusing on strategies for responding to predicted risk while maximizing release.

Meeting of Minds – The meeting of minds for this generation has been highlighted so far by the Attorney General's National Symposium on Pretrial Justice in 2011, along with the numerous policy statements issued by national organizations favoring the administration of bail based on risk.

Changes in Laws, Policies and Practices – Jurisdictions are only now beginning to make changes reflecting the knowledge generated and shared by this generation of pretrial reform. Nevertheless, changes are occurring at the county level (such as in Milwaukee County, Wisconsin, which has implemented a number of legal and evidence-based pretrial practices), the state level (such as in Colorado, which passed a new bail statute based on pretrial best practices in 2013), and even the national level (such as in the federal pretrial system, which continues to examine its release and detention policies and practices).

The Current Generation of Bail/Pretrial Reform

The first two generations of bail reform used research to attain a broad meeting of the minds, which, in turn, led to changes to laws, policies, and practices. It is now clear, however, that these two generations did not go far enough. The traditional money bail system, which includes heavy reliance upon secured bonds administered primarily through commercial sureties, continues to flourish in America, thus causing the unnecessary detention of bailable defendants. Moreover, for a number of reasons, the states have not fully embraced ways to fairly and transparently detain persons without bail, choosing instead to maintain a primarily charge-and-money-based bail system to respond to threats to public safety. In short, the two previous generations of bail reform have instructed us on how to properly implement both "bail" (release) and "no bail" (detention), but many states have instead clung to an outmoded system that leads to the detention of bailable defendants (or those whom we believe should be bailable defendants) and the release of unbailable defendants (or those whom we believe should be unbailable defendants) – abuses to the "bail/no bail" dichotomy that historically demand correction.

Fortunately, the current generation of pretrial reform has a vast amount of relevant research literature from which to fashion solutions to these problems. Moreover, like previous generations, this generation also shaped a distinct meeting of minds of numerous individuals, organizations, and government agencies, all of which now believe that pretrial improvements are necessary.

At its core, the third generation of pretrial reform thus has three primary goals. First, it aims to fully implement lawful bail/no bail dichotomies so that the right persons (and in lawful proportions) are deemed bailable and unbailable. Second, using the best available research and best pretrial practices, it seeks to lawfully effectuate the release and subsequent mitigation of pretrial risk of defendants deemed bailable and the fair and transparent detention of those deemed unbailable. Third, it aims to do this primarily by replacing charge-and-money-based bail systems with systems based on empirical risk.

Generations of Reform and the Commercial Surety Industry

The first generation of bail reform in America in the 20th century focused almost exclusively on finding alternatives to the predominant release system in place at the time, which was one based primarily on secured financial conditions administered through a commercial surety system. In hindsight, however, the second generation of bail reform arguably has had more of an impact on the for-profit bail bond industry in America. That generation focused primarily on public safety, and it led to changes in federal and state laws providing ways to assess pretrial risk for public safety, to release defendants with supervision designed to mitigate the risk to public safety, and even to detain persons deemed too risky.

Despite this national focus on public safety, however, the commercial surety industry did not alter its business model of providing security for defendants solely to help provide reasonable assurance of court appearance. Today, judges concerned with public safety cannot rely on commercial bail bondsmen because in virtually every state allowing money as condition of bail, the laws have been crafted so that financial conditions cannot be forfeited for breaches in public safety such as new crimes. In those states, a defendant who commits a new crime may have his or her bond revoked, but the money is not lost. When the bond is revoked, bondsmen, when they are allowed into the justice system (for most countries, four American states, and a variety of other large and small jurisdictions have ceased allowing profit at bail), can simply walk away, even though the justice system is not yet finished with that particular defendant. Bondsmen are free to walk away and are even free re-enter the system – free to negotiate a new surety contract with the same defendant, again with the money forfeitable only upon his or her failing to appear for court. Advances in our knowledge about the ineffectiveness and deleterious effects of money at bail only exacerbate the fundamental disconnect between the commercial surety industry, which survives on the use of money for court appearance, and what our society is trying to achieve through the administration of bail.

There are currently two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. Commercial bail agents and the insurance companies that support them are concerned with only one – court appearance – because legally money is simply not relevant to public safety. Historically speaking, America's gradual movement toward using pretrial services agencies, which, when necessary, supervise defendants both for court appearance and public safety concerns, is due, at least in part, to the commercial surety industry's purposeful decision not to take responsibility for public safety at bail.

What Does the History of Bail Tell Us?

The history of bail tells us that the pretrial release and detention system that worked effectively over the centuries was a "bail/no bail" system, in which bailable defendants (or those whom society deemed should be bailable defendants) were expected to be released and unbailable defendants (or those whom society deemed should be unbailable defendants) were expected to be detained. Moreover, the bail side of the dichotomy functioned most effectively through an uncompensated and un-indemnified personal surety system based on unsecured financial conditions. What we in America today know as the traditional money bail system – a system relying primarily on secured financial conditions administered through commercial sureties – is, historically speaking, a relatively new system that was encouraged to solve America's dilemma of the unnecessary detention of bailable defendants in the 1800s. Unfortunately, however, the traditional money bail system has only exacerbated the two primary abuses that have typically led to historical correction: (1) the unnecessary detention of bailable defendants, whom we now often categorize as lower risk; and (2) the release of those persons whom we feel should be unbailable defendants, and whom we now often categorize as higher risk.

The history of bail also instructs us on the proper purpose of bail. Specifically, while avoiding blood feuds may have been the primary purpose for the original bail setting, once more public processes and jails were fully introduced into the administration of criminal justice, the purpose of bail changed to one of providing a mechanism of conditional release. Concomitantly, the purpose of "no bail" was and is detention. Historically speaking, the only purpose for limiting or conditioning pretrial release was to assure that the accused come to court or otherwise face justice. That changed in the 1970s and 1980s, as jurisdictions began to recognize public safety as a second constitutionally valid purpose for limiting pretrial freedom.[21]

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[21] Occasionally, a third purpose for limiting pretrial freedom has been articulated as maintaining or protecting the integrity of the courts or judicial process. Indeed, the third edition of the ABA Standards changed "to prevent intimidation of witnesses and interference with the orderly administration of justice" to "safeguard the integrity of the judicial process" as a "third purpose of release conditions." ABA Standards *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-5.2 (a) (history of the standard) at 107. The phrase "integrity of the judicial process," however, is one that has been historically misunderstood (its meaning requires a review of

The American history of bail further instructs us on the lessons of the first two generations of bail and pretrial reform in the 20th century. If the first generation provided us with practical methods to better effectuate the release side of the "bail/no bail" dichotomy, the second generation provided us with equally effective methods for lawful detention. Accordingly, despite our inability to fully implement what we now know are pretrial best practices, the methods gleaned from the first two generations of bail reform as well as the research currently contributing to the third generation have given us ample knowledge to correct perceived abuses and to make improvements to pretrial justice. In the next section, we will see how the evolution of the law and legal foundations of pretrial justice provide the parameters for those improvements.

Additional Sources and Resources: William Blackstone, *Commentaries on the Laws of England* (Oxford 1765-1769); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail,* 34 Syracuse L. Rev. 517 (1983); Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement,* 1 Res. in Corr. 3:1 (1988); Comment, *Bail: An Ancient Practice Reexamined,* 70 Yale L. J. 966 (1960-61); Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (AMS Press, Inc., New York 1966); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Praeger Pub. 1991); Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System,* 33 Hous. L. Rev. 731 (1996-97); William F. Duker, *The Right to Bail: A Historical Inquiry,* 42 Alb. L. Rev. 33 (1977-78); Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II,* 113 Univ. Pa. L. Rev. 959 and 1125 (1965); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found. 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (Harper & Rowe 1965); James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases,* 6 Fordham L. Rev. 387 (1937); William Searle Holdsworth, *A History of English Law* (Methuen & Co., London, 1938); Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L. Q. 475 (1977); Evie Lotze, John Clark, D. Alan Henry, & Jolanta Juszkiewicz, *The Pretrial Services Reference Book: History, Challenges, Programming* (Pretrial Servs. Res. Ctr. 1999); Hermine Herta

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appellate briefs for decisions leading up to the Supreme Court's opinion in *Salerno*), and that typically begs further definition. Nevertheless, in most, if not all cases, that further definition is made unnecessary as being adequately covered by court appearance and public safety. Indeed, the ABA Standards themselves state that one of the purposes of the pretrial decision is "maintaining the integrity of the judicial process by securing defendants for trial." *Id.* Std. 10-1.1, at 36.

Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L. J. 1139 (1971-72); Gerald P. Monks, *History of Bail* (1982); Luke Owen Pike, *The History of Crime in England* (Smith, Elder, & Co. 1873); Frederick Pollock & Frederic Maitland, *The History of English Law Before the Time of Edward I* (1898); Timothy R. Schnacke, Michael R. Jones, Claire M. B. Brooker, *The History of Bail and Pretrial Release* (PJI 2010); Wayne H. Thomas, Jr. *Bail Reform in America* (Univ. CA Press 1976); Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 New Eng. J. on Crim. & Civ. Confinement 267 (1993); Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 Yale L. J. 320 (1987-88). **Cases:** *United States v. Edwards*, 430 A. 2d 1321 (D.C. 1981) (en banc); *State v. Brooks*, 604 N.W. 2d 345 (Minn. 2000); *State v. Briggs*, 666 N.W. 2d 573 (Iowa 2003).

Chapter 3: Legal Foundations of Pretrial Justice

History and Law

History and the law clearly influence each other at bail. For example, in 1627, Sir Thomas Darnell and four other knights refused to pay loans forced upon them by King Charles I. When the King arrested the five knights and held them on no charge (thus circumventing the Statute of Westminster, which required a charge, and the Magna Carta, on which the Statute was based), Parliament responded by passing the Petition of Right, which prohibited detention by any court without a formal charge. Not long after, however, officials sidestepped the Petition of Right by charging individuals and then running them through numerous procedural delays to avoid release. This particular practice led to the Habeas Corpus Act of 1679. However, by expressly acknowledging discretion in setting amounts of bail, the Habeas Corpus Act also unwittingly allowed determined officials to begin setting financial conditions of bail in prohibitively high amounts. That, in turn, led to passage of the English Bill of Rights, which prohibited "excessive" bail. In America, too, we see historical events causing changes in the laws and those laws, in turn, influencing events thereafter. One need only look to events before and after the two American generations of bail reform in the 20th century to see how history and the law are intertwined.

And so it is that America, which had adopted and applied virtually every English bail reform verbatim in its early colonial period, soon began a process of liberalizing both criminal laws generally, and bail in particular, due to the country's unique position in culture and history. Essentially, America borrowed the best of English law (such as an overall right to bail, habeas corpus, and prohibition against excessiveness) and rejected the rest (such as varying levels of discretion potentially interfering with the right to bail as well as harsh criminal penalties for certain crimes). The Colonies wrote bail provisions into their charters and re-wrote them into their constitutions after independence. Among those constitutions, we see broader right-to-bail provisions, such as in the model Pennsylvania law, which granted bail to all except those facing capital offenses (limited to willful murder) and only "where proof is evident or the presumption

great."[22] Nevertheless, some things remained the same. For example, continuing the long historical tradition of bail in England, the sole purpose of limiting pretrial freedom in America remained court appearance, and the only means for doing so remained setting financial conditions or amounts of money to be forfeited if a defendant missed court.

> *"The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of law, where there is no law, there is no freedom."*
>
> John Locke, 1689

In America, the ultimate expression of our shared values is contained in our founding documents, the Declaration of Independence and the Constitution. But if the Declaration can be viewed as amply supplying us with certain fundamental principles that can be interwoven into discussions of bail, such as freedom and equality, then the Constitution has unfortunately given us some measure of confusion on the topic. The confusion stems, in part, from the fact that the Constitution itself explicitly covers only the right of habeas corpus in Article 1, Section 9 and the prohibition on excessive bail in the 8th Amendment, which has been traced to the Virginia Declaration of Rights. There is no express right to bail in the U.S. Constitution, and that document provides no illumination on which persons should be bailable and which should not. Instead, the right to bail in the federal system originated from the Judiciary Act of 1789, which provided an absolute right to bail in non-capital federal criminal cases. Whether the constitutional omission was intentional is subject to debate, but the fact remains that when assessing the right to bail, it is typical for a particular state to provide superior rights to the United States Constitution. It also means that certain federal cases, such *United States v. Salerno*, must be read realizing that the Court was addressing a bail/no bail scheme derived solely from legislation. And it means that any particular bail case or dispute has the potential to involve a fairly complex mix of state and federal claims based upon any particular state's bail scheme.

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[22] June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 531 (1983) (quoting 5 American Charters 3061, F. Thorpe ed. 1909).

The Legal "Mix"

There are numerous sources of laws surrounding bail and pretrial practices, and each state – and often a jurisdiction within a state – has a different "mix" of sources from that of all other jurisdictions. In any particular state or locality, bail practices may be dictated or guided by the United States Constitution and United States Supreme Court opinions, federal appellate court opinions, the applicable state constitution and state supreme court and other state appellate court decisions, federal and state bail statutes, municipal ordinances, court rules, and even administrative regulations. Knowing your particular mix and how the various sources of law interact is crucial to understanding and ultimately assessing your jurisdiction's pretrial practices.

The fact that we have separate and sometimes overlapping federal and state pretrial legal foundations is one aspect of the evolution of bail law that adds complexity to particular cases. The other is the fact that America has relatively little authoritative legal guidance on the subject of bail. In the federal realm, this may be due to issues of incorporation and jurisdiction, but in the state realm it may also be due to the relatively recent (historically speaking) change from unsecured to secured bonds. Until the nineteenth century, historians suggest that bail based on unsecured bonds administered through a personal surety system led to the release of virtually all bailable criminal defendants. Such a high rate of release leaves few cases posing the kind of constitutional issues that require an appellate court's attention. But even in the 20th century, we really have only two (or arguably three) significant United States Supreme Court cases discussing the important topic of the release decision at bail. It is apparently a topic that lawyers, and thus federal and state trial and appellate courts, have largely avoided. This avoidance, in turn, potentially stands in the way of jurisdictions looking for the bright line of the law to guide them through the process of improving the administration of bail.

On the other hand, what we lack in volume of decisions is made up to some extent by the importance of the few opinions that we do have. Thus, we look at *Salerno* not as merely one case among many from which we may derive guidance; instead, *Salerno* must be scrutinized and continually referenced as a foundational standard as we attempt to discern the legality of proposed improvements. The evolution of law in America, whether broadly encompassing all issues of criminal procedure, or more narrowly discussing issues related directly to bail and pretrial justice, has demonstrated conclusively the law's

importance as a safeguard to implementing particular practices in the criminal process. Indeed, in other fields we speak of using evidence-based practices to achieve the particular goals of the discipline. In bail, however, we speak of "legal and evidence-based practices,"[23] because it is the law that articulates those disciplinary goals to begin with. The phrase legal and evidence-based practices acknowledges the fact that in bail and pretrial justice, the empirical evidence, no matter how strong, is always subservient to fundamental legal foundations based on fairness and equal justice.

Fundamental Legal Principles

While all legal principles affecting the pretrial process are important, there are some that demand our particular attention as crucial to a shared knowledge base. The following list is derived from materials taught by D.C. Superior Court Judge Truman Morrison, III, in the National Institute of Corrections' Orientation for New Pretrial Executives, and occasionally supplemented by information contained in Black's Law Dictionary (9th ed.) as well as the sources footnoted or cited at the end of the chapter.

The Presumption of Innocence

Perhaps no legal principle is as simultaneously important and misunderstood as the presumption of innocence. Technically speaking, it is the principle that a person may not be convicted of a crime unless and until the government proves guilt beyond a reasonable doubt, without any burden placed on the defendant to prove his or her innocence. Its importance is emphasized in the Supreme Court's opinion in *Coffin v. United States*, in which the Court wrote: "a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[24] In *Coffin*, the Court traced the presumption's origins to various extracts of Roman law, which included language similar to the "better that ten guilty persons go free" ratio articulated by Blackstone. The importance of the presumption of innocence has not waned, and the Court has expressly quoted the "axiomatic and elementary" language in just the last few years.

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[23] Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007).

[24] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

Its misunderstanding comes principally from the fact that in *Bell v. Wolfish*, the Supreme Court wrote that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun,"[25] a line that has caused many to argue, incorrectly, that the presumption of innocence has no application to bail. In fact, *Wolfish* was a "conditions of confinement" case, with inmates complaining about various conditions (such as double bunking), rules (such as prohibitions on receiving certain books), and practices (such as procedures involving inmate searches) while being held in a detention facility. In its opinion, the Court was clear about its focus in the case: "We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails. . . . Instead, what is at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee's right to be free from punishment, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point."[26] Specifically, and as noted by the Court, the parties were not disputing whether the government could detain the prisoners, the government's purpose for detaining the prisoners, or even whether complete confinement was a legitimate means for limiting pretrial freedom, all issues that would necessarily implicate the right to bail, statements contained in *Stack v. Boyle*, and the presumption of innocence. Instead, the issue before the Court was whether, after incarceration, the prisoners' complaints could be considered punishment in violation of the Due Process Clause.

Accordingly, the presumption of innocence has everything to do with bail, at least so far as determining which classes of defendants are bailable and the constitutional and statutory rights flowing from that decision. And therefore, the language of *Wolfish* should in no way diminish the strong statements concerning the right to bail found in *Stack v. Boyle* (and other state and federal cases that have quoted *Stack*), in which the Court wrote, "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[27] The idea that the right to bail (that is, the right to release when the accused is bailable) necessarily triggers serious consideration of the presumption of innocence is also clearly seen

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[25] *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

[26] *Id.* at 533-34 (internal citations omitted).

[27] 342 U.S. 1, 4 (1951) (internal citation omitted).

through Justice Marshall's dissent in *United States v. Salerno,* in which he wrote, albeit unconvincingly, that "the very pith and purpose of [the Bail Reform Act of 1984] is an abhorrent limitation of the presumption of innocence."[28]

As explained by the Court in *Taylor v. Kentucky,* the phrase is somewhat inaccurate in that there is no true presumption – that is, no mandatory inference to be drawn from evidence. Instead, "it is better characterized as an 'assumption' that is indulged in the absence of contrary evidence."[29] Moreover, the words "presumption of innocence" themselves are found nowhere in the United States Constitution, although the phrase is linked to the 5th, 14th, and 6th Amendments to the Constitution. *Taylor* suggests an appropriate way of looking at the presumption as "a special and additional caution" to consider beyond the notion that the government must ultimately prove guilt. It is the idea that "no surmises based on the present situation of the accused"[30] should interfere with the jury's determination. Applying this concept to bail, then, the presumption of innocence is like an aura surrounding the defendant, which prompts us to set aside our potentially negative surmises based on the current arrest and confinement as we determine the important question of release or detention.

> *"Here we deal with a right, the right to release of presumably innocent citizens. I cannot conceive that such release should not be made as widely available as it reasonably and rationally can be."*
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> *Pugh v. Rainwater,* 572 F.2d 1053 (5th Cir. 1978) (Gee, J. specially concurring)

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[28] *United States v. Salerno,* 481 U.S. 739, 762-63 (1987).

[29] *Taylor v Kentucky,* 436 U.S. 478, 483 n. 12 (1978).

[30] *Id.* at 485 (quoting 9 J. Wigmore, Evidence § 2511 (3d ed. 1940) at 407).

The Right to Bail

When granted by federal or state law, the right to bail should be read as a right to release through the bail process. It is often technically articulated as the "right to non-excessive" bail, which goes to the reasonableness of any particular conditions or limitations on pretrial release.

The preface, "when granted by federal or state law" is crucial to understand because we now know that the "bail/no bail" dichotomy is one that legislatures or the citizenry are free to make though their statutes and constitutions. Ever since the Middle Ages, there have been certain classes of defendants (typically expressed by types of crimes, but changing now toward categories of risk) who have been refused bail – that is, denied a process of release altogether. The bail/no bail dichotomy is exemplified by the early bail provisions of Massachusetts and Pennsylvania, which granted bail to some large class of persons "except," and with the exception being the totality of the "no bail" side. These early provisions, as well as those copied by other states, were technically the genesis of what we now call "preventive detention" schemes, which allow for the detention of risky defendants – the risk at the time primarily being derived from the seriousness of the charge, such as murder or treason.

The big differences between detention schemes then and now include: (1) the old schemes were based solely on risk for failure to appear for court; we may now detain defendants based on a second constitutionally valid purpose for limiting pretrial freedom – public safety; (2) the old schemes were mostly limited to findings of "proof evident and presumption great" for the charge; today preventive detention schemes often have more stringent burdens for the various findings leading to detention; (3) overall, the states have largely widened the classes of defendants who may lawfully be detained – they have, essentially, changed the ratio of bailable to unbailable defendants to include potentially more unbailable defendants than were deemed unbailable, say, during the first part of the 20th century; and (4) in many cases, the states have added detailed provisions to the detention schemes (in addition to their release schemes). Presumably, this was to follow guidance by the United States Supreme Court from its opinion in *United States v. Salerno*, which approved the federal detention scheme based primarily on that law's inclusion of certain procedural due process elements designed to make the detention process fair and transparent.

How a particular state has defined its "bail/no bail" dichotomy is largely due to its constitution, and arguably on the state's ability to easily amend that

constitution. According to legal scholars Wayne LaFave, et al., in 2009 twenty-three states had constitutions modeled after Pennsylvania's 1682 language that guaranteed a right to bail to all except those charged with capital offenses, where proof is evident or the presumption is great. It is unclear whether these states today choose to remain broad "right-to-bail" states, or whether their constitutions are simply too difficult to amend. Nevertheless, these states' laws likely contain either no, or extremely limited, statutory pretrial preventive detention language.[31]

Nine states had constitutions mirroring the federal constitution – that is, they contain an excessive bail clause, but no clause explicitly granting a right to bail. The United States Supreme Court has determined that the federal constitution does not limit Congress' ability to craft a lawful preventive detention statute, and these nine states likewise have the same ability to craft preventive detention statutes (or court rules) with varying language.

The remaining 18 states had enacted in their constitutions relatively recent amendments describing more detailed preventive detention provisions. As LaFave, et al., correctly note, these states may be grouped in three ways: (1) states authorizing preventive detention for certain charges, combined with the requirement of a finding of danger to the community; (2) states authorizing preventive detention for certain charges, combined with some condition precedent, such as the defendant also being on probation or parole; and (3) states combining elements of the first two categories.

There are currently two fundamental issues concerning the right to bail in America today. The first is whether states have created the right ratio of bailable to unbailable defendants. The second is whether they are faithfully following best practices using the ratio that they currently have. The two issues are connected.

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[31] *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure* (3rd ed. 2007 & 5th ed. 2009). Readers should be vigilant for activity changing these numbers. For example, the 2010 constitutional amendment in Washington State likely adds it to the category of states having preventive detention provisions in their constitutions. Moreover, depending on how one reads the South Carolina constitution, the counts may, in fact, reveal 9 states akin to the federal scheme, 21 states with traditional right to bail provisions, and 20 states with preventive detention amendments.

American law contemplates a presumption of release, and thus there are limits on the ratio of bailable to unbailable defendants. The American Bar Association Standards on Pretrial Release describes its statement, "the law favors the release of defendants pending adjudication of charges" as being "consistent with Supreme Court opinions emphasizing the limited permissible scope of pretrial detention."[32] It notes language from *Stack v. Boyle*, in which the Court equates the right to bail to "[the] traditional right to freedom before conviction,"[33] and from *United States v. Salerno*, in which the Court wrote, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[34] Beyond these statements, however, we have little to tell us definitively and with precision how many persons should remain bailable in a lawful bail/no bail scheme.

We do know, however, that the federal "bail/no bail" scheme was examined by the Supreme Court and survived at least facial constitutional attacks based on the Due Process Clause and the 8th Amendment. Presumably, a state scheme fully incorporating the detention-limiting elements of the federal law would likely survive similar attacks. Accordingly, using the rest of the *Salerno* opinion as a guide, one can look at any particular jurisdiction's bail scheme to assess whether that scheme appears, at least on its face, to presume liberty and to restrict detention by incorporating the numerous elements from the federal statute that were approved by the Supreme Court. For example, if a particular state included a provision in either its constitution or statute opening up the possibility of detention for all defendants no matter what their charges, the scheme should be assessed for its potential to over-detain based on *Salerno's* articulated approval of provisions that limited detention to defendants "arrested for a specific category of extremely serious offenses."[35] Likewise, any jurisdiction that does not "carefully" limit detention – that is, it detains carelessly or without thought possibly through the casual use of money – is likely to be seen as running afoul of the foundational principles underlying the Court's approval of the federal law.

The second fundamental issue concerning the right to bail – whether states are faithfully following the ratio that they currently have – is connected to the first. If states have not adequately defined their bail/no bail ratio, they will often see money still being used to detain defendants whom judges feel are extreme risks,

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[32] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-1.1 (commentary) at 38.

[33] 342 U.S. 1, 4 (1951).

[34] 481 U.S. 739, 755 (1987).

[35] *Id.* at 750.

which is essentially the same practice that led to the second generation of American bail reform in the 20th century. Simply put, a proper bail/no bail dichotomy should lead naturally to an in-or-out decision by judges, with bailable defendants released pursuant to a bond with reasonable conditions and unbailable defendants held with no bond. Without belaboring the point, judges are not faithfully following any existing bail/no bail dichotomy whenever they (1) treat a bailable defendant as unbailable by setting unattainable conditions, or (2) treat an unbailable defendant as bailable in order to avoid the lawfully enacted detention provisions. When these digressions occur, then they suggest either that judges should be compelled to comply with the existing dichotomy, or that the balance of the dichotomy must be changed.

This latter point is important to repeat. Among other things, the second generation of American bail reform was, at least partially, in response to judges setting financial conditions of bail at unattainable levels to protect the public despite the fact that the constitution had not been read to allow public safety as a proper purpose for limiting pretrial freedom. Judges who did so were said to be setting bail "sub rosa," in that they were working secretively toward a possibly improper purpose of bail. The Bail Reform Act of 1984, as approved by the United States Supreme Court, was designed to create a more transparent and fair process to allow the detention of high-risk defendants for the now constitutionally valid purpose of public safety. From that generation of reform, states learned that they could craft constitutional and statutory provisions that would effectively define the "bail" and "no bail" categories so as to satisfy both the Supreme Court's admonition that liberty be the "norm" and the public's concern that the proper persons be released and detained.

Unfortunately, many states have not created an appropriate balance. Those that have attempted to, but have done so inadequately, are finding that the inadequacy often lies in retaining a charge-based rather than a risk-based scheme to determine detention eligibility. Accordingly, in those states judges continue to set unattainable financial conditions at bail to detain bailable persons whom they consider too risky for release. If a proper bail/no bail balance is not crafted through a particular state's preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to expeditiously detain otherwise bailable defendants. On the other hand, if the proper balance is created so that high-risk defendants can be detained through a fair and transparent process, money can be virtually eliminated from the bail process without negatively affecting public safety or court appearance rates.

Despite certain unfortunate divergences, the law, like the history, generally considers the right to bail to be a right to release. Thus, when a decision has been made to "bail" a particular defendant, every consideration should be given, and every best practice known should be employed, to effectuate and ensure that release. Bailable defendants detained on unattainable conditions should be considered clues that the bail process is not functioning properly. Judicial opinions justifying the detention of bailable defendants (when the bailable defendant desires release) should be considered aberrations to the historic and legal notion that the right to bail should equal the right to release.

What Can International Law and Practices Tell Us About Bail?

Unnecessary and arbitrary pretrial detention is a worldwide issue, and American pretrial practitioners can gain valuable perspective by reviewing international treaties, conventions, guidelines, and rules as well as reports documenting international practices that more closely follow international norms.

According to the American Bar Association's Rule of Law Initiative,

"International standards strongly encourage the imposition of noncustodial measures during investigation and trial and at sentencing, and hold that deprivation of liberty should be imposed only when non-custodial measures would not suffice. The overuse of detention is often a symptom of a dysfunctional criminal justice system that may lack protection for the rights of criminal defendants and the institutional capacity to impose, implement, and monitor non-custodial measures and sanctions. It is also often a cause of human rights violations and societal problems associated with an overtaxed detention system, such as overcrowding; mistreatment of detainees; inhumane detention conditions; failure to rehabilitate offenders leading to increased recidivism; and the imposition of the social stigma associated with having been imprisoned on an ever-increasing part of the population. Overuse of pretrial detention and incarceration at sentencing are equally problematic and both must be addressed in order to create effective and lasting criminal justice system reform."

International pretrial practices, too, can serve as templates for domestic improvement. For example, bail practitioners frequently cite to author F.E. Devine's study of international practices demonstrating various effective alternatives to America's traditional reliance on secured bonds administered by commercial bail bondsmen and large insurance companies.

Sources and Resources: David Berry & Paul English, *The Socioeconomic Impact of Pretrial Detention* (Open Society Foundation 2011); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (Greenwood Publishing Group 1991); Anita H. Kocsis, *Handbook of International Standards on Pretrial Detention Procedure* (ABA, 2010); Amanda Petteruti & Jason Fenster, *Finding Direction:*

Expanding Criminal Justice Options by Considering Policies of Other Nations (Justice Policy Institute, 2011). There are also several additional documents and other resources available from the Open Society Foundation's Global Campaign for Pretrial Justice online website, found at http://www.opensocietyfoundations.org/projects/global-campaign-pretrial-justice.

Release Must Be the Norm

This concept is part of the overall consideration of the right to bail, discussed above, but it bears repeating and emphasis as its own fundamental legal principle. The Supreme Court has said, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[36] As noted previously, in addition to suggesting the ratio of bailable to unbailable defendants, the second part of this quote cautions against a release process that results in detention as well as a detention process administered haphazardly. Given that the setting of a financial bail condition often leaves judges and others wondering whether the defendant will be able to make it – i.e., the release or detention of that particular defendant is now essentially random based on any number of factors – it is difficult to see how such a detention caused by money can ever be considered a "carefully limited" process.

Due Process

Due Process refers generally to upholding people's legal rights and protecting individuals from arbitrary or unfair federal or state action pursuant to the rights afforded by the Fifth and Fourteenth Amendments of the United States Constitution (and similar or equivalent state provisions). The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[37] The Fourteenth Amendment places the same restrictions on the states. The concept is believed to derive from the Magna Carta, which required King John of England to accept certain limitations to his power, including the limitation that no man be imprisoned or otherwise deprived of his rights except by lawful judgment of his peers or the law of the land. Many of the original provisions of the Magna Carta were incorporated into the Statute of Westminster of 1275, which included important provisions concerning bail.

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[36] *Id.* at 755.

[37] U.S. Const. amend. V.

As noted by the Supreme Court in *United States v. Salerno*, due process may be further broken down into two subcategories:

> So called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process.[38]

In *Salerno*, the Court addressed both substantive and procedural fairness arguments surrounding the federal preventive detention scheme. The substantive due process argument dealt with whether detention represented punishment prior to conviction and an ends-means balancing analysis. The procedural issue dealt with how the statute operated – whether there were procedural safeguards in place so that detention could be ordered constitutionally. People who are detained pretrial without having the benefit of the particular safeguards enumerated in the *Salerno* opinion could, theoretically, raise procedural due process issues in an appeal of their bail-setting.

A shorthand way to think about due process is found in the words "fairness" or "fundamental fairness." Other words, such as "irrational," "unreasonable," and "arbitrary" tend also to lead to due process scrutiny, making the Due Process Clause a workhorse in the judicial review of bail decisions. Indeed, as more research is being conducted into the nature of secured financial conditions at bail – their arbitrariness, the irrationality of using them to provide reasonable assurance of either court appearance or public safety, and the documented negative effects of unnecessary pretrial detention – one can expect to see many more cases based on due process clause claims.

Equal Protection

If the Due Process Clause protects against unfair, arbitrary, or irrational laws, the Equal Protection Clause of the Fourteenth Amendment (and similar or equivalent state provisions) protects against the government treating similarly situated persons differently under the law. Interestingly, "equal protection" was not mentioned in the original Constitution, despite the phrase practically embodying what we now consider to be the whole of the American justice

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

system. Nevertheless, the Fourteenth Amendment to the United States Constitution now provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[39] While there is no counterpart to this clause that is applicable to the federal government, federal discrimination may be prohibited as violating the Due Process Clause of the Fifth Amendment.

> *"The only stable state is the one in which all men are equal before the law."*
>
> Aristotle, 350 B.C.

Over the years, scholars have argued that equal protection considerations should serve as an equally compelling basis as does due process for mandating fair treatment in the administration of bail, especially when considering the disparate effect of secured money bail bonds on defendants due only to their level of wealth. This argument has been bolstered by language from Supreme Court opinions in cases like *Griffin v. Illinois*, which dealt with a defendant's ability to purchase a transcript required for appellate review. In that case, Justice Black wrote, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[40] Moreover, sitting as circuit justice to decide a prisoner's release in two cases, Justice Douglas uttered the following dicta frequently cited as support for equal protection analysis: (1) "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?";[41] and (2) "[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."[42] Overall, despite scholarly arguments to invoke equal protection analysis to the issue of bail (including any further impact caused by the link between income and race), the courts have been largely reluctant to do so.

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[39] U.S. Const. amend. XIV, § 1.

[40] 351 U.S. 12, 19 (1956).

[41] *Bandy v. United States*, 81 S. Ct. 197, 198 (1960).

[42] *Bandy v. United States*, 82 S. Ct. 11, 13 (1961).

Excessive Bail and the Concept of Least Restrictive Conditions

Excessive bail is a legal term of art used to describe bail that is unconstitutional pursuant to the 8th Amendment to the United States Constitution (and similar or equivalent state provisions). The 8th Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[43] The Excessive Bail Clause derives from reforms made by the English Parliament in the 1600s to curb the abuse of judges setting impossibly high money bail to thwart the purpose of bail to afford a process of pretrial release. Indeed, historians note that justices began setting high amounts on purpose after King James failed to repeal the Habeas Corpus Act, and the practice represents, historically, the first time that a condition of bail rather than the actual existence of bail became a concern. The English Bill of Rights of 1689 first used the phrase, "Excessive bail ought not to be required," which was incorporated into the 1776 Virginia Declaration of rights, and ultimately found its way into the United States and most state constitutions. Excessiveness must be determined by looking both at federal and state law, but a rule of thumb is that the term relates overall to reasonableness.

"Excessive bail" is now, in fact, a misnomer, because bail more appropriately defined as a process of release does not lend itself to analysis for excessiveness. Instead, since it was first uttered, the phrase excessive bail has always applied to conditions of bail or limitations on pretrial release. The same historical factors causing jurisdictions to define bail as money are at play when one says that bail can or cannot be excessive; hundreds of years of having only one condition of release – money – have caused the inevitable but unfortunate blurring of bail and one of its conditions. Accordingly, when we speak of excessiveness, we now more appropriately speak in terms of limitations on pretrial release or freedom.

Looking at excessiveness in England in the 1600s requires us to consider its application within a personal surety system using unsecured amounts. Bail set at a prohibitively high amount meant that no surety (i.e., a person), or even group of sureties, would willingly take responsibility for the accused. Even before the prohibition, however, amounts were often beyond the means of any particular defendant, requiring sometimes several sureties to provide "sufficiency" for the bail determination. Accordingly, as is the case today, it is likely that some indicator of excessiveness at a time of relatively plentiful sureties for any particular defendant was continued detention of an otherwise bailable

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[43] U.S. Const. amend. VIII.

defendant. Nevertheless, before the abuses leading to the English Bill of Rights and Habeas Corpus Act, there was no real indication that high amounts required of sureties led to detention in England. And in America, "[a]lthough courts had broad authority to deny bail for defendants charged with capital offenses, they would generally release in a form of pretrial custody defendants who were able to find willing custodians."[44] In a review of the administration of bail in Colonial Pennsylvania, author Paul Lermack concluded that "bail . . . continued to be granted routinely . . . for a wide variety of offenses . . . [and] [a]lthough the amount of bail required was very large in cash terms and a default could ruin a guarantor, few defendants had trouble finding sureties."[45]

The current test for excessiveness from the United States Supreme Court is instructive on many points. In *United States v. Salerno*, the Court wrote as follows:

> The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack v. Boyle, supra.* We believe that, when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the 8th Amendment does not require release on bail.[46]

Thus, as explained in *Galen v. County of Los Angeles*, to determine excessiveness, one must

> look to the valid state interests bail is intended to serve for a particular individual and judge whether bail conditions are excessive for the purpose of achieving those interests. The state may not set bail to achieve invalid interests . . . nor in an amount

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[44] Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 Yale L. J. 323, 323-24 (1987-88) (internal citations omitted).

[45] Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 Temp. L. Q. 475 at 497, 505 (1977).

[46] 481 U.S. 739, 754-55 (1987).

> that is excessive in relation to the valid interests it seeks to achieve.[47]

Salerno thus tells us at least three important things. First, the law of *Stack v. Boyle* is still strong: when the state's interest is assuring the presence of the accused, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the 8th Amendment."[48] The idea of "reasonable" calculation necessarily compels us to assess how judges are typically setting bail, which might be arbitrarily (such as through a bail schedule) or irrationally (such as through setting financial conditions to protect the public when those conditions cannot be forfeited for breaches in public safety, or when they are otherwise not effective at achieving the lawful purposes for setting them, which recent research suggests).

Second, financial conditions (i.e., amounts of money) are not the only conditions vulnerable to an excessive bail claim. Any unreasonable condition of release, including a nonfinancial condition, that has no relationship to mitigating an identified risk, or that exceeds what is needed to reasonably assure the constitutionally valid state interest, might be deemed constitutionally excessive.

Third, the government must have a proper purpose for limiting pretrial freedom. This is especially important because scholars and courts (as well as Justice Douglas, again sitting as circuit justice) have indicated that setting bail with a purpose to detain an otherwise bailable defendant would be unconstitutional. In states where the bail/no bail dichotomy has been inadequately crafted, however, judges are doing precisely that.

While the Court in *Salerno* upheld purposeful pretrial detention pursuant to the Bail Reform Act of 1984, it did so only because the statute contained "numerous procedural safeguards" that are rarely, if ever, satisfied merely through the act of setting a high money bond. Therefore, when a state has established a lawful method for preventively detaining defendants, setting financial conditions designed to detain otherwise bailable defendants outside of that method could still be considered an unlawful purpose. Purposeful pretrial detention through a process of the type endorsed by the United States Supreme Court is entirely different from purposeful pretrial detention done through setting unattainable financial conditions of release.

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[47] 477 F.3d 652, 660 (9th Cir. 2007) (internal citations omitted).

[48] 342 U.S. 1, 5 (1951).

When the United States Supreme Court says that conditions of bail must be set at a level designed to assure a constitutionally valid purpose for limiting pretrial freedom "and no more," as it did in *Salerno*, then we must also consider the related legal principle of "least restrictive conditions" at bail. The phrase "least restrictive conditions" is a term of art expressly contained in the federal and District of Columbia statutes, the American Bar Association best practice standards on pretrial release, and other state statutes based on those Standards (or a reading of *Salerno*). Moreover, the phrase is implicit through similar language from various state high court cases articulating, for example, that bail may be met only by means that are "the least onerous" or that impose the "least possible hardship" on the accused.

Commentary to the ABA Standard recommending release under the least restrictive conditions states as follows:

> This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act and the District of Columbia release and pretrial detention statute, as well as in the laws and court rules of a number of states. The presumption constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.[49]

The least restrictive principle is foundational, and is expressly reiterated throughout the ABA Standards when, for example, those Standards recommend citation release or summonses versus arrest. Moreover, the Standards' overall scheme creating a presumption of release on recognizance, followed by release on nonfinancial conditions, and finally release on financial conditions is directly tied to this foundational premise. Indeed, the principle of least restrictive conditions transcends the Standards and flows from even more basic

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[49] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-1.2 (commentary) at 39-40 (internal citations omitted).

understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty.

More specifically, however, the ABA Standards' commentary on financial conditions makes it clear that the Standards consider secured financial conditions to be more restrictive than both unsecured financial conditions and nonfinancial conditions: "When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first."[50] Moreover, the Standards state, "Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unsecured bond because such a bond requires no 'up front' costs to the defendant and no costs if the defendant meets appearance requirements."[51] These principles are well founded in logic: setting aside, for now, the argument that money at bail might not be of any use at all, it at least seems reasonably clear that secured financial conditions (requiring up-front payment) are always more restrictive than unsecured ones, even to the wealthiest defendant. Moreover, in the aggregate, we know that secured financial conditions, as typically the only condition precedent to release, are highly restrictive compared to all nonfinancial conditions and unsecured financial conditions in that they tend to cause pretrial detention. Like detention itself, any condition causing detention should be considered highly restrictive. In sum, money is a highly restrictive condition, and more so (and possibly excessive) when combined with other conditions that serve the same purpose.

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[50] *Id.* Std. 10-1.4 (c) (commentary) at 43-44.

[51] *Id.* Std. 10-5.3 (a) (commentary) at 112.

What Can the Juvenile Justice System Tell Us About Adult Bail?

In addition to the fact that the United States Supreme Court relied heavily on *Schall v. Martin*, a juvenile preventive detention case, in writing its opinion in *United States v. Salerno*, an adult preventive detention case, the juvenile justice system has an impressive body of knowledge and research that can be used to inform the administration of bail for adults.

Perhaps most relevant is the work being done through the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI), an initiative to promote changes to juvenile justice policies and practices to "reduce reliance on secure confinement, improve public safety, reduce racial disparities and bias, save taxpayers' dollars, and stimulate overall juvenile justice reforms."

In remarks at the National Symposium on Pretrial Justice in 2011, Bart Lubow, Director of the Juvenile Justice Strategy Center of the Foundation, stated that JDAI used cornerstone innovations of adult bail to inform its work with juveniles, but through collaborative planning and comprehensive implementation of treatments designed to address a wider array of systemic issues, the juvenile efforts have eclipsed many adult efforts by reducing juvenile pretrial detention an average of 42% with no reductions in public safety measures.

Sources and Resources: *National Symposium on Pretrial Justice: Summary Report of Proceedings* at 23-24 (Statement of Bart Lubow) (PJI/BJA 2011); *Schall v. Martin*, 467 U.S 253 (1984); *United States v. Salerno*, 481 U.S. 739 (1987); Additional information may be found at the Annie E. Casey Foundation Website, found at http://www.aecf.org/.

Bail May Not Be Set For Punishment (Or For Any Other Invalid Purpose)

This principle is related to excessiveness, above, because analysis for excessiveness begins with looking at the government's purpose for limiting pretrial freedom. It is more directly tied to the Due Process Clause, however, and was mentioned briefly in *Salerno* when the Court was beginning its due process analysis. In *Bell v. Wolfish*, the Supreme Court had previously written, "The Court of Appeals properly relied on the Due Process Clause, rather than the 8th Amendment, in considering the claims of pretrial detainees. Due process

requires that a pretrial detainee not be punished."[52] Again, there are currently only two constitutionally valid purposes for limiting pretrial freedom – court appearance and public safety. Other reasons, such as punishment or, as in some states, to enrich the treasury, are clearly unconstitutional. And still others, such as setting a financial condition to detain, are at least potentially so.

The Bail Process Must Be Individualized

In *Stack v. Boyle*, the Supreme Court wrote as follows:

> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure [at the time, the nature and circumstances of the offense, the weight of the evidence against the defendant, and the defendant's financial situation and character] are to be applied in each case to each defendant.[53]

In his concurrence, Justice Jackson observed that if the bail in *Stack* had been set in a uniform blanket amount without taking into account differences between defendants, it would be a clear violation of the federal rules. As noted by Justice Jackson, "Each defendant stands before the bar of justice as an individual."[54]

At the time, the function of bail was limited to setting conditions of pretrial freedom designed to provide reasonable assurance of court appearance. Bail is still limited today, although the purposes for conditioning pretrial freedom have been expanded to include public safety in addition to court appearance. Nevertheless, pursuant to *Stack*, there must be standards in place relevant to these purposes. After *Stack*, states across America amended their statutes to include language designed to individualize bail setting for purposes of court appearance. In the second generation of bail reform, states included individualizing factors relevant to public safety. And today, virtually every state has a list of factors that can be said to be "individualizing criteria" relevant to the proper purposes for limiting pretrial freedom. To the extent that states do not use these factors, such as when over-relying on monetary bail bond schedules that

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[52] 441 U.S. 520, 535 and n. 16 (1979).

[53] 342 U.S. 1, 5 (1951) (internal citations omitted).

[54] *Id.* at 9.

merely assign amounts of money to charges for all or average defendants, the non-individualized bail settings are vulnerable to constitutional challenge.

The concept of requiring standards to ensure that there exists a principled means for making non-arbitrary decisions in criminal justice is not without a solid basis under the U.S. Constitution. Indeed, such standards have been a fundamental precept of the Supreme Court's death penalty jurisprudence under the cruel and unusual punishment clause of the 8th Amendment.

> *"The term [legal and evidence-based practices] is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles."*
>
> Marie VanNostrand, Ph.D., 2007

The Right to Counsel

This principle refers to the Sixth Amendment right of the accused to assistance of counsel for his or her defense. There is also a 5th Amendment right, which deals with the right to counsel during all custodial interrogations, but the 6th Amendment right more directly affects the administration of bail as it applies to all "critical stages" of a criminal prosecution. According to the Supreme Court, the 6th Amendment right does not attach until a prosecution is commenced. Commencement, in turn, is "the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[55] In *Rothgery v. Gillespie County*, the United States Supreme Court "reaffirm[ed]" what it has held and what "an overwhelming majority of American jurisdictions" have understood in practice: "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[56]

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[55] *See United States* v. *Gouveia*, 467 U. S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)).

[56] 554 U.S. 191, 198, 213 (2008).

Both the American Bar Association's and the National Association of Pretrial Services Agencies' best practice standards on pretrial release recommend having defense counsel at first appearances in every court, and important empirical data support the recommendations contained in those Standards. Noting that previous attempts to provide legal counsel in the bail process had been neglected, in 1998 researchers from the Baltimore, Maryland, Lawyers at Bail Project sought to demonstrate empirically whether or not lawyers mattered during bail hearings. Using a controlled experiment (with some defendants receiving representation at the bail bond review hearing and others not receiving representation) those researchers found that defendants with lawyers: (1) were over two and one-half times more likely to be released on their own recognizance; (2) were over four times more likely to have their initially-set financial conditions reduced at the hearing; (3) had their financial conditions reduced by a greater amount; (4) were more likely to have the financial conditions reduced to a more affordable level ($500 or under); (5) spent less time in jail (an average of two days versus nine days for unrepresented defendants); and (6) had longer bail bond review hearings than defendants without lawyers at first appearance.

The Privilege Against Compulsory Self-Incrimination

This foundational principle refers to the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment (in addition to similar or equivalent state provisions), which says that no person "shall be compelled, in any criminal case, to be a witness against himself . . ." At bail there can be issues surrounding pretrial interviews as well as with incriminating statements the defendant makes while the court is setting conditions of release. In that sense, the principle against compulsory self-incrimination is undoubtedly linked to the right to counsel in that counsel can help a particular defendant fully understand his or her other rights.

Probable Cause

Black's Law Dictionary defines probable cause as reasonable cause, or a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Probable cause sometimes refers to having more evidence for than against. It is a term of art in criminal procedure referring to the requirement that arrests be based on probable cause. Probable cause to arrest is present when "at that moment [of the

arrest] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person] had committed or was committing an offense."[57] In *County of Riverside v. McLaughlin,* [58] the Supreme Court ruled that suspects who are arrested without a warrant must be given a probable cause hearing within 48 hours.

As the arrest or release decision is technically one under the umbrella of a broadly defined bail or pretrial process, practices surrounding probable cause or the lack of it are crucial for study. Interestingly, because a probable cause hearing is a prerequisite only to "any significant pretrial restraint of liberty,"[59] jurisdictions that employ bail practices that are speedy and result in a large number of releases using least restrictive conditions (such as the District of Columbia) may find that they need not hold probable cause hearings for every arrestee prior to setting bail.

Other Legal Principles

Of course, there are other legal principles that are critically important to defendants during the pretrial phase of a criminal case, such as certain rights attending trial, evidentiary rules and burdens of proof, the right to speedy trial, and rules affecting pleas. Moreover, there are principles that arise only in certain jurisdictions; for example, depending on which state a person is in, using money to protect public safety may be expressly unlawful and thus its prohibition may rise to the level of other, more universal legal principles beyond its inferential unlawfulness due to its irrationality. Nevertheless, the legal foundations listed above are the ones most likely to arise in the administration of bail. It is thus crucial to learn them and to recognize the issues that arise within them.

What Do the Legal Foundations of Pretrial Justice Tell Us?

Pretrial legal foundations provide the framework and the boundaries within which we must work in the administration of bail. They operate uniquely in the pretrial phase of a criminal case, and together should serve as a cornerstone for all pretrial practices; they animate and inform our daily work and serve as a visible daily backdrop for our pretrial thoughts and actions.

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[57] *Beck v. Ohio,* 379 U.S. 89, 91 (1964).

[58] 500 U.S. 44 (1991).

[59] *Gerstein v. Pugh,* 420 U.S. 103, 125 (1975).

For the most part, the legal foundations confirm and solidify the history of bail. The history of bail tells us that the purpose of bail is release, and the law has evolved to strongly favor, if not practically demand the release of bailable defendants as well as to provide us with the means for effectuating the release decision. The history tells us that "no bail" is a lawful option, and the law has evolved to instruct us on how to fairly and transparently detain unbailable defendants. History tells us that court appearance and public safety are the chief concerns of the bail determination, and the law recognizes each as constitutionally valid purposes for limiting pretrial freedom.

The importance of the law in "legal and evidence-based practices" is unquestioned. Pretrial practices, judicial decision making (for judges are sworn to uphold the law and their authority derives from it), and even state bail laws themselves must be continually held up to the fundamental principles of broad national applicability for legal legitimacy. Moreover, the law acts as a check on the evidence; a pretrial practice, no matter how effective, must always bow to the higher principles of equal justice, rationality, and fairness. Finally, the law provides us with the fundamental goals of the pretrial release and detention decision. Indeed, if evidence-based decision making is summarized as attempting to achieve the goals of a particular discipline by using best practices, research, and evidence, then the law is critically important because it tells us that the goals of bail are to maximize release while simultaneously maximizing court appearance and public safety. Accordingly, all of the research and pretrial practices must be continually questioned as to whether they inform or further these three inter-related goals. In the next section, we will examine how the evolution of research at bail has, in fact, informed lawful and effective bail decision making.

Additional Sources and Resources: Black's Law Dictionary (9th ed. 2009); Douglas L. Colbert, Ray Paternoster, & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 32 Cardozo L. Rev. 1719 (2002); *Early Appointment of Counsel: The Law, Implementation, and Benefits* (Sixth Amend. Ctr./PJI 2014); Wayne R. LaFave, Jerold H. Israel, Nancy J. King and Orin S. Kerr, *Criminal Procedure* (3rd ed. 2007 & 5th ed. 2009); Jack K. Levin & Lucan Martin, 8A American Jurisprudence 2d, *Bail and Recognizance* (West 2009); Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011); Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services*

(CJI/NIC 2007); 3B Charles Allen Wright & Peter J. Henning, Federal Practice and Procedure §§ 761-87 (Thomson Reuters 2013).

Chapter 4: Pretrial Research

The Importance of Pretrial Research

Research allows the field of bail and pretrial justice to advance. Although our concepts of proper research have certainly changed over the centuries, arguably no significant advancement in bail or pretrial justice has ever occurred without at least some minimal research, whether that research was legal, historical, empirical, opinion, or any other way of better knowing things. This was certainly true in England in the 1200s, when Edward I commissioned jurors to study bail and used their documented findings of abuse to enact the Statute of Westminster in 1275. It is especially true in America in the 20th century, when research was the catalyst for the first two generations of bail reform and has arguably sparked a third.

While other research disciplines are important, the current workhorse of the various methods in bail is social research. According to noted sociologists Earl Babbie and Lucia Benaquisto, social research is important because we often already know the answers to life's most pressing problems, but we are still unable to solve them. Social science research provides us with the solutions to these problems by telling us how to organize and run our social affairs by analyzing the forms, values, and customs that make up our lives. This is readily apparent in bail, where many of the solutions to current problems are already known; social science research provides help primarily by illuminating how we can direct our social affairs so as to fully implement those solutions. By continually testing theories and hypotheses, social science research finds incremental explanations that simplify a complex life, and thus allows us to solve confounding issues such as how to reduce or eliminate unnecessary pretrial detention.

> *"We can't solve our social problems until we understand how they come about, persist. Social science research offers a way to examine and understand the operation of human social affairs. It provides points of view and technical procedures that uncover things that would otherwise escape our awareness."*
>
> Earl Babbie & Lucia Benaquisto, 2009

Like history and the law, social science research and the law are growing more and more entwined. In the 1908 case of *Muller v. Oregon,*[60] Louis Brandeis submitted a voluminous brief dedicated almost exclusively to social science research indicating the negative effects of long work hours on women. This landmark instance of the use of social research in the law, ultimately dubbed a "Brandeis brief," became the model for many legal arguments thereafter. One need only read the now famous footnote 11 of the Supreme Court's opinion in *Brown v. Board of Education,*[61] which ended racial segregation in America's schools and showed the detrimental effects of segregation on children, to understand how social science research can significantly shape our laws.

Social science research and the law are especially entwined in criminal justice and bail. Perhaps no single topic ignites as deep an emotional response as crime – how to understand it, what to do about it, and how to prevent it. And bail, for better or worse, ignites the same emotional response. Moreover, bail is deceptively complex because it superimposes notions of a defendant's freedom and the presumption of innocence on top of our societal desires to bring defendants to justice and to avoid pretrial misbehavior. Good social science research can aid us in simplifying the topic by answering questions surrounding the three legal and historical goals of bail and conditions of bail. Specifically, social science pretrial research tells us what works to simultaneously: (1) maximize release; (2) maximize public safety; and (3) maximize court appearance.

Because of the complex balance of bail, research that addresses all three of these goals is superior to research that does not. For example, studies showing only the effectiveness of release pursuant to a commercial surety bond at ultimately reducing failures to appear (whether true or not) is less helpful than also knowing how those bonds do or do not affect public safety and tend to detain otherwise bailable defendants. It is helpful to know that pretrial detention causes negative long-term effects on defendants; it is more helpful to learn how to reduce those effects while simultaneously keeping the community safe. It is helpful to know a defendant's risk empirically; it is more helpful to know how to best embrace risk so as to facilitate release and then to mitigate known risk to further the constitutionally valid purposes for limiting pretrial freedom.

Nevertheless, some research is always better than no research, even if that research is found on the lowest levels of an evidence-based decision making

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[60] *Muller v. Oregon,* 208 U.S. 412 (1908).

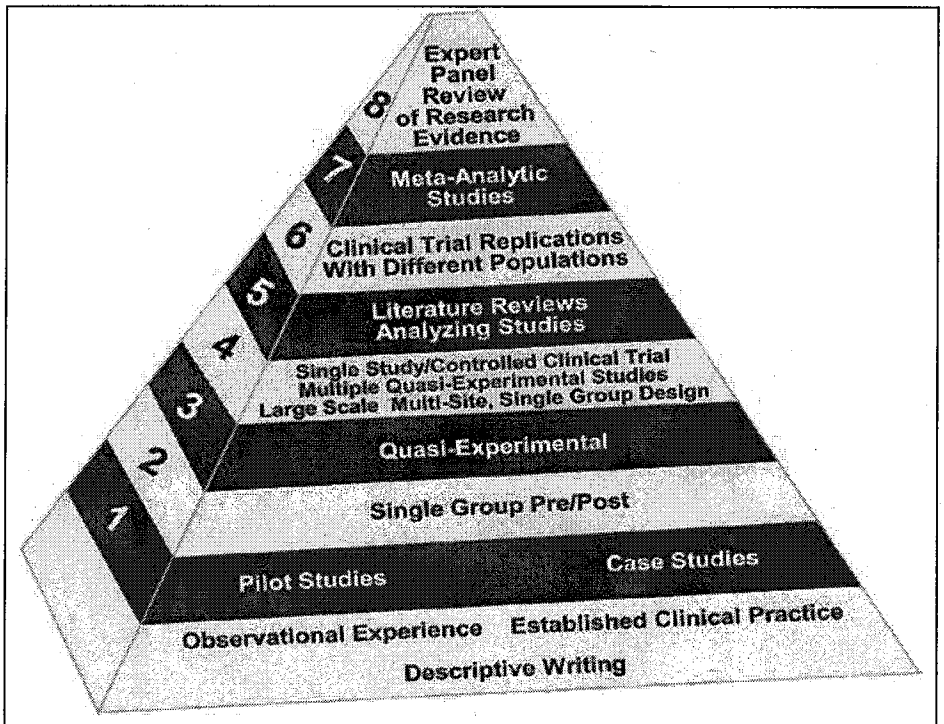
[61] *Brown v. Board of Education,* 347 U.S. 483 (1954).

hierarchy of evidence pyramid. And that is simply because we are already making decisions every day at bail, often with no research at all, and typically based on customs and habits formed over countless decades of uninformed practice. To advance our policies, practices, and laws, we must at least become informed consumers of pretrial research. We must recognize the strengths and limitations of the research, understand where it is coming from, and even who is behind creating it. Ultimately, however, we must use it to help solve what we perceive to be our most pressing problems at bail.

Research in the Context of Legal and Evidence-Based Practices

The term "evidence-based practices" is common to numerous professional fields. As noted earlier, however, due to the unique nature of the pretrial period of a criminal case as well as the importance of legal foundations to pretrial decision making, Dr. Marie VanNostrand has more appropriately coined the term "legal and evidence-based practices" for the pretrial field. Legal and evidence-based practices are defined as "interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage."

In addition to holding up practices and the evidence behind them to legal foundations, to fully follow an evidence-based decision making model jurisdictions must also determine how much research is needed to make a practice "evidence-based." According to the U.S. Department of Health and Human Services (HHS), this is done primarily by assessing the strength of the evidence indicating that the practice leads to the desired outcome. To help with making this assessment, many fields employ the use of graphics indicating the varying "strength of evidence" for the kinds of data or research they are likely to use. For example, the Colorado Commission on Criminal and Juvenile Justice, a statewide commission that focuses on evidence-based recidivism reduction and cost-effective criminal justice expenditures, refers to the strength of evidence pyramid, below, which was developed by HHS's Substance Abuse and Mental Health Services Administration's Co-Occurring Center for Excellence (COCE).



As one can see, the levels vary in strength from lower to higher, with higher levels more likely to illuminate research that works better to achieve the goals of a particular field. As noted by the COCE, "Higher levels of research evidence derive from literature reviews that analyze studies selected for their scientific merit in a particular treatment area, clinical trial replications with different populations, and meta-analytic studies of a body of research literature. At the highest level of the pyramid are expert panel reviews of the research literature."

Sources and Resources: Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007); Information gathered from the Colorado Commission on Criminal and Juvenile Justice website, found at http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251622402893; *Understanding Evidence-Based Practices for Co-Occurring Disorders* (SAMHSA's CORE) contained in SAMHSA's website, found online at http://www.samhsa.gov/co-occurring/topics/training/OP5-Practices-8-13-07.pdf.

Research in the Last 100 Years: The First Generation

If we focus on just the last 100 years, we see that major periods of bail research in America have led naturally to more intense periods of reform resulting in new policies, practices, and laws. Although French historian Alexis de Tocqueville informally questioned America's continued use of money bail in 1835, detailed studies of bail practices in America had their genesis in the 1920s, first from Roscoe Pound and Felix Frankfurter's study of criminal justice in Cleveland, Ohio, and then from Arthur Beeley's now famous study of bail in Chicago, Illinois. Observing secured-money systems primarily administered through the use of commercial bail bondsmen (that had really only existed since 1898), both of those 1920s studies found considerable flaws in the current way of administering bail. Beeley's seminal statement of the problem in 1927, made at the end of a painstakingly detailed report, is still relevant today:

> [L]arge numbers of accused, but obviously dependable persons are needlessly committed to Jail; while many others, just as obviously undependable, are granted a conditional release and never return for trial. That is to say, the present system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.[62]

Pound, Frankfurter, and Beeley began a period of bail research, advanced significantly by Caleb Foote in the 1950s, that culminated in the first generation of bail reform in the 1960s. That research consisted of several types – for example, one of the most important historical accounts of bail was published in 1940 by Elsa de Haas. But the most significant literature consisted of social science studies observing and documenting the deficiencies of the current system. As noted by author Wayne H. Thomas, Jr.,

> [These] studies had shown the dominating role played by bondsmen in the administration of bail, the lack of any meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because bail, even in modest amounts, was

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[62] Arthur L. Beeley, *The Bail System in Chicago*, at 160 (Univ. of Chicago Press, 1927).

> beyond their means. The studies also revealed that bail was often used to 'punish' defendants prior to a determination of guilt or to 'protect' society from anticipated future conduct, neither of which is a permissible purpose of bail; that defendants detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.[63]

Clearly, the most impactful of this period's research was so-called "action research," in which bail practices were altered and outcomes measured in pioneering "bail projects" to study alternatives to the secured bond/commercial surety system of release. Perhaps the most well-known of these endeavors was the Manhattan Bail Project, conducted by the Vera Foundation (now the Vera Institute of Justice) and the New York University Law School beginning in 1960. The Manhattan Bail Project used an experimental design to demonstrate that given the right information, judges could release more defendants without the requirement of a financial bond condition and with no measurable impact on court appearance rates. At that time in American history, bail had only two goals – to release defendants while simultaneously maximizing court appearance – because public safety had not yet been declared a constitutionally valid purpose for limiting pretrial freedom. The Manhattan Bail Project was significant because it worked to achieve both of the existing goals. Based on the information provided by Vera, release rates increased while court appearance rates remained high.

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[63] Wayne H. Thomas, Jr., *Bail Reform in America* at 15 (Univ. Cal. Press 1976).

Caleb Foote's Unfulfilled Prediction Concerning Bail Research

At the National Conference on Bail and Criminal Justice in 1964, Professor of Law Caleb Foote explained to attendees that courts would likely move from their "wholly passive role" during the first generation of bail reform to a more active one, saying, "Certainly courts are not going to be immune to the sense of basic unfairness which alike has motivated scholarly research, foundation support for bail action projects, the Attorney General's Committee on Poverty, and your attendance at this Conference." Noting the lack of any definitive empirical evidence showing that pretrial detention alone adversely affected the quality of treatment given to criminal defendants, Foote nonetheless cited current studies attempting to show that very thing, and predicted:

"If it comes to be generally accepted that in the outcome of his case the jailed defendant is prejudiced compared with the defendant who has pretrial liberty, such a finding will certainly have a profound impact upon any judicial consideration of constitutional bail questions. It was such impermissible prejudicial effects, stemming from poverty, which formed the basis of the due process requirement of counsel in *Gideon v. Wainwright.*"

Since then, numerous studies have highlighted the prejudicial effects of pretrial detention, with the research consistently demonstrating that when compared to defendants who are released, defendants detained pretrial – all other things being equal – plead guilty more often, are convicted more often, get sentenced to prison more often, and receive longer sentences. And yet, despite this overwhelming research, Foote's prediction of increased judicial interest and activity in the constitutional issues of bail has not come true.

Sources and Resources: *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* at 29 n. 1 (2007) (citing studies); John Clark, *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process,* at 2 (PJI/MacArthur Found. 2012) (same); *The National Conference on Bail and Criminal Justice, Proceedings and Interim Report,* at 224-25 (Washington, D.C. April 1965);

The Manhattan Bail Project was the center of discussion of bail reform at the 1964 National Conference on Bail and Criminal Justice, which in turn led to changes in both federal and state laws designed to facilitate the release of bailable defendants who were previously unnecessarily detained. Those changes included presumptions for release on recognizance, release on unsecured bonds (like those used for centuries in England and America prior to the 1800s), release on "least restrictive" nonfinancial conditions, and additional constraints on the

use of secured money bonds. The improvements were, essentially, America's attempt to solve the early 20th century's dilemma of bailable defendants not being released – a dilemma that, historically speaking, has always demanded correction.

The Second Generation

Research flowing toward the second generation of pretrial reform in America followed the same general pattern of identifying abuses or areas in need of improvement and then gradually creating a meeting of minds on practical solutions to those abuses. In that generation, though, the identified "abuse" dealt primarily with the "no bail" side of the "bail/no bail" dichotomy – the side that determines who should not be released at all. As summarized by Senator Edward Kennedy in 1980,

> Historically, bail has been viewed as a procedure designed to ensure the defendant's appearance at trial by requiring him to post a bond or, in effect, make a promise to appear. Current findings, suggest, however, that this traditional approach, though noble in design, has one important shortcoming. It fails to deal effectively with those defendants who commit crimes while they are free on bail.[64]

Indeed, for nearly 1,500 years, the only acceptable purpose for limiting pretrial freedom was to assure that the defendant performed his or her duty to face justice, which ultimately came to mean appearing for court. Even when crafting their constitutional and statutory exceptions to any recognized right to bail, the states and the federal government had always done so with an eye toward court appearance. To some, limiting freedom based on future dangerousness was un-American, more akin to tyrannical practices of police states, and contrary to all notions of fundamental human rights. Indeed, there was considerable debate over whether it could *ever* be constitutional to do so.

Nevertheless, many judges felt compelled to respond to legitimate fears for public safety even if the law did not technically allow for it. Accordingly, those judges often followed two courses of action when faced with obviously dangerous defendants who perhaps posed virtually no risk of flight: (1) if those

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[64] Edward M. Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 Fordham L. Rev. 423, 423 (1980) (internal footnotes omitted).

defendants happened to fall in the categories listed as "no bail," judges could deny their release altogether; (2) if they did not fall into a "no bail" category, judges could and would set high monetary conditions of bail to effectively detain the defendant. The practice of detaining persons for public safety, or preventive detention, was known at the time as furthering a "sub rosa" or secret purpose for limiting freedom, and it was done with little interference from the appellate courts.

The research leading to reform in this area was multifaceted. Law reviews published articles on the right to bail, the Excessive Bail Clause, and on due process concerns. Historians examined the right to bail in England and America to determine if and how it could be restricted or even denied altogether for purposes of public safety. Politicians and others looked to the experiences of states that had already changed their laws to account for public safety and danger. And social scientists documented what Congress ultimately called "the alarming problem of crimes committed by persons on release"[65] by conducting empirical studies of pretrial release and re-arrest rates in a number of American jurisdictions.

Ultimately, this research led to dramatic changes in the administration of bail. Congress passed the Bail Reform Act of 1984, which expanded the law to allow for direct, fair, and transparent detention of certain dangerous defendants after a due process hearing. In *United States v. Salerno*, the Supreme Court upheld the Act, giving constitutional validity to public safety as a limitation on pretrial freedom. If they had not already done so, many states across the country changed their statutes and constitutions to allow consideration of dangerousness in the release and detention decision and by re-defining the "no bail" side of their schemes to better reflect which defendants should be denied the right to bail altogether.

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[65] S. Rep. No. 98-225, P. L. 98-473 p. 3 (1983).

The Third Generation

The previous generations of bail research have followed the pattern of identifying abuses or issues of concern and then finding consensus on solutions, and the current generation is no different. Some of the research in this generation of bail reform is merely a continuation of studies begun in previous generations. For example, a body of literature examining the effects of pretrial detention on ultimate outcomes of cases (guilty pleas, sentences, etc.) began in the 1950s and has continued to this day. As another example, after Congress passed the Bail Reform Act of 1966, pretrial services programs gradually expanded from the "bail projects" of the early 1960s to more comprehensive agencies designed to carry out the mandates of new laws requiring risk assessment and often supervision of pretrial defendants. As these programs evolved, a body of research began to develop around their practices. In 1973, the National Association of Pretrial Services Agencies (NAPSA) was founded to, among other things, promote research and development in the field. In 1976, NAPSA and the Department of Justice created the Pretrial Services Resource Center (PSRC, now the Pretrial Justice Institute), an entity also designed to, among other things, collect and disseminate research and information relevant to the pretrial field. The data collected by these entities over the years, in addition to the numerous important reports they have issued analyzing that data, have been instrumental sources of fundamental pretrial research.

A Meeting of Minds – Who is Currently In Favor of Pretrial Improvements?

The following national organizations have produced express policy statements generally supporting the use of evidence-based and best pretrial practices, which include risk assessment and fair and transparent preventive detention, at the front end of the criminal justice system:

The Conference of Chief Justices

The Conference of State Court Administrators

The National Association of Counties

The International Association of Chiefs of Police

The Association of Prosecuting Attorneys

The American Council of Chief Defenders

The National Association of Criminal Defense Lawyers

The American Jail Association

The American Bar Association

The National Judicial College

The National Sheriff's Association

The American Probation and Parole Association

The National Association of Pretrial Services Agencies

In addition, numerous other organizations and individuals are lending their support or otherwise partnering to facilitate pretrial justice in America. For a list of just those organizations participating in the Pretrial Justice Working Group, created in the wake of the National Symposium on Pretrial Justice, go to http://www.pretrial.org/infostop/pjwg/

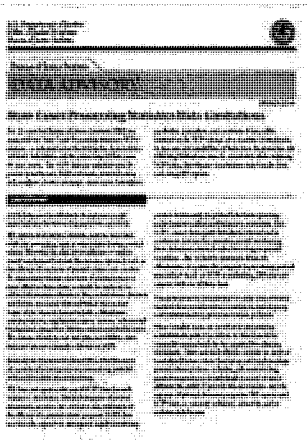
As another example, in 1983, the PSRC – with funding from the Bureau of Justice Statistics (BJS) – initiated the National Pretrial Reporting Program, which was designed to create a national pretrial database by collecting local bail data and aggregating it at the state and national levels. In 1994, that program became BJS's State Court Processing Statistics (SCPS) program, which collected data on felony defendants in jurisdictions from the 75 most populous American counties. Research documents analyzing that data, including the *Felony Defendants from Large Urban Counties* series, and *Pretrial Release of Felony Defendants in State Courts,*

have become crucial, albeit sometimes misinterpreted sources of basic pretrial data, such as defendant charges and demographics, case outcomes, types of release and release rates, financial condition amounts, and basic information on pretrial misconduct. Most recently, BJS asked the Urban Institute to re-design and re-develop the National Pretrial Reporting Program as a replacement to SCPS.

An Unusual, But Necessary, Research Warning

Since 1988, the Bureau of Justice Statistic's (BJS) State Court Processing Statistics (SCPS) program (formerly the National Pretrial Reporting Program) has been an important source of data on criminal processing of persons charged with felonies in the 75 most populous American counties. Issues surrounding pretrial release, in particular, have been tempting topics for study due to the SCPS's inclusion of data indicating whether defendants were released pretrial, the type of release (e.g., personal recognizance, surety bond), and whether the defendant misbehaved while on pretrial release. In some cases, researchers would use the SCPS data to make "evaluative" statements, that is, statements declaring that a particular type of release was superior to another based on the data showing pretrial misbehavior associated with each type. Moreover, when these studies favored the commercial bail bonding and insurance industry, that industry would repeat the researcher's evaluative statements (as well as make their own statements based on their own reading of the SCPS data), and claim that the data demonstrated that the use of a commercial surety bond was a superior form of release.

According to Bechtel, et.al, (2012) "The bonding industry's claims based on the SCPS data became so widespread that BJS was compelled to take the unusual and unprecedented step of issuing a 'Data Advisory.'" That advisory, issued in March of 2010, listed the limitations of the SCPS data, and specifically warned that, "Any evaluative statement about the effectiveness of a particular program in preventing pretrial misconduct based on SCPS is misleading."



Despite the warning, there are those who persist in citing SCPS data to convince policy makers or others about the effectiveness of one type of release over another. Both Bechtel, et al., and VanNostrand, et al., have listed flaws in the various studies using the data and have given compelling reasons for adopting a more discriminating attitude whenever persons or entities begin comparing one type of release with another.

As mentioned in the body of this paper, the best research at bail, which will undoubtedly include future efforts at comparing release types, must not only comply with the rigorous standards necessary so as not to violate the BJS Data Advisory, but should also address all three legal and evidence-based goals underlying the bail decision, which include maximizing release while maximizing public safety and court appearance.

Sources and Resources: Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research* (PJI, 2012); Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010); Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (PJI/BJA 2011).

Finally, a related body of ongoing research derives simply from pretrial services agencies and programs measuring themselves, which can be a powerful way to present and use data to affect pretrial practices. In 2011, the NIC published *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field,* which proposed standardized definitions and uniform suggested measures consistent with established pretrial standards to "enable pretrial services agencies to gauge more accurately their programs' effectiveness in meeting agency and justice system goals."[66] Broadly speaking, standardized guidelines and definitions for documenting performance measures and outcomes enables better communication and leads to better and more coordinated research efforts overall.

Other research flowing toward this current generation of pretrial reform, akin to Arthur Beeley's report on Chicago bail practices, has been primarily observational. That research, such as some of the multifaceted analyses performed in Jefferson County, Colorado, in 2007-2010, merely examines system practices to assess whether those practices or even the current laws can be improved. Other entities, such as Human Rights Watch and the Justice Policy Institute, have created similar research documents that include varying ratios of observational and original research. On the other hand, another body of this generation's research goes far beyond observation and uses large data sets and complex statistical tests to create empirical pretrial risk instruments that provide scientific structure and meaning to current lists dictating the factors judges must consider in the release and detention decision.

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[66] *Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field* (NIC 2011) at v.

In between is a body of research most easily identified by topic, but sometimes associated best with the person or entity producing it. For example, throughout the years researchers have been interested in analyzing judicial discretion and guided discretion in the decision to release, and so one finds numerous papers and studies examining that issue. In particular, though, Dr. John Goldkamp spent much of his distinguished academic career focusing on judicial discretion in the pretrial release decision, and published numerous important studies on his findings. Likewise, other local jurisdictions have delved deep into their own systems to look at a variety of issues associated with pretrial release and detention, but perhaps none have done so as consistently and thoroughly as the New York City Criminal Justice Agency, and its research continues to inspire and inform the nation.

Other topics of interest in this generation of reform include racial disparity, cost benefit analyses affecting pretrial practices, training police officers for first contacts and effects of that training on pretrial outcomes, citation release, the legality and effectiveness of monetary bail schedules, pretrial processes and outcomes measurements, re-entry from jail to the community, bail bondsmen and bounty hunters, special populations such as those with mental illness or defendants charged with domestic violence, and gender issues. Prominent organizations consistently working on publishing pretrial research literature include various agencies within the Department of Justice, including the National Institute of Corrections, the Bureau of Justice Assistance, the Bureau of Justice Statistics, and the National Institute of Justice. Other active entities include the Pretrial Justice Institute, the National Association of Counties, the United States Probation and Pretrial Services, the Pretrial Services Agency for the District of Columbia, the Vera Institute, the Urban Institute, and the Justice Policy Institute. Other organizations, such as the International Association of Chiefs of Police, the National Association of Drug Court Professionals, National Council on Crime and Delinquency, the Council of State Governments, the Pew Research Center, the American Probation and Parole Association, and various colleges and universities have also become actively involved in pretrial issues.

Along with these entities are a number of individuals who have consistently led the pretrial field by devoting much or all of their professional careers on pretrial research, such as Dr. John Goldkamp, D. Alan Henry, Dr. Marie VanNostrand, Dr. Christopher Lowenkamp, Dr. Alex Holsinger, Dr. James Austin, Dr. Mary Phillips, Dr. Brian Reaves, Dr. Thomas Cohen, Dr. Edward J. Latessa, Timothy Cadigan, Spurgeon Kennedy, John Clark, Kenneth J. Rose, Barry Mahoney, and Dr. Michael Jones. Often these individuals are sponsored by generous

philanthropic foundations interested in pretrial justice, such as the Public Welfare Foundation and the Laura and John Arnold Foundation.

Public Opinion Research

An important subset of criminal justice research is survey research, which can include collecting data to learn how people feel about crime or justice policy. For example, in 2012 the PEW Center on the States published polling research by Public Opinion Strategies and the Mellman Group showing that while people desire public safety and criminal accountability, they also support sentencing and corrections reforms that reduce imprisonment, especially for non-violent offenders. In 2009, the National Institute of Corrections reported a Zogby International poll similarly showing that 87% of those contacted would support research-based alternatives to jail to reduce recidivism for non-violent persons.

Very little of this type of research had been done in the field of pretrial release and detention, but in 2013 Lake Research Partners released the results of a nationwide poll focusing on elements of the current pretrial reform movement. That research found "overwhelming support" for replacing a cash-based bonding system with risk-based screening tools. Moreover, that support was high among all demographics, including gender, age, political party identification, and region. Interestingly too, most persons polled were unaware of the current American situation, with only 36% of persons understanding that empirical risk assessment was not currently happening in most places.

Sources and Resources: *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (NIC, 2010); *Support for Risk Assessment Programs Nationwide* (Lake Research Partners 2013) found at http://www.pretrial.org/download/advocacy/Support%20for%20Risk%20Assessment%20Nationwide%20-%20Lake%20Research%20Partners.pdf. Public Opinion on Sentencing and Corrections Policy in America (Public Opinion Strategies/Mellman Group 2012) found at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf;

All of this activity brings hope to a field that has recently been described as significantly limited in its research agenda and output. In 2011, the Summary Report to the National Symposium on Pretrial Justice listed four recommendations related to a national research agenda: (1) collect a comprehensive set of pretrial data needed to support analysis, research, and reform through the Bureau of Justice Statistics; (2) embark on comprehensive research that results in the identification of proven best pretrial practices through the National Institute of Justice; (3) develop and seek funding for research proposals relating to pretrial justice; and (4) prepare future practitioners and leaders to effectively address pretrial justice issues in a fair, safe, and effective manner.

In the wake of the Symposium, the Department of Justice's Office of Justice Programs (OJP) convened a Pretrial Justice Working Group, a standing, multidisciplinary group created to collaboratively address national challenges to moving toward pretrial reform. The Working Group, in turn, established a "Research Subcommittee," which was created to stimulate detailed pretrial data collection, increase quantitative and qualitative pretrial research, support existing OJP initiatives dealing with evidence-based practices in local justice systems, and develop pretrial justice courses of studies in academia. Due in part to that Subcommittee's purposeful focus, its members have begun a coordinated effort to identify pretrial research needs and to develop research projects designed specifically to meet those needs. Accordingly, across America, we are seeing great progress in both the interest and the output of pretrial research.

> *"Research is formalized curiosity. It is poking and prying with a purpose."*
>
> Zora Neale Hurston, 1942

However, there are many areas of the pretrial phase of a defendant's case that are in need of additional helpful research. For example, while Professor Doug Colbert has created groundbreaking and important research on the importance of defense attorneys at bail, and while the Kentucky Department of Public Advocacy has put that research into practice through a concentrated effort toward advancing pretrial advocacy, there is relatively little else on this very important topic. Similarly, other areas under the umbrella of pretrial reform, such as a police officer's decision to arrest or cite through a summons, the prosecutor's decision to charge, early decisions dealing with specialty courts, and diversion, suffer from a relative lack of empirical research. This is true in the legal field as well, as only a handful of scholars have recently begun to focus

again on fundamental legal principles or on how state laws can help or hinder our intent to follow evidence-based pretrial practices. In sum, there are still many questions that, if answered through research, would help guide us toward creating bail systems that are the most effective in maximizing release, public safety, and court appearance. Moreover, there exists today even a need to better compile, categorize, and disseminate the research that we do have. To that end, both the National Institute of Justice and the Pretrial Justice Institute have recently created comprehensive bibliographies on their websites.

Current Research – Special Mention

One strand of current pretrial research warranting special mention, however, is research primarily focusing on one or both of the two following categories: (1) empirical risk assessment; and (2) the effect of release type on pretrial outcomes, including the more nuanced question of the effect of specific conditions of release on pretrial outcomes. The two topics are related, as often the data sets compiled to create empirical risk instruments contain the sort of data required to answer the questions concerning release type and conditions as well as the effects of conditional release or detention on risk itself. The more nuanced subset of how conditions of release affect pretrial outcomes can become quite complicated when we think about differential supervision strategies including questions of dosage, e.g., how much drug testing must we order (if any) to achieve the optimal pretrial court appearance and public safety rates?

Empirical Risk Assessment Instruments

Researchers creating empirical pretrial risk assessment instruments take large amounts of defendant data and identify which specific factors are statistically related and how strongly they are related to defendant pretrial misconduct. Ever since the mid-20th century, primarily in response to the United States Supreme Court's opinion in *Stack v. Boyle,* states have enacted into their laws factors judges are supposed to consider in making a release or detention decision. For the most part, these factors were created using logic and later some research from the 1960s showing the value of community ties to the pretrial period. Unfortunately, however, little to no research existed to demonstrate which of the many enacted factors were actually predictive of pretrial misconduct and at what strength. Often, judges relied on one particular factor – the current charge or sometimes the charge and police affidavit – to make their decisions. Over the years, single jurisdictions, such as counties, occasionally created risk instruments

using generally accepted social science research methods, but their limited geographic influence and sometimes their lack of data from which to test multiple variables meant that research in this area spread slowly.

In 2003, however, Dr. Marie VanNostrand created the Virginia Pretrial Risk Assessment Instrument, most recently referred to by Dr. VanNostrand and others as simply the "Virginia Model," which was ultimately tested and validated in multiple Virginia jurisdictions and then deployed throughout the state. Soon after, other researchers developed other multi-jurisdictional risk instruments, including Kentucky, Ohio, Colorado, Florida, and the federal system, and now other American jurisdictions, including single counties, are working on similar instruments. Still others are "borrowing" existing instruments for use on local defendants while performing the process of validating them for their local population. Most recently, in November 2013, researchers sponsored by the Laura and John Arnold Foundation announced the creation of a "national" risk instrument, capable of accurately predicting pretrial risk (including risk of violent criminal activity) in virtually any American jurisdiction due to the extremely large database used to create it.

In its 2012 issue brief titled, *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants*, PJI and BJA summarize the typical risk instrument as follows:

> A pretrial risk assessment instrument is typically a one-page summary of the characteristics of an individual that presents a score corresponding to his or her likelihood to fail to appear in court or be rearrested prior to the completion of their current case. Instruments typically consist of 7-10 questions about the nature of the current offense, criminal history, and other stabilizing factors such as employment, residency, drug use, and mental health.
>
> Responses to the questions are weighted, based on data that shows how strongly each item is related to the risk of flight or rearrest during pretrial release. Then the answers are tallied to produce an overall risk score or level, which can inform the judge or other decisionmaker about the best course of action.[67]

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[67] *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants* (PJI/BJA 2012) (internal footnote omitted).

Using a pretrial risk assessment instrument is an evidence-based practice, and to the extent that it helps judges with maximizing the release of bailable defendants and identifying those who can lawfully be detained, it is a legal and evidence-based practice. Nevertheless, it is a relatively new practice – it is too new for detailed discussion in the current ABA Criminal Justice Standards on Pretrial Release – and so the fast-paced research surrounding these instruments must be scrutinized and our shared knowledge constantly updated to provide for the best application of these powerful tools. In 2011, Dr. Cynthia Mamalian authored *The State of the Science of Pretrial Risk Assessment*, and noted many of the issues (including "methodological challenges") that surround the creation and implementation of these instruments.[68]

Bail and the Aberrational Case

Social scientists primarily deal with aggregate patterns of behavior rather than with individual cases, but the latter is often what criminal justice professionals are used to. Cases that fall outside of a particular observable pattern might be called "outliers" or "aberrations" by social scientists and thus disregarded by the research that is most relevant to bail. Unfortunately, however, it is often these aberrational cases – typically those showing pretrial misbehavior – that drive public policy.

Thus, when making policy decisions about bail it is important for decision makers to embrace perspective by also studying aggregates. By looking at a problem from a distance, one can often see that the single episode that brought a particular case to the pretrial justice discussion table may not present the actual issue needing improvement. If the single case represents an aggregate pattern, however, or if that case illustrates some fundamental flaw in the system that demands correction, then that case may be worthy of further study.

In the aggregate, very few defendants misbehave while released pretrial (for example, the D.C. Pretrial Services Agency reports that in 2012, 89% of released defendants were arrest-free during their pretrial phase, and that only 1% of those arrested were for violent crimes; likewise, Kentucky reports a 92% public safety rate), and yet occasionally defendants will commit heinous crimes under all forms of supervision, including secured detention. In the aggregate, most people show up for court (again, D.C. Pretrial reports that 89% of defendants did not miss a single court date; likewise, Kentucky reports a 90% court appearance rate), and yet occasionally some high profile defendant will not appear, just as fifty may not show up for traffic court on the same day. In the aggregate, virtually all defendants will ultimately be released back into our communities and thus can be safety supervised within our communities while awaiting the disposition of

[68] *See* Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment*, at 26 (PJI/BJA 2011).

their cases, and yet occasionally there are defendants who are so risky that they must be detained.

Sources and Resources: Tara Boh Klute & Mark Heyerly, *Report on Impact of House Bill 463: Outcomes, Challenges, and Recommendations* (KY Pretrial Servs. 2012); Michael G. Maxfield & Earl Babbie, Research Methods for Criminal Justice and Criminology (Wadsworth, 6th ed. 2008); D.C. Pretrial statistics found at http://www.psa.gov/.

Beyond those issues, however, is the somewhat under-discussed topic of what these "risk-based" instruments mean for states that currently have entire bail schemes created without pure notions of risk in mind. For example, many states have preventive detention provisions in their constitutions denying the right to bail for certain defendants, but often these provisions are tied primarily to the current charge or the charge and some criminal precondition. The ability to better recognize high-risk defendants, who perhaps should be detained but who, because of their charge, are not detainable through the available "no bail" process, has caused these states to begin re-thinking their bail schemes to better incorporate risk. The general move from primarily a charge-and-resource-based bail system to one based primarily on pretrial risk automatically raises questions as to the adequacy of existing statutory and constitutional provisions.

Effects of Release Types and Conditions on Pretrial Outcomes

The second category of current research – the effect of release type as well as the effect of individual conditions on pretrial outcomes – continues to dominate discussions about what is next in the field. Once we know a particular defendant's risk profile, it is natural to ask "what works" to then mitigate that risk. The research surrounding this topic is evolving rapidly. Indeed, during the writing of this paper, the Pretrial Justice Institute released a rigorous study indicating that release on a secured (money paid up front) bond does nothing for public safety or court appearance compared to release on an unsecured (money promised to be paid only if the defendant fails to appear) bond, but that secured bonds have a significant impact on jail bed use through their tendency to detain defendants pretrial. Likewise, in November 2013, the Laura and John Arnold Foundation released its first of several research studies focusing on the impact of pretrial supervision. Though admittedly lacking detail in important areas, that study suggested that moderate and higher risk defendants who were supervised were significantly more likely to show up for court than non-supervised defendants.

In 2011, VanNostrand, Rose, and Weibrecht summarized the then-existing research behind a variety of release types, conditions, and differential supervision strategies, including court date notification, electronic monitoring, pretrial supervision and supervision with alternatives to detention, release types based on categories of bail bonds, and release guidelines, and that summary document, titled *State of the Science of Pretrial Release Recommendations and Supervision,* remains an important foundational resource for anyone focusing on the topic. Nevertheless, as the Pretrial Justice Institute explained in its conclusion to that report, we have far to go before we can confidently identify legal and evidence-based conditions and supervision methods:

> Great strides have been made in recent years to better inform [the pretrial release decision], both in terms of what is appropriate under the law and of what works according to the research, and to identify which supervision methods work best for which defendants.
>
> As this document demonstrates, however, there is still much that we do not know about what kinds of conditions are most effective. Moreover, as technologies advance to allow for the expansion of potential pretrial release conditions and the supervision of those conditions, we can anticipate that legislatures and courts will be called upon to define the limits of what is legally appropriate.[69]

Application and Implications

Applying the research has been a major component of jurisdictions currently participating in the National Institute of Correction's (NIC's) Evidence-Based Decision Making Initiative, a collaborative project among the Center for Effective Public Policy, the Pretrial Justice Institute, the Justice Management Institute, and the Carey Group. The seven jurisdictions piloting the NIC's collaborative "Framework," which has been described as providing a "purpose and a process" for applying evidence-based decision making to all decision points in the justice system, are actively involved in applying research and evidence to real world issues with the aim toward reducing harm and victimization while maintaining certain core justice system values. Those Framework jurisdictions focusing on the

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[69] Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision,* at 42 (conclusion by PJI) (PJI/BJA 2011).

pretrial release and detention decision are learning first hand which areas have sufficient research to fully inform pretrial improvements and which areas have gaps in knowledge, thus signifying the need for more research. Their work will undoubtedly inform the advancement of pretrial research in the future.

Finally, the weaving of the law with the research into pretrial application has the potential to itself raise significantly complex issues. For example, if GPS monitoring is deemed by the research to be ineffective, is it not then excessive under the 8th Amendment? If a secured money condition does nothing for public safety or court appearance, is it not then irrational, and thus also a violation of a defendant's right to due process, for a judge to set it? If certain release conditions actually increase a lower risk defendant's chance of pretrial misbehavior, can imposing them ever be considered lawful? These questions, and others, will be the sorts of questions ultimately answered by future court opinions.

What Does the Pretrial Research Tell Us?

Pretrial research is crucial for telling us what works to achieve the purposes of bail, which the law and history explain are to maximize release while simultaneously maximizing public safety and court appearance. All pretrial research informs, but the best research helps us to implement laws, policies, and practices that strive to achieve all three goals. Each generation of bail or pretrial reform has a body of research literature identifying areas in need of improvement and creating a meeting of minds surrounding potential solutions to pressing pretrial issues. This current generation is no different, as we see a growing body of literature illuminating poor laws, policies, and practices while also demonstrating evidence-based solutions that are gradually being implemented across the country.

Nevertheless, in the field of pretrial research there are still many areas requiring attention, including areas addressed in this chapter such as risk assessment, risk management, the effects of money bonds, cost/benefit analyses, impacts and effects of pretrial detention, and racial disparity as well as areas not necessarily addressed herein, such as money bail forfeitures, fugitive recovery, and basic data on misdemeanor cases.

Most of us are not research producers. We are, however, research consumers. Accordingly, to further the goal of pretrial justice we must understand how rapidly the research is evolving, continually update our knowledge base of relevant research, and yet weed out the research that is biased, flawed, or

otherwise unacceptable given our fundamental legal foundations. We must strive to understand the general direction of the pretrial research and recognize that a change in direction may require changes in laws, policies, and practices to keep up. Most importantly, we must continue to support pretrial research in all its forms, for it is pretrial research that advances the field.

Additional Sources and Resources: Steve Aos, Marna Miller, & Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (WSIPP 2006); Earl Babbie & Lucia Benaquisto, *Fundamentals of Social Research: Second Canadian Edition* (Cengage Learning 2009); Bernard Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes*, 43 Tex. L. Rev. 319 (1964-65); Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research* (PJI, 2012); John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services*, Topics in Cmty. Corr. (2008); Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006* (BJS 2010); Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010); Elsa de Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (AMS Press, Inc., New York 1966); *Evidence-Based Practices in the Criminal Justice System (Annotated Bibliography)* (NIC updated 2013); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 Univ. of Pa. L. Rev. 1031 (1954); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (DOJ/Vera Found. 1964); Michael R. Jones, *Pretrial Performance Measurement: A Colorado Example of Going from the Ideal to Everyday Practice* (PJI 2013); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI Oct. 2013); *Laura and John Arnold Foundation Develops National Model for Pretrial Risk Assessments* (Nov. 2013) found at http://www.arnoldfoundation.org/laura-and-john-arnold-foundation-develops-national-model-pretrial-risk-assessments; Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* (Laura & John Arnold Found. 2013); Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Laura & John Arnold Found. 2013); Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura & John Arnold Found. 2013); Michael G. Maxfield & Earl Babbie, *Research Methods for Criminal Justice and Criminology* (Wadsworth, 6th ed. 2008); *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. 1965); *National Symposium on Pretrial Justice: Summary Report of Proceedings* (PJI/BJS 2011); Mary T. Phillips, *A Decade of Bail Research in*

New York City (N.Y. NYCCJA 2012); Roscoe Pound & Felix Frankfurter (Eds.), *Criminal Justice in Cleveland* (Cleveland Found. 1922); Marie VanNostrand, *Assessing Risk Among Pretrial Defendants In Virginia: The Virginia Pretrial Risk Assessment Instrument* (VA Dept. Crim. Just. Servs. 2003); Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services* (CJI/NIC 2007).

Chapter 5: National Standards on Pretrial Release

Pretrial social science research tells us what works to further the goals of bail. History and the law tell us that the goals of bail are to maximize release while simultaneously maximizing public safety and court appearance, and the law provides a roadmap of how to constitutionally deny bail altogether through a transparent and fair detention process. If this knowledge was all that any particular jurisdiction had to use today, then its journey toward pretrial justice might be significantly more arduous than it really is. But it is not so arduous, primarily because we have national best practice standards on pretrial release and detention, which combine the research and the law (which is intertwined with history) to develop concrete recommendations on how to administer bail.

In the wake of the 1964 National Conference on Bail and Criminal Justice and the 1966 Federal Bail Reform Act, various organizations began issuing standards designed to address relevant pretrial release and detention issues at a national level. The American Bar Association (ABA) was first in 1968, followed by the National Advisory Committee on Criminal Justice, the National District Attorneys Association, and finally the National Association of Pretrial Services Agencies (NAPSA). The NAPSA Standards, in particular, provide important detailed provisions dealing with the purposes, roles, and functions of pretrial services agencies.

The ABA Standards

Among these sets of standards, however, the ABA Standards stand out. Their preeminence is based, in part, on the fact that they "reflect[] a consensus of the views of representatives of all segments of the criminal justice system,"[70] which includes prosecutors, defense attorneys, academics, and judges, as well as various groups such as the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Attorneys General, the U.S. Department of Justice, the Justice Management Institute, and other notable pretrial scholars and pretrial agency professionals.

More significant, however, is the justice system's use of the ABA Criminal Justice Standards as important sources of authority. The ABA's Standards have been

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[70] Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence*, 23 Crim. Just. (Winter 2009).

either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100 law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts had used the Standards to implement new court rules. According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, "[t]he Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects."[71]

> *"The Court similarly dismisses the fact that the police deception which it sanctions quite clearly violates the American Bar Association's Standards for Criminal Justice – Standards which the Chief Justice has described as 'the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history,' and which this Court frequently finds helpful."*
>
> *Moran v. Burbine*, 475 U.S. 412 (1986) (Stevens, J. dissenting)

The ABA's process for creating and updating the Standards is "lengthy and painstaking," but the Standards finally approved by the ABA House of Delegates (to become official policy of the 400,000 member association) "are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process, either individually or as representatives of their respective associations, and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions, over three or more years."[72]

Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the ABA Standards use both to provide rationales for its recommendations. For example, in recommending that commercial sureties be abolished, the ABA relies on numerous critiques of the money bail system going back nearly 100 years, social science experiments, law review articles, and various state statutes providing for its abolition. In recommending a presumption of release on recognizance and

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[71] *Id.* (internal quotation omitted).

[72] *Id.*

that money not be used to protect public safety, the ABA relies on United States Supreme Court opinions, findings from the Vera Foundation's Manhattan Bail Project, discussions from the 1964 Conference on Bail and Criminal Justice, Bureau of Justice Statistics data, as well as the *absence* of evidence, i.e., "the absence of any relationship between the ability of a defendant to post a financial bond and the risk that a defendant may pose to public safety."[73]

The ABA Standards provide recommendations spanning the entirety of the pretrial phase of the criminal case, from the decision to release on citation or summons, to accountability through punishment for pretrial failure. They are based, correctly, on a "bail/no bail" or "release/detain" model, designed to fully effectuate the release of bailable defendants while providing those denied bail with fair and transparent due process hearing prior to detention.

Drafters of the 2011 Summary Report to the National Symposium on Pretrial Justice recognized that certain fundamental features of an ideal pretrial justice system are the same features that have been a part of the ABA Standards since they were first published in 1968. And while that Report acknowledged that simply pointing to the Standards is not enough to change the customs and habits built over 100 years of a bail system dominated by secured money, charge versus risk, and profit, the Standards remain a singularly important resource for all pretrial practitioners. Indeed, given the comprehensive nature of the ABA Standards, jurisdictions can at least use them to initially identify potential areas for improvement by merely holding up existing policies, practices, and even laws to the various recommendations contained therein.

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[73] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), Std. 10-5.3 (a) (commentary) at 111.

Chapter 6: Pretrial Terms and Phrases

The Importance of a Common Vocabulary

It is only after we know the history, the law, the research, and the national standards that we can fully understand the need for a common national vocabulary associated with bail. The Greek philosopher Socrates correctly stated that, "The beginning of wisdom is a definition of terms." After all, how can you begin to discuss society's great issues when the words that you apply to those issues elude substance and meaning? But beyond whatever individual virtue you may find in defining your own terms, the undeniable merit of this ancient quote fully surfaces when applied to dialogue with others. It is one thing to have formed your own working definition of the terms "danger" or "public safety," for example, but your idea of danger and public safety can certainly muddle a conversation if another person has defined the terms differently. This potential for confusion is readily apparent in the field of bail and pretrial justice, and it is the wise pretrial practitioner who seeks to minimize it.

Minimizing confusion is necessary because, as noted previously, bail is already complex, and the historically complicated nature of various terms and phrases relating to bail and pretrial release or detention only adds to that complexity, which can sometimes lead to misuse of those terms and phrases. Misuse, in turn, leads to unnecessary quibbling and distraction from fundamental issues in the administration of bail and pretrial justice. This distraction is multiplied when the definitions originate in legislatures (for example, by defining bail statutorily as an amount of money) or court opinions (for example, by articulating an improper or incomplete purpose of bail). Given the existing potential for confusion, avoiding further complication is also a primary reason for finding consensus on bail's basic terms and phrases.

As also noted previously, bail is a field that is changing rapidly. For nearly 1,500 years, the administration of bail went essentially unchanged, with accused persons obtaining pretrial freedom by pledging property or money, which, in turn, would be forfeited if those persons did not show up to court. By the late 1800s, however, bail in America had changed from the historical personal surety system to a commercial surety system, with the unfortunate consequence of solidifying money at bail while radically transforming money's use from a condition subsequent (i.e., using unsecured bonds) to a condition precedent (i.e.,

using secured bonds) to release. Within a mere 20 years after the introduction of the commercial surety system in America, researchers began documenting abuses and shortcomings associated with that system based on secured financial conditions. By the 1980s, America had undergone two generations of pretrial reform by creating alternatives to the for-profit bail bonding system, recognizing a second constitutionally valid purpose for the government to impose restrictions on pretrial freedom, and allowing for the lawful denial of bail altogether based on extreme risk. These are monumental changes in the field of pretrial justice, and they provide further justification for agreeing on basic definitions to keep up with these major developments.

Finally, bail is a topic of increasing interest to criminal justice researchers, and criminal justice research begins with conceptualizing and operationalizing terms in an effort to collect and analyze data with relevance to the field. For example, until we all agree on what "court appearance rates" mean, we will surely struggle to agree on adequate ways to measure them and, ultimately, to increase them. In the same way, as a field we must agree on the meaning and purpose of so basic a term as "bail."

More important than achieving simple consensus, however, is that we agree on meanings that reflect reality or truth. Indeed, if wisdom begins with a definition of terms, wisdom is significantly furthered when those definitions hold up to what is real. For too long, legislatures, courts, and various criminal justice practitioners have defined bail as an amount of money, but that is an error when held up to the totality of the law and practice through history. And for too long legislatures, courts, and criminal justice practitioners have said that the purpose of bail is to provide reasonable assurance of public safety and/or court appearance, but that, too, is an error when held up against the lenses of history and the law. Throughout history, the definition of "bail" has changed to reflect what we know about bail, and the time to agree on its correct meaning for this generation of pretrial reform is now upon us.

The Meaning and Purpose of "Bail"

For the legal and historical reasons articulated above, bail should never be defined as money. Instead, bail is best defined in terms of release, and most appropriately as a process of conditional release. Moreover, the purpose of bail is not to provide reasonable assurance of court appearance and public safety – that is the province and purpose of conditions of bail or limitations on pretrial freedom. The purpose of bail, rather, is to effectuate and maximize release. There

is "bail" – i.e., a process of release – and there is "no bail," – a process of detention. Constitutionally speaking, "bail" should always outweigh "no bail" because, as the U.S. Supreme Court has explained, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[74]

Historically, the term bail derives from the French "baillier," which means to hand over, give, entrust, or deliver. It was a delivery, or bailment, of the accused to the surety – the jailer of the accused's own choosing – to avoid confinement in jail. Indeed, even until the 20th century, the surety himself or herself was often known as the "bail" – the person to whom the accused was delivered. Unfortunately, however, for centuries money was also a major part of the bail agreement. Because paying money was the primary promise underlying the release agreement, the coupling of "bail" and money meant that money slowly came to be equated with the release process itself. This is unfortunate, as money at bail has never been more than a condition of bail – a limitation on pretrial freedom that must be paid upon forfeiture of the bond agreement. But the coupling became especially misleading in America after the 1960s, when the country attempted to move away from its relatively recent adoption of a secured money bond and toward other methods for releasing defendants, such as release on recognizance and release on nonfinancial conditions.

Legally, bail as a process of release is the only definition that (1) effectuates American notions of liberty from even colonial times; (2) acknowledges the rationales for state deviations from more stringent English laws in crafting their constitutions (and the federal government in crafting the Northwest Territory Ordinance of 1787); and (3) naturally follows from various statements equating bail with release from the United States Supreme Court from *United States v. Barber*[75] and *Hudson v. Parker*,[76] to *Stack v. Boyle*[77]

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[74] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

[75] 140 U.S. 164, 167 (1891) ("[I]n criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time . . . .").

[76] 156 U.S 277, 285 (1895) ("The statutes of the United States have been framed upon the theory that a person accused of a crime shall not, until he has been finally adjudged guilty . . . be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail . . . .").

[77] 342 U.S. 1, 4 (1951) ("[F]ederal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction . . . .").

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

Bail as a process of release accords not only with history and the law, but also with scholars' definitions (in 1927, Beeley defined bail as the release of a person from custody), the federal government's usage (calling bail a process in at least one document), and use by organizations such as the American Bar Association, which has quoted Black's Law Dictionary definition of bail as a "process by which a person is released from custody."[79] States with older (and likely outdated) bail statutes often still equate bail with money, but many states with newer provisions, such as Virginia (which defines bail as "the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer"),[80] Colorado (which defines bail as security like a pledge or a promise, which can include release without money),[81] and Florida (which defines bail to include "any and all forms of pretrial release"[82]) have enacted statutory definitions to recognize bail as something more than simply money. Moreover, some states, such as Alaska,[83] Florida,[84] Connecticut,[85] and Wisconsin,[86] have constitutions explicitly incorporating the word "release" into their right-to-bail provisions.

> *"In general, the term 'bail' means the release of a person from custody upon the undertaking, with or without one or more persons for him, that he will abide the judgment and orders of the court in appearing and answering the charge against him. It is essentially a delivery or bailment of a person to his sureties—the jailers of his own choosing—so that he is placed in their friendly custody instead of remaining in jail."*
>
> Arthur Beeley, 1927

A broad definition of bail, such as "release from governmental custody" versus simply release from jail, is also appropriate to account for the recognition that

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[78] 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm . . . .").
[79] *Frequently Asked Questions About Pretrial Release Decision Making* (ABA 2012).
[80] Va. Code. § 19.2-119 (2013).
[81] Colo. Rev. Stat. § 16-1-104 (2013).
[82] Fla. Stat. § 903.011 (2013).
[83] Alaska Const. art. I, § 11.
[84] Fla. Const. art. I, § 14.
[85] Conn. Const. art. 1, § 8.
[86] Wis. Const. art. 1, § 8.

bail, as a process of conditional release prior to trial, includes many mechanisms – such as citation or "station house release" – that effectuate release apart from jails and that are rightfully considered in endeavors seeking to improve the bail process.

The Media's Use of Bail Terms and Phrases

Much of what the public knows about bail comes from the media's use, and often misuse, of bail terms and phrases. A sentence from a newspaper story stating that "the defendant was released without bail," meaning perhaps that the defendant was released without a secured financial condition or on his or her own recognizance, is an improper use of the term "bail" (which itself means release) and can create unnecessary confusion surrounding efforts at pretrial reform. Likewise, stating that someone is being "held on $50,000 bail" not only misses the point of bail equaling release, but also equates money with the bail process itself, reinforcing the misunderstanding of money merely as a condition of bail – a limitation of pretrial freedom which, like all such limitations, must be assessed for legality and effectiveness in any particular case. For several reasons, the media continues to equate bail with money and tends to focus singularly on the amount of the financial condition (as opposed to any number of non-financial conditions) as a sort-of barometer of the justice system's sense of severity of the crime. Some of those reasons are directly related to faulty use of terms and phrases by the various states, which define terms differently from one another, and which occasionally define the same bail term differently at various places within a single statute.

In the wake of the 2011 National Symposium on Pretrial Justice, the Pretrial Justice Working Group created a Communications Subcommittee to, among other things, create a media campaign for public education purposes. To effectively educate the public, however, the Subcommittee recognized that some measure of media education also needed to take place. Accordingly, in 2012 the John Jay College Center on Media, Crime, and Justice, with support from the Public Welfare Foundation, held a symposium designed to educate members of the media and to help them identify and accurately report on bail and pretrial justice issues. Articles written by symposium fellows are listed as they are produced, and continue to demonstrate how bail education leads to more thorough and accurate coverage of pretrial issues.

Sources and Resources: John Jay College and Public Welfare Foundation Symposium resources, found at http://www.thecrimereport.org/conferences/past/2012-05-jailed-without-conviction-john-jaypublic-welfare-sym. Pretrial Justice Working Group website and materials, found at http://www.pretrial.org/infostop/pjwg/.

To say that bail is a process of release and that the purpose of bail is to maximize release is not completely new (researchers have long described an "effective" bail decision as maximizing or fostering release) and may seem to be only a subtle shift from current articulations of meaning and purpose. Nevertheless, these ideas have not taken a firm hold in the field. Moreover, certain consequences flow from whether or not the notions are articulated correctly. In Colorado, for example, where, until recently, the legislature incorrectly defined bail as an amount of money, bail insurance companies routinely said that the sole function of bail was court appearance (which only makes sense when bail and money are equated, for legally the only purpose of money was court appearance), and that the right to bail was the right merely to have an amount of money set – both equally untenable statements of the law. Generally speaking, when states define bail as money their bail statutes typically reflect the definition by overemphasizing money over all other conditions throughout the bail process. This, in turn, drives individual misperceptions about what the bail process is intended to do.

Likewise, when persons inaccurately mix statements of purpose for bail with statements of purpose for conditions of bail, the consequences can be equally misleading. For example, when judges inaccurately state that the purpose of bail is to protect public safety (again, public safety is a constitutionally valid purpose for any particular condition of bail or limitation of pretrial freedom, not for bail itself), those judges will likely find easy justification for imposing unattainable conditions leading to pretrial detention – for many, the safest pretrial option available. When the purpose of bail is thought to be public safety, then the emphasis will be on public safety, which may skew decisionmakers toward conditions that lead to unnecessary pretrial detention. However, when the purpose focuses on release, the emphasis will be on pretrial freedom with conditions set to provide a reasonable assurance, and not absolute assurance, of court appearance and public safety.

Thus, bail defined as a process of release places an emphasis on pretrial release and bail conditions that are attainable at least in equal measure to their effect on court appearance and public safety. In a country, such as ours, where bail may be constitutionally denied, a focus on bail as release when the right to bail is granted is crucial to following *Salerno's* admonition that pretrial liberty be our nation's norm. Likewise, by correctly stating that the purpose of any particular bail condition or limitation on pretrial freedom is tied to the constitutionally valid rationales of public safety and court appearance, the focus is on the particular

condition – such as GPS monitoring or drug testing – and its legality and efficacy in providing reasonable assurance of the desired outcome.

Other Terms and Phrases

There are other terms and phrases with equal need for accurate national uniformity. For example, many states define the word "bond" differently, sometimes describing it in terms of one particular type of bail release or condition, such as through a commercial surety. A bond, however, occurs whenever the defendant forges an agreement with the court, and can include an additional surety, or not, depending on that agreement. Prior definitions – and thus categories of bail bonds – have focused primarily on whether or how those categories employ money as a limitation on pretrial freedom, thus making those definitions outdated. Future use of the term bond should recognize that money is only one of many possible conditions, and, in light of legal and evidence-based practices, should take a decidedly less important role in the agreement forged between a defendant and the court. Accordingly, instead of describing a release by using terms such as "surety bond," "ten percent bond," or "personal recognizance bond," pretrial practitioners should focus first on release or detention, and secondarily address conditions (for release is always conditional) of the release agreement.

Other misused terms include: "pretrial" and "pretrial services," which are often inaccurately used as a shorthand method to describe pretrial services agencies and/or programs instead of their more appropriate use as (1) a period of time, and (2) the actual services provided by the pretrial agency or program; "court appearance rates" (and, concomitantly, "failure to appear rates") which is defined in various ways by various jurisdictions; "the right to bail," "public safety," "sureties" or "sufficient sureties," and "integrity of the judicial process." There have been attempts at creating pretrial glossaries designed to bring national uniformity to these terms and phrases, but acceptance of the changes in usage has been fairly limited. Until that uniformity is reached, however, jurisdictions should at least recognize the extreme variations in definitions of terms and phrases, question whether their current definitions follow from a study of bail history, law, and research, and be open to at least discussing the possibility of changing those terms and phrases that are misleading or otherwise in need of reform.

Additional Sources and Resources: Black's Law Dictionary (9th ed. 2009); *Criminal Bail: How Bail Reform is Working in Selected District Courts*, U.S. GAO Report to the Subcomm. on Courts, Civ. Liberties, and the Admin. of Justice (1987); Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford Univ. Press, 3rd ed. 1995); Timothy R. Schnacke, Michael R. Jones, & Claire M. B. Brooker, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (PJI 2011) (currently available electronically on the PJI website).

Chapter 7: Application – Guidelines for Pretrial Reform

In a recent op-ed piece for *The Crime Report,* Timothy Murray, then Executive Director of the Pretrial Justice Institute, stated that "the cash-based model [relying primarily on secured bonds] represents a tiered system of justice based on personal wealth, rather than risk, and is in desperate need of reform."[87] In fact, from what we know about the history of bail, because a system of pretrial release and detention based on secured bonds administered primarily through commercial sureties causes abuses to both the "bail" and "no bail" sides of our current dichotomy, reform is not only necessary – it is ultimately inevitable. But how should we marshal our resources to best accomplish reform? How can we facilitate reform across the entire country? What can we do to fully understand pretrial risk, and to fortify our political will to embrace it? And how can we enact and implement laws, policies, and practices aiming at reform so that the resulting cultural change will actually become firmly fixed?

Individual Action Leading to Comprehensive Cultural Change

The answers to these questions are complex because every person working in or around the pretrial field has varying job responsibilities, legal boundaries, and, presumably, influence over others. Nevertheless, pretrial reform in America requires all persons – from entry-level line officers and pretrial services case workers to chief justices and governors – to embrace and promote improvements within their spheres of influence while continually motivating others outside of those spheres to reach the common goal of achieving a meaningful top to bottom (or bottom to top) cultural change. The common goal is collaborative, comprehensive improvement toward maximizing release, public safety, and court appearance through the use of legal and evidence-based practices, but we will only reach that goal through individual action.

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[87] Timothy Murray, *Why the Bail Bond System Needs Reform,* The Crime Report (Nov. 19, 2013) found at http://www.thecrimereport.org/viewpoints/2013-11-why-the-bail-bond-system-needs-reform

Individual Decisions

Individual action, in turn, starts with individual decisions. First, every person working in the field must decide whether pretrial improvements are even necessary. It is this author's impression, along with numerous national and local organizations and entities, that improvements are indeed necessary, and that the typical reasons given to keep the customary yet damaging practices based on a primarily money-based bail system are insufficient to reject the national movement toward meaningful pretrial reform. The second decision is to resolve to educate oneself thoroughly in bail and to make the necessary improvements by following the research, wherever that research goes and so long as it does not interfere with fundamental legal foundations. Essentially, the second decision is to follow a legal and evidence-based decision making model for pretrial improvement. By following that model, persons (or whole jurisdictions working collaboratively) will quickly learn (1) which particular pretrial justice issues are most pressing and in need of immediate improvement, (2) which can be addressed in the longer term, and (3) which require no action at all.

Third, each person must decide how to implement improvements designed to address the issues. This decision is naturally limited by the person's particular job and sphere of influence, but those limitations should not stop individual action altogether. Instead, the limitations should serve merely as motivation to recruit others outside of each person's sphere to join in a larger collaborative process. Fourth and finally, each person must make a decision to ensure those improvements "stick" by using proven implementation techniques designed to promote the comprehensive and lasting use of a research-based improvement.

Learning about improvements to the pretrial process also involves learning the nuances that make one's particular jurisdiction unique in terms of how much pretrial reform is needed. If, for example, in one single (and wildly hypothetical) act, the federal government enacted a provision requiring the states to assure that no amount of money could result in the pretrial detention of any particular defendant – a line that is a currently a crucial part of both the federal and District of Columbia bail statutes – some states would be thrust immediately into perceived chaos as their constitutions and statutes practically force bail practices that include setting high amounts of money to detain high-risk yet bailable defendants pretrial. Other states, however, might be only mildly inconvenienced, as their constitutions and statutes allow for a fairly robust preventive detention process that is simply unused. Still others might recognize that their preventive detention provisions are somewhat archaic because they rely primarily on

charge-based versus risk-based distinctions. Knowing where one's jurisdiction fits comparatively on the continuum of pretrial reform needs can be especially helpful when crafting solutions to pretrial problems. Some states underutilize citations and summonses, but others have enacted statutory changes to encourage using them more. Some jurisdictions rely heavily on money bond schedules, but some have eliminated them entirely. There is value in knowing all of this.

Individual Roles

The process of individual decision making and action will look different depending on the person and his or her role in the pretrial process. For a pretrial services assessment officer, for example, it will mean learning everything available about the history, fundamental legal foundations, research, national standards, and terms and phrases, and then holding up his or her current practices against that knowledge to perhaps make changes to risk assessment and supervision methods. Despite having little control over the legal parameters, it is nonetheless important for each officer to understand the fundamentals so that he or she can say, for example, "Yes, I know that bail should mean release and so I understand that our statute, which defines bail as money, has provisions that can be a hindrance to certain evidence-based pretrial practices. Nevertheless, I will continue to pursue those practices within the confines of current law while explaining to others operating in other jobs and with other spheres of influence how amending the statute can help us move forward." This type of reform effort – a bottom to top effort – is happening in numerous local jurisdictions across America.

> *"Once you make a decision, the universe conspires to make it happen."*
>
> Ralph Waldo Emerson

For governors or legislators, it will mean learning everything available about the history, legal foundations, research, national standards, and terms and phrases, and then also holding up the state's constitution and statutes against that knowledge to perhaps make changes to the laws to better promote evidence-based practices. It is particularly important for these leaders to know the fundamentals and variances across America so that each can say, for example, "I now understand that our constitutional provisions and bail statutes are somewhat outdated, and thus a hindrance to legal and evidence-based practices

designed to fully effectuate the bail/no bail dichotomy that is already technically a part of our state bail system. I will therefore begin working with state leaders to pursue the knowledge necessary to make statewide improvements to bail and pretrial justice so that our laws will align with broad legal and evidence-based pretrial principles and therefore facilitate straightforward application to individual cases." This type of reform effort – a top to bottom effort – is also happening in America, in states such as New York, New Jersey, Delaware, and Kentucky.

Everyone has a role to play in pretrial justice, and every role is important to the overall effort. Police officers should question whether their jurisdiction uses objective pretrial risk assessment and whether it has and uses fair and transparent preventive detention (as the International Chiefs of Police/PJI/Public Welfare Foundation's Pretrial Justice Reform Initiative asks them to do), but they should also question their own citation policies as well as the utility of asking for arbitrary money amounts on warrants. Prosecutors should continue to advocate support for pretrial services agencies or others using validated risk assessments (as the Association of Prosecuting Attorneys policy statement urges them to do), but they should also question their initial case screening policies as well as whether justice is served through asking for secured financial conditions for any particular bond at first appearance. Defense attorneys, jail administrators, sheriffs and sheriff's deputies, city and county officials, state legislators, researchers and academics, persons in philanthropies, and others should strive individually to actively implement the various policy statements and recommendations that are already a part of the pretrial justice literature, and to question those parts of the pretrial system seemingly neglected by others.

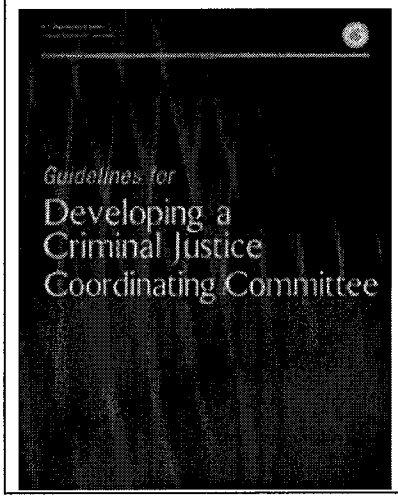
Everyone has a part to play in pretrial justice, and it means individually deciding to improve, learning what improvements are necessary, and then implementing legal and evidence-based practices to further the goals of bail. Nevertheless, while informed individual action is crucial, it is also only a means to the end of a comprehensive collaborative culture change. In this generation of pretrial reform, the most successful improvement efforts have come about when governors and legislators have sat at the same table as pretrial services officers (and everyone else) to learn about bail improvements and then to find comprehensive solutions to problems that are likely insoluble through individual effort alone.

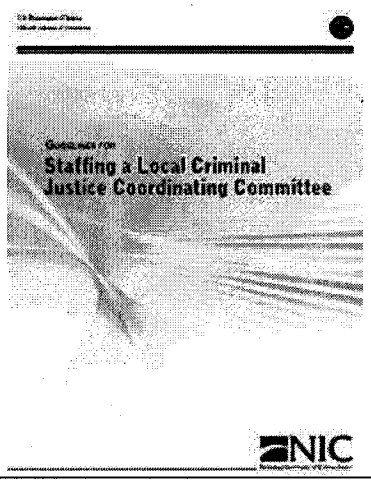
Collaboration and Pretrial Justice

In a complicated justice system made up of multiple agencies at different levels of government, purposeful collaboration can create a powerful mechanism for discussing and implementing criminal justice system improvements. Indeed, in the National Institute of Corrections document titled *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems*, the authors call collaboration a "key ingredient" of an evidence-based system, which uses research to achieve system goals.

Like other areas in criminal justice, bail and pretrial improvements affect many persons and entities, making collaboration between system actors and decision makers a crucial part of an effective reform strategy. Across the country, local criminal justice coordinating committees (CJCCs) are demonstrating the value of coming together with a formalized policy planning process to reach system goals, and some of the most effective pretrial justice strategies have come from jurisdictions working through these CJCCs. Collaboration allows individuals with naturally limited spheres of influence to interact and achieve group solutions to problems that are likely insoluble through individual efforts. Moreover, through staff and other resources, CJCCs often provide the best mechanisms for ensuring the uptake of research so that full implementation of legal and evidence-based practices will succeed.

The National Institute of Corrections currently publishes two documents designed to help communities create and sustain CJCCs. The first, Robert Cushman's *Guidelines for Developing a Criminal Justice Coordinating Committee* (2002), highlights the need for system coordination, explains a model for a planning and coordination framework, and describes mechanisms designed to move jurisdictions to an "ideal" CJCC. The second, Dr. Michael Jones's *Guidelines for Staffing a Criminal Justice Coordinating Committee* (2012), explains the need and advantages of CJCC staff and how that staff can help collect, digest, and synthesize research for use by criminal justice decision makers.





Judicial Leadership

Finally, while everyone has a role and a responsibility, judges must be singled out as being absolutely critical for achieving pretrial justice in America. Bail is a judicial function, and the history of bail in America has consistently demonstrated that judicial participation will likely mean the difference between pretrial improvement and pretrial stagnation. Indeed, the history of bail is replete with examples of individuals who attempted and yet failed to make pretrial improvements because those changes affected only one or two of the three goals associated with evidence-based decision making at bail, and they lacked sufficient judicial input on the three together. Judges alone are the individuals who must ensure that the balance of bail – maximizing release (through an understanding of a defendant's constitutional rights) while simultaneously maximizing public safety and court appearance (through an understanding of the constitutionally valid purposes of limiting pretrial freedom, albeit tempered by certain fundamental legal foundations such as due process, equal protection, and excessiveness, combined with evidence-based pretrial practices) – is properly maintained. Moreover, because the judicial decision to release or detain any particular defendant is the crux of the administration of bail, whatever improvements we make to other parts of the pretrial process are likely to stall if judges do not fully participate in the process of pretrial reform. Finally, judges are in the best position to understand risk, to communicate that understanding to others, and to demonstrate daily the political will to embrace the risk that is inherent in bail as a fundamental precept of our American system of justice.

Indeed, this generation of bail reform needs more than mere participation by judges; this generation needs judicial leadership. Judges should be organizing and directing pretrial conferences, not simply attending them. Judges should be educating the justice system and the public, including the media, about the right to bail, the presumption of innocence, due process, and equal protection, not the other way around.

Fortunately, American judges are currently poised to take a more active leadership role in making the necessary changes to our current system of bail. In February of 2013, the Conference of Chief Justices, made up of the highest judicial officials of the fifty states, the District of Columbia, and the various American territories, approved a resolution endorsing certain fundamental

recommendations surrounding legal and evidence-based improvements to the administration of bail. Additionally, the National Judicial College has conducted focus groups with judges designed to identify opportunities for improvement. Moreover, along with the Pretrial Justice Institute and the Bureau of Justice Assistance, the College has created a teaching curriculum to train judges on legal and evidence-based pretrial decision making. Judges thus need only to avail themselves of these resources, learn the fundamentals surrounding legal and evidence-based pretrial practice, and then ask how to effectuate the Chief Justice Resolution in their particular state.

The Chief Justice Resolution should also serve as a reminder that all types of pretrial reform include both an evidentiary and a policy/legal component – hence the term legal and evidence-based practices. Indeed, attempts to increase the use of evidence or research-based practices without engaging the criminal justice system and the general public in the legal and policy justifications and parameters for those practices may lead to failure. For example, research-based risk assessment, by itself, can be beneficial to any jurisdiction, but only if implementing it involves a parallel discussion of the legal parameters for embracing and then mitigating risk, the need to avoid other practices that undermine the benefits of assessment, and the pitfalls of attempting to fully incorporate risk into a state legal scheme that is unable to adequately accommodate it. On the other hand, increasing the use of unsecured financial conditions, coupled with a discussion of how research has shown that those conditions can increase release without significant decreases in court appearance and public safety – the three major legal purposes underlying the bail decision – can move a jurisdiction closer to model bail practices that, among other things, ensure bailable defendants who are ordered release are actually released.

Additional Sources and Resources: Association of Prosecuting Attorneys, *Policy Statement on Pretrial Justice* (2012) found at http://www.apainc.org/html/APA+Pretrial+Policy+Statement.pdf. Conference of Chief Justices Resolution 3: *Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial* Release (2013), found at http://www.pretrial.org/wp-content/uploads/2013/05/CCJ-Resolution-on-Pretrial.pdf; William F. Dressell & Barry Mahoney, *Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement* (Nat'l. Jud. College 2013); *Effective Pretrial Decision Making: A Model Curriculum for Judges* (BJA/PJI/Nat'l Jud. Coll. (2013) http://www.pretrial.org/download/infostop/Judicial%20Training.pdf; Dean L. Fixsen, Sandra F. Naoom, Karen A. Blase, Robert M. Friedman, and Frances Wallace, *Implementation Research: A Synthesis of the Literature* (Univ. S. Fla. 2005); International Chiefs of Police Pretrial Justice Reform Initiative, found at http://www.theiacp.org/Pretrial-Justice-Reform-Initiative.

Conclusion

Legal and evidence-based pretrial practices, derived from knowing the history of bail, legal foundations, and social science pretrial research, and expressed as recommendations in the national best practice standards, point overwhelmingly toward the need for pretrial improvements. Fortunately, in this third generation of American bail reform, we have amassed the knowledge necessary to implement pretrial improvements across the country, no matter how daunting or complex any particular state believes that implementation process to be. Whether the improvements are minor, such as adding an evidence-based supervision technique to an existing array of techniques, or major, such as drafting new constitutional language to allow for the fair and transparent detention of high-risk defendants without the need for money bail, the only real prerequisites to reform are education and action. This paper is designed to further the process of bail education with the hope that it will lead to informed action.

As a prerequisite to national reform, however, that bail education must be uniform. Accordingly, achieving pretrial justice in America requires everyone both inside and outside of the field to agree on certain fundamentals, such as the history of bail, the legal foundations, the importance of the research and national standards, and substantive terms and phrases. This includes agreeing on the meaning and purpose of the word "bail" itself, which has gradually evolved into a word that often is used to mean anything but its historical and legal connotation of release. Fully understanding these fundamentals of bail is paramount to overcoming our national amnesia of a system of bail that worked for centuries in England and America – an unsecured personal surety system in which bailable defendants were released, in which non-bailable defendants were detained, and in which no profit was allowed.

> *"A sound pretrial infrastructure is not just a desirable goal – it is vital to the legitimate system of government and to safer communities."*
>
> Deputy Attorney General James M. Cole (2011).

Moreover, while we have learned much from the action generated by purely local pretrial improvement projects, we must not forget the enormous need for pretrial justice across the entire country. We must thus remain mindful that meaningful American bail reform will come about only when entire American

states focus on these important issues. Anything less than an entire state's complete commitment to examine all pretrial practices across jurisdictions and levels of government – by following the research from all relevant disciplines – means that any particular pretrial practitioner's foremost duty is to continue communicating the need for reform until that complete commitment is achieved. American pretrial justice ultimately depends on reaching a tipping point among the states, which can occur only when enough states have shown that major pretrial improvements are necessary and feasible.

In 1964, Robert Kennedy stated the following:

> [O]ur present bail system inflicts hardship on defendants and it inflicts considerable financial cost on society. Such cruelty and cost should not be tolerated in any event. But when they are *needless*, then we must ask ourselves why we have not developed a remedy long ago. For it is clear that the cruelty and cost of the bail system *are* needless.[88]

Fifty years later, this stark assessment remains largely true, and yet we now have significant reason for hope that this third generation of bail reform will be America's last. For in the last 50 years, we have accumulated the knowledge necessary to replace, once and for all, this "cruel and costly" system with one that represents safe, fair, and effective administration of pretrial release and detention. We have amassed a body of research literature, of best practice standards, and of experiences from model jurisdictions that together have created both public and criminal justice system discomfort with the status quo. It is a body of knowledge that points in a single direction toward effective, evidence-based pretrial practices, and away from arbitrary, irrational, and customary practices, such as the casual use of money. We now have the information necessary to recognize and fully understand the paradox of bail. We know what to do, and how to do it. We need only to act.

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[88] Attorney General Robert F. Kennedy, Testimony on Bail Legislation Before the Subcommittee on Constitutional Rights and Improvements in the Judicial Machinery of the Senate Judiciary Committee 4 (Aug. 4, 1964) (emphasis in original) *available at* http://www.justice.gov/ag/rfkspeeches/1964/08-04-1964.pdf.

TAB 41

Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States

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Overview

The rates of crime, incarceration and correctional supervision are disproportionately high in the U.S. and translate into exorbitant costs to individuals, the public and the state. Though many offenders recidivate, a considerable proportion do not. Thus, there is a need to identify those offenders at greater risk of recidivism and to allocate resources and target risk management and rehabilitation efforts accordingly. Doing so necessitates accurate and reliable assessments of recidivism risk. There is overwhelming evidence to suggest that assessments of risk completed using structured approaches produce estimates that are both more accurate and more consistent across assessors compared to subjective or unstructured approaches. More and more, structured risk assessment approaches are being used in correctional agencies.

In this review, we summarize the research conducted in the United States examining the performance of instruments designed to assess risk of recidivism, including committing a new crime and violating of conditions of supervision, among adult offenders. We focus specifically on performance of tools validated and currently used in correctional settings in the United States.

Methodology

We identified instruments designed to assess risk of recidivism by searching academic research databases and Google. We identified additional instruments by looking through the reference lists of recent publications and through discussion with colleagues. Criteria for instruments to be included in the review were: a) designed to assess the likelihood of general recidivism (i.e., new offenses and violation of conditions); b) intended for assessing adult offenders (18 years of age and older); c) used in correctional settings in the United States; and d) validated in the United States. Instruments were excluded from our review if they: a) were designed to assess the likelihood of adverse outcomes for specific offenses (e.g., sexual offenses, violent offenses, spousal assault); b) were intended for assessing juvenile offenders (less than 18 years of age); c) were not used in correctional settings in the United States; d) had not been validated in the United States.; or e) were developed for use in a specific institution or ward.

We then identified studies examining the validity of these instruments using the same databases, search engine and secondary sources as above, using both the acronyms and full names of the instruments as search criteria. We searched for studies published between 1970 and 2012 in peer-reviewed journals, as well as government reports, doctoral dissertations, and Master's theses. Using this search strategy, an initial total of 173 records was filtered to a final count of 53 studies, representing 72 unique samples.

Information about the characteristics of the instruments, assessment process, and studies was collected. We also recorded information on inter-rater reliability and predictive validity, overall and by offender sex, race/ethnicity, study context, and recidivism outcome, where possible.

Findings

There were very few U.S. evaluations examining the predictive validity of assessments completed using instruments commonly used in U.S. correctional agencies. In most cases, validity had only been examined in one or two studies conducted in the United States, and frequently, those investigations were completed by the same people who developed the instrument. Also, only two of the 53 studies reported evaluations of inter-rater reliability. There was no one instrument that emerged as systematically producing more accurate assessments than the others. Performance within and between instruments varied depending on the assessment sample, circumstances, and outcome.

Some instruments performed better in predicting particular recidivism outcomes than others. Other instruments were developed to assess for specific populations (e.g., parolees) or appeared to perform better for some subgroups of offenders than others (e.g., male versus female offenders). Finally, the information and amount of time required to complete assessments varied considerably. Some instruments could be completed based solely on offender self-report; other instruments used information derived from a variety of sources, including self-report, interview, and review of official records. Still other instruments could be completed based on file review alone. The number of items included the instruments also varied considerably: from four to 130.

Conclusion

When deciding which recidivism risk assessment instrument to implement in practice, we recommend first narrowing the potential risk assessment instruments by answering the following questions: *What is your outcome of interest? What is your population? What resources are required to complete the assessment?* We then recommend careful consideration of the research evidence, including the amount and strength of the empirical support for inter-rater reliability and predictive validity, generalizability of findings, and possible sources of bias that may have impacted results. Finally, it is important to remember that the goal of risk assessment is not simply predict the likelihood of recidivism, but, ultimately, to reduce the risk of recidivism. To do so, the risk assessment tool must be implemented in a sustainable fashion with fidelity; findings of the risk assessment must be communicated accurately and completely; and, finally, information derived during the risk assessment process must be used to guide risk management and rehabilitation efforts.

BACKGROUND

Prevalence of General Offending and Recidivism in the U.S.

The crime rate in the U.S. is high, estimated at 3,295 crimes per 100,000 residents in 2011 (FBI, 2012). With 743 in 100,000 U.S. adults incarcerated at the end of 2009 (Glaze, 2011), the rate of incarceration is over four times the rate found in more than that of half the world's countries (Walmsley, 2010). Indeed, though the U.S. has less than 5% of the global population, it has more than 25% of the world's prisoners (Liptak, 2008). Further, approximately one out of every 30 adults is under some form of correctional supervision (Pew Center on the States, 2009).

These high rates of crime, incarceration and correctional supervision translate into exorbitant costs. Approximately $74 billion was spent on corrections in 2007 (Kyckelhahn, 2012). When both direct and indirect costs are considered, estimates of annual costs have reached as high as $1.7 trillion (Anderson, 1999). Though almost two-thirds of offenders recidivate following release, another third do not go on to reoffend (Langan & Levin, 2002). Criminal justice expenditures, however, typically are distributed equally among offenders, regardless of risk level. It would be more cost-effective to allocate funding based on consideration of other factors, such as risk of recidivism and treatment needs. Indeed, correctional programs that adhere to the Risk-Need-Responsivity (RNR) model for offender assessment and rehabilitation have increased efficacy in reducing recidivism (e.g., Lowenkamp, Pealer, Smith & Latessa, 2006).

The RNR model represents an idiographic approach to risk management and rehabilitation. First, the *risk* principle dictates that treatment and intervention should be proportionate to each offender's recidivism *risk*, with more restrictive and intensive efforts used for high-risk offenders. The *need* principle calls for consideration of individual criminogenic needs to tailor treatment to each offender. Finally, the *responsivity* principle requires adapting treatment according to the individual offenders' learning styles, motivation, personalities and strengths, and use of approaches that are known to be responsive to the identified needs (Bonta & Andrews, 2007). Adherence to the principles of the RNR model necessitates accurate and reliable assessments of recidivism risk.

ISSUES IN RISK ASSESSMENT

Risk Assessment in Correctional Settings in the U.S.

Risk assessment can be defined as the process of estimating the likelihood of future offending to identify those at higher risk and in greater need of intervention. Conducting risk assessments also may assist in the identification of treatment targets and the development of risk management and treatment plans. There is overwhelming evidence to suggest that assessments of risk completed using structured approaches produce estimates that are both more accurate and more consistent across assessors compared to subjective or unstructured approaches (Ægisdóttir et al., 2006). Importantly, the use of structured approaches to classify higher risk individuals within the general offender population also produce better outcomes compared to unstructured approaches (Mamalian, 2011). More and more, correctional agencies are recommending—and many now require—the use of structured risk assessment approaches (Skeem & Monahan, 2011).

Evolution of Risk Assessment

The focus and structure of risk assessment tools have shifted significantly over time. The general characteristics of four distinct generations are summarized below.

First Generation

The first generation of risk assessment is best described as unstructured professional judgment, in which the assessor relies on their professional training and information gathered from the offender, official records or other sources to inform their evaluation of risk for recidivism. It is "unstructured" insofar as there is no set checklist or protocol for completing the risk assessment, though assessors may indeed complete structured interviews during the risk assessment process. This method of assessment was widely accepted for decades prior to the development of structured risk assessment tools in the 1970s. Today, it is less frequently used, but nonetheless remains a prominent risk assessment strategy, despite evidence that accuracy of unstructured assessments risk are less accurate than chance.

Second Generation

Following decades of research focused on identifying factors that increase risk of recidivism, second generation tools represent a drastic advance in risk assessment technology. Second tools are actuarial in nature and comprised primarily of historical and static factors (e.g., sex, age and criminal history). Rather than subjective judgments of recidivism risk, instruments such as the Salient Factor Score (SFS) and Violent Risk Appraisal Guide (VRAG) instead guide assessors to consider a set list of risk factors to arrive at a numerical risk of recidivism. Actuarial instruments are described more fully in the following section.

Third Generation

The third generation of risk assessment is characterized by the development of tools that include dynamic factors and criminogenic needs, and may use an actuarial or structured professional judgment approach. Third generation tools, such as the Level of Service Inventory-Revised (LSI-R), the Self-Appraisal Questionnaire (SAQ), and the Historical-Clinical-Risk Management-20 (HCR-20), still guide assessors to consider static factors; however, by including potentially dynamic items, such as attitude and substance use, they may be sensitive to change in risk levels over time and can assist in identification of treatment targets. These tools are sometimes referred to as "risk-need" instruments and, unlike second generation assessments, tend to be theoretically- and empirically-based as opposed to wholly data driven.

Fourth Generation

Most recently, fourth generation risk assessments explicitly integrate case planning and risk management into the assessment process. As such, the primary goal of the fourth generation extends beyond assessing risk and focuses on enhancing treatment and supervision. Examples of fourth generation tools include the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), Ohio Risk Assessment System (ORAS), and Wisconsin Risk and Needs tool (WRN). Like the third generation, this generation of risk assessment instruments allows for the role of professional judgment while remaining grounded in research and theory.

Structured Approaches to Conducting Risk Assessments

There are two broad categories that distinguish between the structured approaches used to conduct risk assessment in the second, third and fourth generations: actuarial and structured professional judgment. We briefly review the strengths and limitations of each below.

Actuarial Risk Assessment

The actuarial approach represents a mechanical model of risk assessment, largely focused on historical or unchanging risk factors. When an actuarial instrument is used to assess risk, an offender is scored on a series of items that were most strongly associated with recidivism in the development sample. The offender's total score is cross-referenced with an actuarial table that translates the score into an estimate of risk over a specified timeframe (e.g., 10 years). This estimate represents the percentage of participants in the instrument's development study who received that score and recidivated. For example, if an offender receives a score of +5 on an instrument which is translated into a risk estimate of 60% over 10 years, this means that 60% of those individuals who received a score of +5 in the instrument's original study went on to recidivate within that time. This does not mean that the offender has a 60% chance of recidivating over a period of 10 years. This is an important distinction that is frequently overlooked in practice.

Strengths of the actuarial approach include:

- *Objectivity.* No human judgment is involved in estimating risk once items have been rated. Items are typically straightforward and easy to rate (e.g., age, sex, number of prior offenses).
- *Accuracy.* Actuarial assessments are more accurate than unstructured assessments.
- *Transparency.* Information used to inform risk estimates is explicitly included in the instrument. Items are weighted in a pre-determined manner to compute total scores and estimate risk.
- *Speed.* Items included in actuarial instruments can usually be scored using information available in official records.

Drawbacks include the application of group-based statistics and norms to individual offenders. Beyond potential statistical issues (see Hart, Michie & Cooke, 2007), this is a concern because we do not know where any given offender falls within a risk bin. Using the same example provided earlier, if 60% of the individuals who received a score of +5 recidivated over a 10-year period, then 40% did not. Actuarial assessments cannot help distinguish whether an offender receiving a score of +5 is among the 60% or 40%. Additionally, with invariant item content comes the potential exclusion of case specific factors that do not systematically increase (or decrease) recidivism risk across the population but are relevant to a particular offender's level of risk. Finally, actuarial assessments speak to level of risk and may inform decisions regarding risk classification and allocation of resources. However, their utility in guiding the development and implementation of individualized risk reduction and rehabilitation plans is limited due to their focus largely on historical or unchangeable factors that cannot be addressed in treatment.

Structured Professional Judgment

In contrast to the mechanistic, actuarial approach, the structured professional judgment approach focuses on creating individualized and coherent risk formulations and comprehensive risk management plans. These instruments act as *aide-mémoires,* guiding assessors to estimate risk level (e.g., low, moderate or high) through consideration of a set number of factors that are empirically and theoretically associated with the outcome of interest. Although offenders are scored on individual items, total scores are not used to make the final judgments of risk. Instead, assessors consider the relevance of each item to the individual offender, as well as whether there are any case specific factors not explicitly included in the list.

Strengths of the structured professional judgment approach include:

- *Professional discretion.* Assessors consider the relevance of factors to the individual offender to inform final estimates of each. Case specific factors also can be taken into consideration.
- *Accuracy.* Structured professional judgment assessments are more accurate than unstructured assessments (and comparable in accuracy to actuarial assessments).

- *Transparency*. Assessors rate a known list of factors according to specific guidelines. Additional items considered are added to the assessment form.
- *Risk communication and reduction*. Risk formulations provide information regarding the anticipated series of stressors and events that lead to the adverse outcome and over what period time, which can inform risk management strategies and identify treatment targets.

Drawbacks include the potential re-introduction of decision-making biases in the final risk judgments. Structured professional judgment instruments also take comparatively longer to administer than actuarial assessments; item ratings often are more nuanced and information might not be readily available on file to code all items. That said, recent reviews show that actuarial and structured professional judgment instruments produce assessments with commensurate rates of validity in predicting recidivism (Fazel, Singh, Doll & Grann, 2012).

Types of Items and Content Domains

Risk assessment instruments include items that represent characteristics of the offender (e.g., physical health, mental health, attitudes), his or her physical and/or social environment (e.g., neighborhood, family, peers) or circumstances (e.g., living situation, employment status) that are associated with the likelihood of offending. *Risk factors* are those characteristics that increase risk of offending, whereas *protective factors* are those that reduce risk. Inclusion of protective factors is risk assessment instruments—designed to assess recidivism risk or otherwise—is relatively rare; however, there is mounting evidence that they contribute unique information and improve predictive validity above and beyond consideration risk factors (e.g., Desmarais, Nicholls, Wilson, & Brink, 2012).

Most frequently, recidivism risk assessment instruments focus on biological, psychological and social characteristics; however, more macro-level factors—such as service, system and societal variables—also may affect risk, but are rarely included in recidivism risk assessment instruments.

In a relatively recent review of the literature, Andrews, Bonta and Wormith (2006) identified a shortlist of the most "powerful" risk factors for recidivism across offenders and situations. These include:

1. History of antisocial behavior
2. Antisocial personality pattern
3. Antisocial cognition
4. Antisocial associates
5. Family and/or marital problems
6. School and/or work problems
7. Leisure and/or recreation problems
8. Substance abuse

These "Central Eight" have been widely accepted as the most important domains to be assessed and targeted in risk assessment and management efforts.

Finally, risk and protective factors can either be static or dynamic in nature. *Static factors* are historical or otherwise unchangeable characteristics (e.g., history of antisocial behavior) that help establish absolute level of risk. In contrast, *dynamic factors* are changeable characteristics (e.g., substance abuse) that establish a relative level of risk and help inform intervention; they can be either relatively *stable*, changing relatively slowly over time (e.g., antisocial cognition) or *acute* (e.g., mood state) (Hanson & Harris, 2000). Research shows that dynamic factors add incrementally to the predictive validity of static factors and that the former may be more relevant to short-term outcomes and rehabilitation efforts (Wilson, Desmarais, Nicholls, Hart, & Brink, in press), whereas the latter to longer term outcomes and risk classification (Hart, Webster, & Douglas, 2001). Thus, there are important benefits to considering both static and dynamic factors in assessing recidivism risk.

Focus of the Present Review

In this review, we summarize the research conducted in the U.S. examining the performance of instruments designed to assess risk of recidivism among adult offenders, including new offenses and violation of conditions. We focus specifically on performance of tools validated and currently used in correctional settings in the United States.[1] By identifying those instruments that produce the most consistent and accurate assessments, decision makers may be able to make more informed choices regarding which measure(s) to implement and how they should invest financial and staff resources.

[1] For meta-analytic reviews of instruments used in other jurisdictions and research outside the United States see Fazel et al., 2012; Gendreau, Goggin, & Little, 1996; Smith, Cullen, & Latessa, 2009).

METHODS OF THE CURRENT REVIEW

Search Criteria and Process

Identifying Risk Assessment Instruments Used in Correctional Settings in the U.S.

Instruments designed to assess risk of recidivism were identified by searching academic research databases (PsycINFO and the U.S. National Criminal Justice Reference Service Abstracts) and Google using combinations of the following keywords: *risk assessment, instrument, tool, general, recidivism, offending, probation revocation, parole violation,* and *prediction.* We identified additional instruments by looking through the reference lists of recent publications and through discussion with colleagues.

We identified instruments designed to assess risk of recidivism by searching academic research databases and the Google search engine. We identified additional instruments by looking through the reference lists of recent publications and through discussion with colleagues. Criteria for instruments to be included in the review were: a) designed to assess the likelihood of general recidivism (i.e., new offenses and violation of conditions); b) intended for assessing adult offenders (18 years of age and older); c) currently or recently used in correctional settings in the United States; and d) validated in the United States.

Instruments were excluded from our review if they: a) were designed to assess the likelihood of specific offenses (e.g., sexual offenses, violent offenses, spousal assault); b) were intended for assessing juvenile offenders (less than 18 years of age); c) were not used in correctional settings in the United States; d) had not been validated in the United States; or e) were developed for use in a specific institution or ward.

We also excluded violence risk assessment instruments (e.g., Historical, Clinical, Risk Management-20, Violence Risk Appraisal Guide), clinical inventories (e.g., Beck Depression Inventory, Novaco Anger Scale), personality assessments (e.g., Psychopathy Checklist-Revised, Personality Assessment Inventory), and criminal thinking scales (e.g., TCU Criminal Thinking Scales, Psychological Inventory of Criminal Thinking) from our formal review. These instruments were not designed to assess risk for general offending *per se*; however, they frequently are used for that purpose in correctional settings in the U.S. Thus, we briefly review their validity in predicting general offending later in this report.

Using these inclusion and exclusion criteria, we identified 19 instruments:

1. Community Risk/Needs Management Scale (CRNMS)
2. Correctional Assessment and Intervention System (CAIS)
3. Correctional Offender Management Profile for Alternative Sanctions (COMPAS)
4. Dynamic Factors Intake Assessment (DFIA)
5. Inventory of Offender Risks, Needs, and Strengths (IORNS)

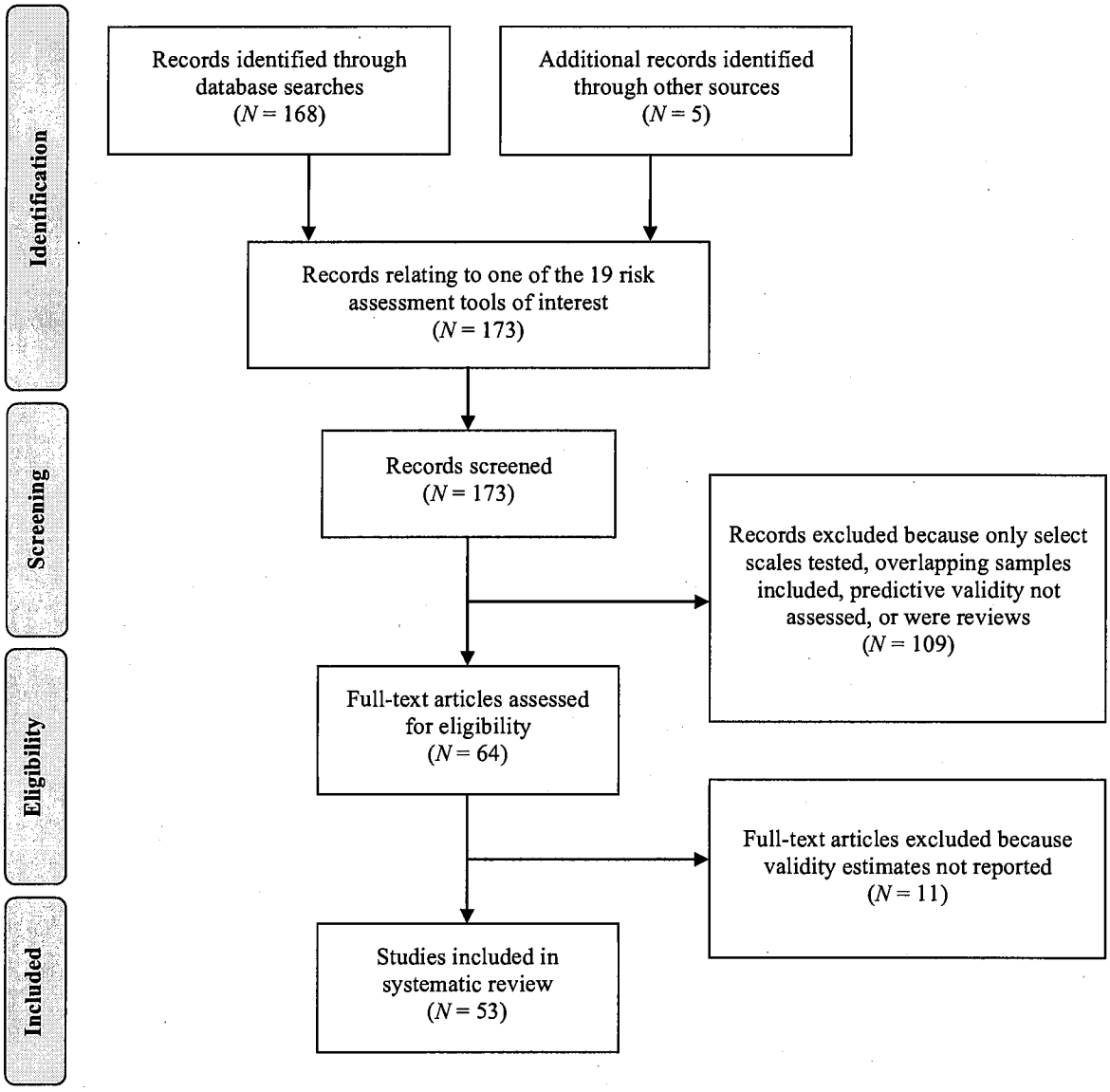
6. Level of Service instruments, including Level of Service/Case Management Inventory (LS/CMI), Level of Service/Risk, Need, Responsivity (LS/RNR), Level of Service Inventory (LSI), Level of Service Inventory-Revised (LSI-R), and Level of Service Inventory-Revised: Screening Version (LSI-R:SV)
7. Offender Assessment System (OASys)
8. Offender Group Reconviction Scale (OGRS)
9. Ohio Risk Assessment System, including the Ohio Risk Assessment System-Pretrial Assessment Tool (ORAS-PAT), Ohio Risk Assessment System-Community Supervision Tool (ORAS-CST), Ohio Risk Assessment System-Community Supervision Screening Tool (ORAS- CSST), Ohio Risk Assessment System-Prison Intake Tool (ORAS-PIT), and Ohio Risk Assessment System-Reentry Tool (ORAS-RT)
10. Federal Post Conviction Risk Assessment (PCRA)
11. Recidivism Risk Assessment Scales (RISc)
12. Risk Management System (RMS)
13. Risk of Reconviction (ROC)
14. Statistical Information of Recidivism Scale (SIR)
15. Salient Factor Score instruments, including the Salient Factor Score-1974 Version (SFS74), Salient Factor Score-1976 Version (SFS76), and Salient Factor Score-1998 Version (SFS98)
16. Self-Appraisal Questionnaire (SAQ)
17. Service Planning Instrument (SPIn) and Service Planning Instrument-Women (SPIn-W)
18. Static Risk and Offender Needs Guide (STRONG)
19. Wisconsin Risk and Needs (WRN) and Wisconsin Risk and Needs-Revised (WRN-R)

We also identified 47 instruments designed for use in specific jurisdictions. Detailed review is beyond the scope of the current report, but these instruments are listed in Appendix A.

Identifying Predictive Validity Studies

Studies investigating the predictive validity of the 19 above instruments were identified using the same databases, search engine and secondary sources as above, using both the acronyms and full names of the instruments as search criteria. We searched for studies published between 1970 and 2012 in peer-reviewed journals, as well as government reports, doctoral dissertations, and Master's theses. Studies were included in our review if their titles, abstracts, or methods sections described evaluations of validity in predicting general offending (including the violation of probation or parole conditions) conducted in the U.S. Studies were excluded if they only included some items or scales of an instrument. Using this search strategy, an initial total of 173 records was filtered to a final count of 53 studies (k samples = 72), including 26 journal articles (k = 30), 16 government reports (k = 31), nine doctoral dissertations (k = 9), and two Master's theses (k = 2). This systematic search process is visually depicted in the figure on the following page. A full list of the included studies is available from the authors upon request.

Systematic Search Conducted to Identify U.S. Predictive Validity Studies



Evaluation Criteria and Process

Three research assistants collected information about the characteristics of the risk assessment instruments (approach, number of items, types of items, domains measured, intended population and outcome) and studies (geographic location, context, design, population, sample size, sex, race/ethnicity, age, diagnostic composition, outcome, length of follow-up), as well as characteristics of the assessment process (setting, timing, format, assessor, sources of information, time needed to administer and score) from the included studies. They recorded information on inter-rater reliability and predictive validity, overall and by offender sex, race/ethnicity, study context, and recidivism outcome, where possible.

To evaluate performance, we computed the median performance indicators reported across studies for inter-rater reliability and predictive validity. For inter-rater reliability, we used the criteria presented in Table 1 to determine the practical significance of the median indicators.

Table 1. Criteria Used to Determine Practical Significance of Aggregate Inter-Rater Reliability Findings

INTER-RATER RELIABILITY	PERFORMANCE INDICATOR		
	Kappa (κ)	Intra-class Correlation Coefficient (ICC)	Observed Agreement (%)
Poor	.00 – .40	.00 – .40	< 70
Fair	.40 – .59	.40 – .59	70 – 79
Good	.60 – .74	.60 – .74	80 – 89
Excellent	.75 – 1.00	.75 – 1.00	90 – 100

Note. Table adapted from Cicchetti (2001, p. 697).

We also computed the median performance indicators for predictive validity. We used the criteria presented in Table 2 to determine the practical significance.

Table 2. Criteria Used to Determine Practical Significance of Aggregate Predictive Validity Findings

PREDICTIVE VALIDITY	PERFORMANCE INDICATOR				
	Cohen's *d*	Correlation (r_{pb})	Area Under the Curve (AUC)	Odds Ratio (OR)	Somer's *d*
Poor	< .20	< .10	< .55	< 1.50	< .10
Fair	.20 – .49	.10 – .23	.55 – .63	1.50 – 2.99	.10 – .19
Good	.50 – .79	.24 – .36	.64 – .71	3.00 – 4.99	.20 – .29
Excellent	≥ .80	.37 – 1.00	.71 – 1.00	≥ 5.00	.30 – 1.00

Notes. Criteria were anchored to Cohen's *d* (1988) and based upon the calculations of Rice and Harris (2005) for AUC values, and Chen, Cohen, and Chen (2010) for the odds ratios. Somer's *d* values, as well as those for other performance indicators reported less frequently, also were interpreted in relation to Cohen's *d*.

In following sections of this report, we first summarize findings across instruments and then present findings of this review by instrument, respectively. We report only the interpretations of the practical significance of the performance indicators for both inter-rater reliability and predictive validity, but detailed statistical results are available upon request. We did not find any studies investigating the predictive validity of the CAIS, CRNMS, DFIA, LS/CMI, LS/RNR, LSI, OGRS, OASys, RISc, ROC, SFS98, SIR, or SPIn that met our inclusion criteria.

For a glossary of terms used in this report, including a brief explanation of the performance indicators included in Tables 1 and 2, see Appendix B.

SUMMARY OF FINDINGS ACROSS INSTRUMENTS

Characteristics of the Risk Assessment Instruments

Table 3 summarizes the characteristics of the risk assessment instruments. The number of items ranged from four for the ORAS-CSST to 130 for the IORNS. All instruments were intended for use across offender populations, with the exception of the SFS74, SFS76 and SFS81. Most were intended to be used to assess risk of new offenses, excluding violations). Of the nine instruments for which estimates were provided in the manual, length ranged from 5-10 minutes for the ORAS-CSST up to 60 minutes for the COMPAS. All were actuarial instruments.

Table 3. Characteristics of Risk Assessment Instruments

INSTRUMENTS	CHARACTERISTICS					
	k	Items	Generation	Intended Population(s)	Intended Outcome(s)	Time (minutes)
COMPAS	3	70	4th	Any Offender	Offenses & Violations	10-60
IORNS	1	130	3rd	Any Offender	Offenses & Violations	15-20
LSI-R	25	54	3rd	Any Offender	Offenses & Violations	30-40
LSI-R:SV	2	8	3rd	Any Offender	Offenses & Violations	10-15
ORAS-PAT	3	7	4th	Any Offender	Offenses	10-15
ORAS-CST	1	35	4th	Any Offender	Offenses	30-45
ORAS-CSST	1	4	4th	Any Offender	Offenses	5-10
ORAS-PIT	1	31	4th	Any Offender	Offenses	Unknown
ORAS-RT	1	20	4th	Any Offender	Offenses	Unknown
PCRA	2	30	4th	Any Offender	Offenses & Violations	15-30
RMS	2	65	4th*	Any Offender	Offenses	Unknown
SAQ	2	72	3rd	Any Offender	Offenses	15
SFS74	3	9	2nd	Parolees	Offenses	Unknown
SFS76	4	7	2nd	Parolees	Offenses	Unknown
SFS81	8	6	2nd	Parolees	Offenses	Unknown
SPIn-W	2	100	4th	Any Offender	Offenses	Unknown
STRONG[a]	1	26	4th	Any Offender	Offenses	Unknown
WRN	9	53	4th	Any Offender	Offenses	Unknown
WRN-R	1	52	4th	Any Offender	Offenses	Unknown

Notes. k = number of samples; Offenses = new arrest, charge, conviction, or incarceration; Violations = violations of conditions of supervision. [a]The STRONG includes three parts; table values reflect only the first part, which is the component used to assess risk of recidivism. *The authors of the RMS describe it as being a 5th generation risk assessment instrument due to its exemplar-based approach.

Table 4 summarizes the types of factors included in the instruments. Only two instruments, the IORNS and the SPIn-W, include protective factors; all others include risk factors exclusively. The majority include static and dynamic factors, with the exception of the SFS instruments and the STRONG, both of which only include static factors. None only include only dynamic factors.

Table 4. Types of Items Included in the Risk Assessment Instruments

	TYPES OF ITEMS			
INSTRUMENTS	**Risk**	**Protective**	**Static**	**Dynamic**
COMPAS	X		X	X
IORNS	X	X	X	X
LSI-R	X		X	X
LSI-R:SV	X		X	X
ORAS-PAT	X		X	X
ORAS-CST	X		X	X
ORAS-CSST	X		X	X
ORAS-PIT	X		X	X
ORAS-RT	X		X	X
PCRA	X		X	X
RMS	X		X	X
SAQ	X		X	X
SFS74	X		X	
SFS76	X		X	
SFS81	X		X	
SPIn-W	X	X	X	X
STRONG[a]	X		X	
WRN	X		X	X
WRN-R	X		X	X

Note. [a]The STRONG includes three parts; table values reflect only the first part, which is the component used to assess risk of recidivism.

Table 5 summarizes the content domains considered in the risk assessment instruments. All instruments include items assessing history of antisocial behavior and substance use problems. Slightly more than half of the instruments have items assessing mental health problems. Nine instruments include items assessing personality problems. Roughly two-thirds of the instruments consider attitudes, and similar proportions consider the influence of peers and relationships. The COMPAS and the LSI-R consider the most content domains. The ORAS-CST, ORAS-PIT, RMS, and SPIn-W evaluate all but one of the domains included in Table 5; the exception varied for each instrument. The SFS81 and STRONG instruments considered the fewest domains.

Table 5. Content Domains Assessed across the Risk Assessment Instruments

	ITEM CONTENT DOMAINS									
INSTRUMENTS	**Attitudes**	**Associates/ Peers**	**History of Antisocial Behavior**	**Personality Problems**	**Relationships**	**Work/ School**	**Recreation/ Leisure Activities**	**Substance Use Problems**	**Mental Health Problems**	**Housing Status**
COMPAS	X	X	X	X	X	X	X	X	X	X
IORNS	X	X	X	X	X	X		X	X	
LSI-R	X	X	X	X	X	X	X	X	X	X
LSI-R:SV	X	X	X		X	X		X	X	
ORAS-PAT			X			X		X		X
ORAS-CST	X	X	X	X	X	X	X	X		X
ORAS-CSST		X	X			X		X		
ORAS-PIT		X	X	X	X	X	X	X	X	X
ORAS-RT	X		X	X	X	X		X	X	
PCRA	X	X	X		X	X		X		
RMS	X	X	X	X	X	X		X	X	X
SAQ	X	X	X	X				X		
SFS74			X			X		X		X
SFS76			X			X		X		
SFS81			X					X		
SPIn-W	X	X	X		X	X	X	X	X	X
STRONG			X					X		
WRN	X	X	X		X	X		X	X	
WRN-R	X	X	X		X	X		X	X	

Note. [a]The STRONG includes three parts; table values reflect only the first part, which is the component used to assess risk of recidivism.

Study Characteristics

Population and Sample Characteristics

More than a third of samples (40%) comprised inmates and roughly a quarter (22%), probationers. The remainder included at either parolees only (11%) or inmates and parolees (7%) or probationers and parolees (11%). Legal status was not reported in six samples (8%).

Studies generally provided few details regarding sample characteristics. Below we summarize findings regarding size, age, sex, race/ethnicity and mental health, when reported.

Sample size. The average sample size after attrition was 5,032.

Age. The average offender age at the time of risk assessment was 33.5 years.

Sex. In samples where sex was reported, the vast majority of offenders (86%) were male.

Race/ethnicity. In samples where race/ethnicity was reported, almost two-thirds (61%) were White and close to one-third (29%) were Black, with 14% identified as Hispanic. It is important to note that racial/ethnic categories were not consistent across studies. For instance, in some cases, authors reported the proportion of offenders identified as White, Black, or Hispanic (Farabee et al., 2010), while others reported prevalence of Hispanic and non-Hispanic offenders (Tillyer & Vose, 2011).

Mental health. Mental health characteristics were rarely reported. Only five studies--one evaluating the SFS74, one evaluating the SFS81, two evaluating the SPIn-W and one evaluating the WRN--described prevalence of major mental disorder (MMD), substance use disorder (SUD), or personality disorder. All offenders in the Howard (2007) study of the SFS81 were diagnosed with an MMD; slightly under half (46%) an SUD, and 11% had a personality disorder. This was the only study reporting prevalence of personality disorders. In one study of the SPIn-W all offenders had an SUD and three-quarters, a MMD (Meadon, 2012), whereas in the other study of the SPIn-W, just over half (53%) had a MMD (Millson et al., 2010). Only the WRN study reported prevalence by diagnosis. Bipolar disorder was the most prevalent MMD (36%) and schizophrenia, the least (16%), and alcohol abuse was the most prevalent SUD (48%) and amphetamines, the least (13%) (Castillo & Alardi, 2011). Finally, in the SFS74 study (Robuck, 1976), just under half of the sample (47%) suffered from alcohol abuse and 15%, illicit drug use.

Assessment Process

Table 6 shows the characteristics of the assessment process used in the studies. Risk assessments were complete by professionals in forensic services for over three-quarters of the studies (82%); the remaining assessments were conducted by the researchers (15%) or, in two studies, were self-administered. These assessments most often took place in a prison (28%) or in the community (38%), but at times were administered in jail (10%), a clinic or hospital (4%), or at another facility (6%). In terms of timing, roughly one third of assessments (36%) were conducted during community supervision, a quarter were completed pre-release (26%), and the remainder were conducted either prior to incarceration (11%) or at admission (10%). The source of information

used to complete the assessments were file reviews in 24 samples (33%), interviews in 12 samples (17%), and offender self-report in two samples (3%).

Table 6. Characteristics of the Assessment Process Used in Studies Included in this Review

CHARACTERISTICS	NUMBER OF SAMPLES *k (%)*
Assessor	
Researcher	11 (15.3)
Professional	59 (81.9)[a]
Offender (self-report)	2 (2.8)[b]
Assessment Setting	
Jail	7 (9.7)
Prison	20 (27.8)
Clinic/Hospital	3 (4.2)
Community	27 (37.5)
Other	4 (5.6)
Unstated/Unclear	11 (15.3)
Timing of Assessment	
Prior to incarceration	8 (11.1)
At admission	7 (9.7)
Prior to release	19 (26.4)
During community supervision	26 (36.1)
Unstated/Unclear	13 (18.1)
Source(s) of Information	
File review	24 (33.3)
Interview	12 (16.7)
Self-report	2 (2.8)
Mixed	18 (25.0)
Unstated/Unclear	16 (22.2)

Notes. Overall $k = 72$ samples. [a]Correctional officer ($k = 35$, 48.6%), parole officer ($k = 2$, 2.8%), probation officer ($k = 1$, 1.4%), other trained staff ($k = 14$, 19.4%), unstated/unclear ($k = 7$, 9.7%). [b]The SAQ, designed to be self-administered, was the only tool not administered by a researcher or professional.

Administration time was reported for only five instruments in a total of nine studies. For the LSI-R administration time ranged from 30 to 60 minutes for assessments conducted in the context of 'real world' practice (Holsinger et al., 2004; Lowenkamp et al., 2009), and 45 to 90 minutes in research studies (Evans, 2009; Latessa et al., 2009). The LSI-R:SV was reported to have a mean administration time of 10 minutes when completed in practice (Miller, 2006). In the same study, the IORNS required 15 minutes to complete; however, this estimate included only the interview portion of the assessment. Across three studies, administration time for the COMPAS varied

from 43 to 165 minutes (Brennan et al., 2009; Farabee et al., 2010; Farabee & Zhang, 2007). In the study evaluating SAQ assessments, assessments were reported to take approximately 20 minutes (Mitchell & McKenzie, 2006).

Study Designs and Procedures

More than two-thirds of studies (70%) used a prospective study design, an optimal approach for examining predictive validity, and the average length of follow-up was almost two years (23.5 months). Studies were most frequently conducted in midwestern states (38%) followed by the southwestern and northeastern (11% each) regions of the U.S.

Close to 70% of the studies examined general recidivism as the outcome; roughly a quarter (26%) considered a variety of outcomes, and the remainder (18%) focused specifically on violations. As a result, our knowledge of the validity of recidivism risk assessment instruments in predicting violations as opposed to other forms of recidivism is limited. The threshold for recidivism varied across studies, but arrest was used as an indicator in close to a third of studies (31%), followed in order by conviction (13%), incarceration (10%), revocations (4%), and charge (3%). Finally, assessments for the majority of samples (65%) were conducted in the context of 'real world' practice rather than for the purposes of research.

Nearly a third of the studies included in our review (31%, $k = 22$) were conducted by the author of the tool being studied. In fact, for many instruments, all of the studies included in our review were completed by the same people who developed the instrument under investigation. This was true for the IORNS (Miller, 2006), the PCRA (Johnson et al., 2011), the ORAS instruments (Latessa et al., 2008, 2009), the STRONG (Barnoski & Drake, 2007), and the WRN-R (Eisenberg et al., 2009). The authors of the RMS conducted one of two studies evaluating predictive validity of RMS assessments (Dow et al., 2005), and the authors of the COMPAS conducted one of three samples evaluating COMPAS assessments (Brennan et al., 2009). The authors of the SFS74, SFS76, and SFS81 evaluated two of three samples for the SFS74 (Hoffman & Beck, 1974), two of four for the SFS76 (Hoffman, 1980; Hoffman & Beck, 1980), and four of eight for the SFS81 (Hoffman, 1983, 1994; Hoffman & Beck, 1985).

Table 7. Design Characteristics and Procedures of Studies Included in this Review

CHARACTERISTICS	NUMBER OF SAMPLES *k (%)*
Study Context	
Research	25 (34.7)
Practice	47 (65.3)
Temporal Design	
Prospective	50 (69.4)
Retrospective	22 (30.6)
Geographical Region	
Northwest	2 (2.8)
Southwest	8 (11.1)
Midwest	27 (37.5)
Northeast	8 (11.1)
Southeast	5 (6.9)
Non-continental	1 (1.4)
Mixture	1 (1.4)
Unstated/Unclear	20 (27.8)
Type of Outcome	
General recidivism	50 (69.4)
Violation/Breach of conditions	13 (18.1)
Mixed	19 (26.4)
Threshold for Recidivism	
Arrest	22 (30.6)
Charge	2 (2.8)
Conviction	9 (12.5)
Incarceration	7 (9.7)
Revocation	3 (4.2)
Mixed	29 (40.3)

Note. k = number of samples

Inter-Rater Reliability

Inter-rater reliability was evaluated in only two studies, one examining the LSI-R and the other, the LSI-R:SV. In both cases, inter-rater reliability was excellent. Assessments were conducted by professionals rather than research assistants, providing evidence of *field* reliability, specifically.

Predictive Validity

Overall

Table 8 presents the practical significance of predictive validity performance indicators across studies. Overall, and consistent with prior research reviews, no one instrument stands out as producing more accurate instruments than the others, with validity varying with the indicator reported. Odds ratios generally suggested poor performance for the majority of instruments, with only one instrument (the SFS81) demonstrating good predictive validity. In contrast, Somer's *d* values ranged from good to excellent. AUCs and point-biserial correlations each ranged from fair to excellent across instruments. Below, we describe predictive validity by instrument.

COMPAS. The predictive validity of COMPAS assessments ranged from poor to good, as a function of performance indicator; more studies used the AUC and, thus, reported good validity.

LSI instruments. LSI-R assessments were evaluated in the most samples. Predictive validity was good across studies and indicators, with the exception of odds ratios. Validity of LSI-R:SV assessments ranged from fair to good.

ORAS instruments. Across instruments and studies, ORAS assessments demonstrated excellent point-biserial values. No other performance indicators were reported.

PCRA. PCRA assessments were evaluated in only two samples, with AUC values suggesting excellent predictive validity in both. No other performance indicators were reported.

RMS. In three samples, RMS assessments showed good performance according to the AUC values. No other performance indicators were reported.

SFS instruments. SFS74, SFS76, and SFS81 assessments showed predictive validity ranging from good to excellent, with the SFS81 outperforming the previous versions.

SPIn-W. SPIn-W assessments showed good performance according to the AUC but poor performance according to the odds ratio.

STRONG. In one study, predictive validity of STRONG assessments was excellent according to the AUC. No other performance indicators were reported.

WRN instruments. Predictive validity for WRN and WRN-R assessments ranged from poor to good, depending on the performance indicator used.

No studies reported predictive validity of IORNS or SAQ assessments using these indicators.

Table 8. Summary of Predictive Validity Findings by Performance Indicator across Studies

INSTRUMENT	MEDIAN PERFORMANCE INDICATOR							
	k	AUC	*K*	r_{pb}	*k*	OR	*k*	Somer's *d*
COMPAS	3	Good	1	Fair	1	Poor	–	–
LSI-R	5	Good	21	Good	6	Poor	2	Good
LSI-R:SV	1	Fair	1	Good	–	–	–	–
ORAS-PAT	–	–	5	Good	–	–	–	–
ORAS-CST	–	–	1	Excellent	–	–	–	–
ORAS-CSST	–	–	1	Excellent	–	–	–	–
ORAS-PIT	–	–	1	Excellent	–	–	–	–
ORAS-RT	–	–	1	Excellent	–	–	–	–
PCRA	2	Excellent	–	–	–	–	–	–
RMS	3	Good	–	–	–	–	–	–
SFS74	–	–	–	–	–	–	2	Good
SFS76	–	–	1	Excellent	–	–	2	Good
SFS81	–	–	4	Excellent	2	Good	5	Excellent
SPIn-W	1	Excellent	–	–	1	Poor	–	–
STRONG	1	Excellent	–	–	–	–	–	–
WRN	3	Good	6	Fair	1	Poor	–	–
WRN-R	1	Good	–	–	–	–	–	–

Notes. *k* = number of samples; AUC = area under the receiver operating characteristic curve; r_{pb} = point-biserial correlation coefficient; OR = odds ratio. Medians were calculated using either total scores or risk bins. There were no studies reporting predictive validity of the IORNS or SAQ using these performance indicators.

Validity of Total Scores in Predicting Different Forms of Recidivism

Table 9 presents the validity of total scores in predicting different forms of recidivism. For general offending *including* violations, predictive validity ranged from poor for SPIn-W assessments to excellent for SFS76 and SFS81 assessments. For general offending *excluding* violations, total scores for over two-thirds of instruments had either good or excellent predictive validity. Specifically, predictive validity ranged from fair for ORAS-PAT assessments to excellent for the ORAS-CST, ORAS-CSST, PCRA, and STRONG assessments. For *violations*, predictive validity ranged from fair COMPAS assessments to excellent WRN assessments. Below, we describe predictive validity by instrument.

COMPAS. The COMPAS total scores demonstrated good validity in predicting general offending *excluding* violations, but was only fair for violations only.

LSI instruments. LSI-R total scores showed good predictive validity for both general offending *including* violations and violations only, and ranged from fair to good validity in general offending *excluding* violations.

ORAS instruments. With the exception of the ORAS-PAT, the total scores on the ORAS instruments all demonstrated predictive validity ranging from good to excellent for general offending *excluding* violations. ORAS-PAT total scores, however, were only fair at predicting general offending outcomes, though predictive validity was good for violations only.

RMS. RMS total scores demonstrated good validity in predicting general offending *excluding* violations, as well as violations only.

SFS instruments. SFS76 and SFS81 total scores showed excellent validity in predicting general offending *including* violations. No studies reported predictive validity of SFS74 total scores by outcome.

SPIn-W. SPIn-W total scores had poor validity in predicting general offending *including* violations.

STRONG. STRONG total scores demonstrated excellent validity in predicting general offending *excluding* violations.

WRN instruments. WRN total scores ranged from fair to good in their ability to predict general offending excluding violations. Predictive validity was excellent for violations only. WRN-R total scores showed good validity in predicting general offending *excluding* violations.

Overall, total scores of SFS76 and SFS81 total scores stood out as excellent predictors of general offending *including* violations. Total scores on the ORAS-CST, ORAS-CSST, PCRA, and STRONG were excellent predictors of general offending *excluding* violations. WRN total scores stood alone as excellent in predicting violations only. It is important to note, however, the small number of studies examining these outcomes; SFS76, ORAS-CST, ORAS-CSST, STRONG, and WRN assessments were evaluated in only one sample, compared to the 26 samples evaluating LSI-R assessments.

Table 9. Validity of Total Scores in Predicting Different Forms of Recidivism

INSTRUMENTS	OUTCOMES					
	k	General Offending (including Violations)	*k*	General Offending (excluding Violations)	*k*	Violations Only
COMPAS	–	–	5	Good	1	Fair
LSI-R	3	Good	26	Fair-Good	7	Good
LSI-R:SV	–	–	2	Fair-Good	–	–
ORAS-PAT	1	Fair	2	Fair	2	Good
ORAS-CST	–	–	1	Excellent	–	–
ORAS-CSST	–	–	1	Excellent	–	–
ORAS-PIT	–	–	1	Good	–	–
ORAS-RT	–	–	1	Good	–	–
PCRA	–	–	2	Excellent	–	–
RMS	–	–	1	Good	1	Good
SFS74	–	–	–	–	–	–
SFS76	1	Excellent	–	–	–	–
SFS81	6	Excellent	–	–	–	–
SPIn-W	1	Poor	–	–	–	–
STRONG	–	–	1	Excellent	–	–
WRN	–	–	8	Fair-Good	1	Excellent
WRN-R	–	–	1	Good	–	–

Notes. k = number of samples. General Offending = new arrest, charge, conviction, or incarceration; Violations = violations of conditions of supervision.

Predictive Validity of Risk Classifications

Table 10 presents the validity of risk classifications in predicting different forms of recidivism. Validity of risk classifications in predicting general offending *including* violations was excellent for SFS74, SFS76, and SPIn-W assessments. For general offending *excluding* violations, the predictive validity was fair for WRN assessments and excellent for RMS and SFS81 assessments. Validity of SFS risk classifications in predicting general offending *including* violations also was excellent.

No U.S. studies examined the predictive validity of risk classifications for violations alone. There also were no U.S. studies reporting predictive validity of the risk classifications for the COMPAS, IORNS, LSI-R, LSI-R:SV, ORAS-PAT, ORAS-CST, ORAS-CSST, ORAS-PIT, ORAS-RT, PCRA, SAQ, STRONG, or WRN-R for any of the recidivism outcomes.

Table 10. Validity of Risk Classifications in Predicting Different Forms of Recidivism

INSTRUMENTS	OUTCOMES			
	k	General Offending (including Violations)	*k*	General Offending (excluding Violations)
RMS	–	–	1	Excellent
SFS74	2	Excellent	–	–
SFS76	2	Excellent	–	–
SFS81	4	Excellent	1	Excellent
SPIn-W	1	Excellent	–	–
WRN	–	–	1	Fair

Notes. *k* = number of samples. There were no studies that reported the predictive validity of the risk classifications for the COMPAS, IORNS, LSI-R, LSI-R:SV, ORAS-PAT, ORAS-CST, ORAS-CSST, ORAS-PIT, ORAS-RT, PCRA, SAQ, STRONG, or WRN-R using these performance indicators. The risk bins used to classify offenders were those recommended by instrument authors.

Predictive Validity across Offender Subgroups

Sex. Table 11 presents the validity of total scores in predicting recidivism by the offender's sex. Overall, predictive validity ranged from fair to excellent for both male and female offenders. Some instruments performed equally well for male and female offenders; for instance, COMPAS assessments demonstrated good predictive validity for both sexes. STRONG assessments also demonstrated excellent validity for both male and female offenders. Finally, predictive validity for the ORAS instrument for which comparisons were possible—namely, the ORAS-CST, ORAS-CSST, ORAS-PIT, and ORAS-RT—ranged from good to excellent for both male and female offenders.

Other instruments showed differential performance by offender sex. In particular, LSI-R assessments showed good predictive validity for male offenders, but predictive validity was only fair for female offenders. Similarly, LSI-R:SV assessments showed only fair predictive validity for female offenders, but ranged from fair to good in its predictions for male offenders.

Other instruments were evaluated in exclusively male or female offenders. Predictive validity of SFS76 and SFS81 assessments, for example, were only evaluated for male offenders; SFS76 total scores demonstrated excellent validity, while validity of SFS81 assessments ranged from good to excellent. WRN total scores also were evaluated for male offenders and showed fair validity. Designed for women, the SPIn-W has only been evaluated for female offenders and showed good validity.

No studies reported predictive validity of assessments by offender sex for the IORNS, ORAS-PAT, PCRA, RMS, SAQ, SFS74, or WRN-R.

Table 11. Validity of Total Scores in Predicting Recidivism by Offender Sex

INSTRUMENTS	OFFENDER SEX			
	k	Male	*k*	Female
COMPAS	2	Good	2	Good
LSI-R[a]	9	Good	8	Fair
LSI-R:SV	2	Fair-Good	1	Fair
ORAS-CST	1	Excellent	1	Good
ORAS-CSST	1	Good	1	Excellent
ORAS-PIT	1	Good	1	Good
ORAS-RT	1	Good	1	Excellent
SFS76[b]	1	Excellent	–	–
SFS81[c]	–	Good-Excellent	–	–
SPIn-W[d,e]	–	–	2	Good
STRONG	1	Excellent	1	Excellent
WRN	1	Fair	–	–

Notes. *k* = number of performance indicators. No studies reported predictive validity estimates by sex for the IORNS, ORAS-PAT, PCRA, RMS, SAQ, SFS74, or WRN-R using the included performance indicators.
[a]One LSI-R sample specifically included technical violations in the operational definition of recidivism.
[b]One SFS76 sample specifically included technical violations in the operational definition of recidivism.
[c]One SFS81 sample specifically included technical violations in the operational definition of recidivism.
[d]Both SPIn-W samples were composed entirely of women.
[e]One SPIn-W sample reported predictive validity of the risk categorizations rather than total scores.

Race/ethnicity. Comparisons by offender race/ethnicity were only possible for assessments completed using the COMPAS and LSI-R. For COMPAS assessments, predictive validity was good for White and Black offenders. For LSI-R assessments, predictive validity ranged from poor to good across White, Black, Hispanic, and non-White offenders, with performance varying largely depending on sample size and performance indicator rather than race/ethnicity. Together, these findings fail to provide evidence of differential performance of COMPAS and LSI-R assessments as a function of offender race/ethnicity.

Diagnostic categories. No comparisons of predictive validity within or across instruments as a function of mental, substance use or personality disorders were possible. Even when these sample characteristics were reported, predictive validity was not provided by subgroup. As for race/ethnicity, there is a critical need for research examining risk assessment accuracy between mentally disordered and nondisordered offenders as well as across diagnostic subgroups. That said, prior meta-analytic work has found the predictors of recidivism to be comparable for mentally disordered offenders (Bonta, Law, & Hanson, 1998), suggesting that assessments also may perform comparably.

Predictive Validity in the Context of Research versus 'Real World' Practice

Recently there has been a focus on the need to establish the performance of risk assessment instruments *in the field*. Much of our knowledge stems from research-based studies, in which researchers can carefully train and monitor assessors. In 'real world' practice, however, such training and oversight is not necessarily present (Douglas, Otto, Desmarais, & Borum, in press).

Comparisons between the performance of assessments completed in the context of research and practice were possible for the LSI-R, RMS, SPIn-W, and WRN. Whereas both LSI-R and WRN total scores performed comparably whether conducted in research studies or in the context of 'real world' practice, RMS risk classifications had better predictive validity when completed by researchers rather than practitioners (though performance was still good). SPIn-W assessments also seemed to perform better in research studies than in practice, though predictive validity in both contexts was excellent. However, in the research context, predictive validity of the SPIn-W was evaluated vis-à-vis the total scores while in practice, the risk classifications were examined, preventing direct comparisons of the results.

No comparisons were possible for the other risk assessment instruments. Specifically, COMPAS, IORNS, SFS76, and SFS81 assessments have only been evaluated in the context of 'real world' practice, and the LSI-R:SV, ORAS tools, PCRA, SAQ, SFS74, STRONG, and WRN-R assessments have only been evaluated in research studies.

SUMMARY OF FINDINGS BY INSTRUMENT

In this section describe each risk assessment instrument and summarize findings of U.S. studies examining predictive validity. Instruments are presented in alphabetical order.

Correctional Offender Management Profiling for Alternative Sanctions

Description

The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) is an actuarial risk assessment instrument intended to assess risk for general offending and violations across offender populations (Brennan et al., 2009).

The COMPAS contains static and dynamic risk factors. Content areas assessed include attitudes, associates or peers, history of antisocial behavior, personality problems, circumstances at school or work, leisure or recreational activities, substance use problems, mental health problems, and housing, divided across 22 scales (Blomberg, Bales, Mann, Meldrum, & Nedelec, 2010). Scores on the self-report assessment, data from official records, and information from interview are used to arrive at an overall risk score for each offender. The COMPAS is a 4th generation risk assessment instrument.

COMPAS assessments are completed through a combination of a computer-assisted self-report questionnaire, an interview conducted by a trained assessor, and data collected from the offender's records. The instrument can be purchased from Northpointe at www.northpointeinc.com. Assessors must complete a 2-day training session that covers practical use, interpretation of results, and case planning strategies in order to administer the COMPAS. Advanced training options that focus on the theoretical underpinnings of offender assessments, gender responsivity, motivational interviewing, and other topics are available.

U.S. Research Evidence

In total, four studies have evaluated predictive validity of COMPAS assessments in U.S. samples. Blomberg and colleagues (2010) found that those identified as higher risk were indeed more likely to recidivate; specifically, 7% of those identified to be low risk recidivated, 16% of those identified as medium risk, and 27% of those identified as high risk. In other samples, predictive validity was good for general offending (Brennan, Dieterich, & Ehret, 2009) and fair for violations (Farabee & Zhang, 2007). Predictive validity for male and female offenders has ranged from good to excellent (Brennan et al., 2009).

There were no studies published between 1970 and 2012 comparing predictive validity in U.S. samples between total scores and risk classifications, assessments completed in research and practice contexts, or by offender race/ethnicity. There also were no U.S. evaluations of inter-rater reliability that met our inclusion criteria.

Practical Issues and Considerations

For the self-report portion of the assessment, the computer upon which the offender completes the questionnaire must have Internet access and run on Windows. The assessor must complete training to be qualified to administer the structured interview.

Selected References and Suggested Readings

Blomberg, T., Bales, W., Mann, K., Meldrum, R., & Nedelec, J. (2010). *Validation of the COMPAS risk assessment classification instrument.* City, ST: publisher. Retrieved from http://www.criminologycenter.fsu.edu/p/pdf/pretrial/Broward%20Co.%20COMPAS%20Validation%202010.pdf

Brennan, T., Dieterich, W., & Ehret, B. (2009). Evaluating the predictive validity of the COMPAS risk and needs assessment system. *Criminal Justice and Behavior, 36*, 21-40.

Farabee, D., Zhang, S., Roberts, R. E. L., & Yang, J. (2010). *COMPAS validation study: Final report.* California Department of Corrections and Rehabilitation. Retrieved from http:// www.cdcr.ca.gov/adult_research_branch/Research_Documents/COMPAS_Final_Report_08-11-10.pdf

Federal Post Conviction Risk Assessment

Description

The Federal Post Conviction Risk Assessment (PCRA) is an actuarial risk assessment instrument intended to assess risk for general offending and violations across offender populations (Johnson, Lowenkamp, VanBenschoten, & Robinson, 2011).

The PCRA contains 30 static and dynamic risk factors. Content areas assessed include attitudes, associates or peers, history of antisocial behavior, relationships, circumstances at work or school, and substance use problems. Self-report assessment scores are combined with probation officer assessment scores to arrive at an overall risk score. The PCRA is a 4th generation risk assessment instrument.

PCRA assessments comprise two components: 1) the Officer Assessment, and 2) Offender Self-Assessment. The self-report questionnaire consists of items that are "scored" and "unscored". The 15 scored items are those that have been shown in studies conducted by the Administrative Office of U.S. Courts (Administrative Office) to predict recidivism and contribute to the overall risk score. The 15 unscored items have been shown in other research to predict recidivism, but have not been evaluated by the Administrative Office. They are included to inform intervention strategies, but do not contribute to the risk scores. Assessments must be administered by probation officers who have passed the online certification test created and offered by the Administrative Office; the Administrative Office prohibits uncertified assessors from accessing the PCRA. Prior to the online certification, probation officers must complete 16 hours of

training. They also must renew their certification every year. The PCRA is available through the Administrative Office at www.uscourts.gov.

U.S. Research Evidence

One study has assessed the predictive validity of PCRA assessments in two large U.S. samples. Johnson, Lowenkamp, VanBenschoten, and Robinson (2011) found excellent predictive validity in both. As of December 2012, there were no studies comparing predictive validity between assessments completed in research and practice contexts, by offender sex or by offender race/ethnicity. There also were no U.S. evaluations of inter-rater reliability that met our inclusion criteria.

Practical Issues and Considerations

Though promising, research evidence is limited to date. As noted above, there were no published evaluations of the reliability and predictive validity of PCRA assessments that met our inclusion criteria beyond the initial construction and validation study. However, a study published early this year by the instrument's authors (Lowenkamp, Johnson, VanBenschoten, & Robinson, 2013) compared predictive validity between research and practical contexts and reported high rates of inter-rater agreement. Independent replication is needed.

Selected References and Suggested Readings

Administrative Office of the United States Courts, Office of Probation and Pretrial Services. (2011, September). *An overview of the Federal Post Conviction Risk Assessment.* Retrieved from http://www.uscourts.gov/uscourts/FederalCourts/PPS/PCRA_Sep_2011.pdf

Johnson, J. L., Lowenkamp, C. T., VanBenschoten, S. W., & Robinson, C. R. (2011). The construction and validation of the Federal Post Conviction Risk Assessment (PCRA). *Federal Probation, 75,* 16-29.

Lowenkamp, C. T., Johnson, J. L., Holsinger, A. M., VanBenschoten, S. W., & Robinson, C. R. (2013). *Psychological Services, 10,* 87-96.

Inventory of Offender Risk, Needs, and Strengths

Description

The Inventory of Offender Risk, Needs, and Strengths (IORNS) is an actuarial risk assessment instrument intended to assess risk for general offending and violations across offender populations (Miller, 2006a).

The IORNS contains 130 static, dynamic, risk, and protective factors. Content areas assessed include attitudes, associates or peers, history of antisocial behavior, personality problems, relationships, circumstances at school or work, substance use problems, mental health problems,

and housing. Individual item responses are summed to create Static, Dynamic and Protective indexes as well as an Overall risk index. There also are two validity scales. The IORNS is a 3rd generation risk assessment instrument.

The IORNS is a true/false self-report questionnaire completed by the offender and requires 3rd grade reading level. The IORNS manual indicates that assessments take 15 to 20 minutes to administer, and 20 to 25 minutes to score. There are no training requirements for assessors, provided the purchaser of the exam has a degree in forensic or clinical psychology or psychiatry as well as certification in psychological testing. The purchaser also is responsible for overseeing the scoring of the assessment. IORNS assessments are available through Psychological Assessment Resources (parinc.com). Costs include those associated with the manual, interview guides, and assessment forms. For further information on pricing, see www.parinc.com.

U.S. Research Evidence

Predictive validity of IORNS assessments have been evaluated in only one U.S. sample conducted by the author of the instrument. Miller (2006b) found that offenders with higher Overall Risk Indices were in jail more frequently and had more non-violent arrests than those with lower scores. Similarly, those offenders who had more half-way house rule violations have significantly lower Overall Risk, and Dynamic Needs Indices.

As of December 2012, there were no published studies comparing predictive validity in U.S. samples between assessments completed in research and practice contexts, by recidivism outcome, offender sex, or offender race/ethnicity. There also were no U.S. evaluations of inter-rater reliability that met our inclusion criteria.

Practical Issues and Considerations

Though findings are promising, predictive validity of IORNS assessments has only been evaluated in one study conducted by the instrument developer that met our inclusion criteria; independent replication is needed.

Selected References and Suggested Readings

Miller, H. A. (2006a). *Manual of the Inventory of Offender Risk, Needs, and Strengths* (IORNS). Odessa, FL: Psychological Assessment Resources.

Miller, H. A. (2006b). A dynamic assessment of offender risk, needs, and strengths in a sample of pre-release general offenders. *Behavioral Sciences & the Law*, *24*, 767-782.

Level of Service Instruments

Description

The Level of Service family of instruments includes the Level of Service Inventory-Revised (LSI-R) and Level of Service Inventory-Revised: Screening Version (LSI-R:SV), actuarial risk assessment instruments intended to assess risk for general offending and violations across offender populations (Andrews & Bonta, 1995; 1998).

The LSI-R contains 54 static and dynamic risk factors. Content areas include attitudes, associates or peers, history of antisocial behavior, personality problems, relationships, circumstances at school or work, leisure or recreational activities, substance use problems, mental health problems, and housing. Item responses are scored and summed for a total score from 0 to 54 that is used to classify risk as: Low = 0-23; Medium = 24-33; and High = >34. The LSI-R is a 3rd generation risk assessment instrument.

The LSI-R:SV contains eight static and dynamic items selected from the LSI-R. Content areas assessed include attitudes, associates or peers, history of antisocial behavior, personality problems, relationships, circumstances at school or work, and substance abuse problems. Individual item responses are scored and summed for a total score ranging from 0-9. This score is used to determine if the offender requires a full LSI-R assessment. Like the interview-based version, the LSI-R:SV is also a 3rd generation risk assessment instrument.

LSI-R and LSI-R:SV assessments are completed through interview and file review, a process estimated to require approximately 30-40 minutes for the LSI-R and 10-15 minutes for the LSI-R:SV (though studies we reviewed reported longer completion times – see below). The assessor does not need formal training, but scoring must be overseen by someone who has post-secondary training in psychological assessment. The LSI-R and LSI-R:SV materials are available through Multi-Health Systems (www.mhs.com). Costs include those associated with the manual, interview guides, and assessment forms. For further information on pricing, see www.mhs.com.

U.S. Research Evidence

Predictive validity of LSI-R total scores had been evaluated in 25 U.S. samples as of December 2012. Performance in has ranged from poor to good, with the median on the cusp of fair and good. There were no studies examining the predictive validity of the risk classifications (as opposed to total scores) that met criteria for inclusion in this review. LSI-R total scores seem perform slightly better for men than for women, though performance is in the fair-good range for both. U.S. studies have not shown differences in validity as a function of racial/ethnicity. Predictive validity for total scores completed in the context of research and practice also is comparable. Validity in predicting is general offending is slightly better than violations. In the one U.S. study reporting inter-rater reliability data, agreement ranged from poor to excellent across content domains, but was excellent overall (Simourd, 2006).

Predictive validity of the LSI-R:SV has only been examined in two U.S. samples with mixed results: one study showed fair performance (Walters, 2011) and the other, good (Lowenkamp et

al., 2009). The LSI-R:SV seems to perform better for men (good predictive validity) than for women (fair predictive validity). There had been no studies comparing predictive validity between total scores and risk classifications, assessments completed in research and practice, by offender race/ethnicity, or by recidivism outcome as of December 2012. Because the LSI-R:SV is a self-report instrument, inter-reliability is not relevant.

The LSI-R instruments have been evaluated extensively outside of the United States. For example, there have been many evaluations of the predictive validity and inter-rater reliability of the LSI-R conducted in Canada and Europe (see, for example, Vose, Cullen, & Smith, 2008), but none have compared the predictive validity between total scores and risk classifications. Similarly, the LSI-R:SV has been studied outside of the United States (e.g., Daffern et al., 2005; Ferguson et al., 2005), but the research does not address the limitations described above.

Practical Issues and Considerations

Researchers and professionals have reported administration times that deviate considerably from the LSI-R manual's estimate of 30-40 minutes, including 60 minutes in one sample (Holsinger et al., 2004) and 45-90 minutes in two others (Evans, 2009; Latessa et al., 2009).

There is considerable variation in the cut-off scores used for the risk categories. The manual encourages altering cut-off scores based on offense group characteristics, but research should be conducted *prior to* implementation to establish the validity of revised cut-off scores (Kim, 2010).

A recent addition to the Level of Service family of instruments is the Level of Service/Case Management Inventory (LS/CMI), an actuarial risk assessment with 43 items intended to aid professionals in offender management with late adolescent and adult offenders. No studies examining the LS/CMI met our inclusion criteria. However, there have been many evaluations of the predictive validity of the LS/CMI conducted outside of the United States (Andrews et al., 2011). Studies have included samples of male and female, as well as young offenders. Performance estimates for these populations ranged from fair to excellent. Inter-rater reliability has also been evaluated for total scores and found to be excellent (Rettinger & Andrews, 2010).

Selected References and Suggested Readings

Andrews, D. A. & Bonta, J. (1995). *LSI-R: The Level of Service Inventory-Revised user's manual.* Toronto: Multi-Health Systems.

Andrews, D. A., & Bonta, J. L. (1998). *Level of Service Inventory-Revised: Screening Version (LSI-R:SV): User's manual.* Toronto: Multi-Health Systems.

Andrews, D. A., Bonta, J., Wormith, J. S., Guzzo, L., Brews, A., Rettinger, J., & Rowe, R. (2011). Sources of variability in estimates of predictive validity: A specification with Level of Service general risk and need. *Criminal Justice & Behavior, 38,* 413-432.

Daffern, M., Ogloff, J. R. P., Ferguson, M., & Thomson, L. (2005). Assessing risk for aggression in a forensic psychiatric hospital using the Level of Service Inventory-Revised:Screening Version. *International Journal of Forensic Mental Health, 4*, 201-206.

Ferguson, A. M., Ogloff, J. R. P., & Thomson, L. (2005). Predicting recidivism by mentally disordered offenders using the LSI-R:SV. *Criminal Justice & Behavior, 36,* 5-20.

Lowenkamp, C. T., Lovins, B., & Latessa, E. J. (2009). Validating the Level of Service Inventory–Revised and the Level of Service Inventory: Screening Version with a sample of probationers. *The Prison Journal, 89*, 192-204.

Rettinger, L. J., & Andrews, D. A. (2010). General risk and need, gender specificity, and the recidivism of female offenders. *Criminal Justice & Behavior, 37,* 29-46.

Vose, B., Cullen, F. T., & Smith, P. (2008). The empirical status of the Level of Service Inventory. *Federal Probation, 72*, 22-29.

Ohio Risk Assessment System

Description

The Ohio Risk Assessment System (ORAS) is comprised of five actuarial risk assessment instruments intended to assess risk for recidivism across offender populations (Latessa et al., 2009): the 7-item Pretrial Assessment Tool (ORAS-PAT), the 4-item Community Supervision Screening Tool (ORAS-CSST), the 35-item Community Supervision Tool (ORAS-CST), the 31-item Prison Intake Tool (ORAS-PIT), and the 20-item Prison Re-entry Tool (ORAS-RT). Each includes static and dynamic risk factors and is designed for use at a specific stage in the criminal justice system; namely, pretrial, community supervision, institutional intake, and community reentry. Assessments identify criminogenic needs and place offenders into risk categories. An additional sixth instrument, the Prison Screening Tool (ORAS-PST), is designed to identify low risk inmates who do not need the full ORAS-PIT assessment.

Item responses are scored and summed to create total scores which are compared against risk classification cut-off values. The ORAS-PAT has a range from 0 to 9, the ORAS-CSST from 0 to 7, the ORAS-CST from 0 to 49, the ORAS-PIT from 3 to 29, and the ORAS-RT from 0 to 28. Each tool considers the offender's history of antisocial behavior, circumstance at school or work, and substance abuse problems; some also evaluate additional domains, such as attitudes (e.g., ORAS-CST, ORAS-RT), and mental health problems (e.g., ORAS-PIT, ORAS-RT). Together, the ORAS system reflects the 4th generation of risk assessment.

The ORAS tools are completed through a structured interview and analysis of official records; the ORAS-CSST, ORAS-PIT, and ORAS-RT additionally use self-report questionnaires. Assessors must complete a 2-day training package that accompanies the tool prior to administering any assessments. The ORAS is published by the Ohio Department of Rehabilitation and Correction (http://www.drc.ohio.gov). The system is non-proprietary and can

be obtained from the Center of Criminal Justice Research, University of Cincinnati (http://www.uc.edu/corrections/services/risk-assessment.html).

U.S. Research Evidence

ORAS-PAT total scores demonstrated fair validity in predicting arrest in the construction sample and good validity in the validation sample (Latessa et al., 2009). A second evaluation found fair predictive validity for ORAS-PAT assessments, good validity for ORAS-PIT and ORAS-RT assessments, and excellent validity for ORAS-CCST and ORAS-CST assessments (Lowenkamp, Lemke, & Latessa, 2008). ORAS-PST assessments have not been included in these evaluations.

Predictive validity of ORAS assessments differs somewhat as a function of offender sex. Specifically, ORAS-CST assessments performed slightly better for male than female offenders, though predictive validity was excellent in both cases. Conversely, ORAS-PIT and ORAS-RT assessments performed better for female (excellent predictive validity) than male offenders (good). ORAS-CSST assessments, in contrast, have shown comparable predictive validity for both male and female offenders. The ORAS-PAT total scores have demonstrated better validity in predicting violations (good) than general offending (fair).

As of December 2012, there had been no U.S. studies comparing predictive validity between total scores and risk classifications, assessments completed in research and practice contexts, or by offender race/ethnicity that met our inclusion criteria. There also had not been any evaluations of inter-rater reliability.

Practical Issues and Considerations

Though findings are very promising, there has been relatively little research on the predictive validity of the ORAS, with only one evaluation of four of the tools and two of the other. Further, studies that met our inclusion criteria did not report inter-rater reliability of the assessments. Finally, all research on the ORAS reviewed in this report had been completed by the study developers; independent replication is needed.

Selected References and Suggested Readings

Latessa, E., Smith, P., Lemke, R., Makarios, M., & Lowenkamp, C. (2009). *Creation and validation of the Ohio Risk Assessment System: Final report.* Cincinnati, OH: Authors. Retrieved from http://www.uc.edu/ccjr/Reports/ProjectReports/ORAS_Final_Report.pdf

Lowenkamp, C. T., Lemke, R., & Latessa, E. (2008). The development and validation of a pretrial screening tool. *Federal Probation, 72*, 2-9.

Risk Management Systems

Description

The Risk Management Systems (RMS) is an actuarial risk assessment instrument intended for use intended to assess risk for general offending across offender populations (Dow, Jones, & Mott, 2005). The RMS currently contains 67 static and dynamic risk factors; however, when it was validated, the instrument included only 65 items. The assessment is split into four parts: 1) Needs (24 items), 2) Risk (9 items), 3) Mental Health (10 items), and 4) Other-External (24 items). Content areas assessed include attitudes, associates or peers, history of antisocial behavior, personality problems, relationships, circumstances at school or work, substance abuse problems, mental health problems, and housing. The developers of the RMS describe it as a 5th generation risk assessment instrument due to its exemplar-based approach.

The RMS is administered using a computer-based questionnaire. As such, the assessor is removed from the initial assessment process; individual item responses are statistically analyzed to calculate risk of recidivism. Risk scores for violence and recidivism range from 1.00 (Low) to 2.00 (High), at 0.01 intervals. However, there are no established cut-off scores for risk categories, so the assessor must interpret the subsequent level of risk/supervision required. RMS assessment materials are available through Syscon Justice Systems (www.syscon.net). For information on pricing see www.syscon.net.

U.S. Research Evidence

As of December 2012, predictive validity of RMS assessments had been reported in two U.S. studies; performance ranged from good (Kelly, 2009; later republished in Shaffer et al., 2010) to excellent (Dow et al., 2005). The risk classifications have notably better predictive validity (excellent) compared to total scores (good). Validity is comparable for predicting general offending and violations. RMS assessments appear to have better predictive validity when completed in research studies (excellent) than in the context of 'real world' practice (good); however, risk classifications were used in one study and total scores in the other.

There were no studies of predictive validity conducted in the United States that compared findings across offender sex or racial/ethnic groups. There also were no U.S. evaluations of inter-rater reliability that met our inclusion criteria.

Practical Issues and Considerations

In the initial development and validation work, the tool was intended to be used for assessing risk for general offending (Dow et al., 2005), but a later study established the validity of RMS assessments in predicting violations (Kelly, 2009). Overall, further independent research is needed to replicate and establish the generalizability of findings, as well as to determine the validity of different cut-off scores.

Selected References and Suggested Readings

Dow, E., Jones, C., & Mott, J. (2005). An empirical modeling approach to recidivism classification. *Criminal Justice and Behavior, 32*, 223-247.

Kelly, B. (2009). *A validation study of Risk Management Systems* (Master's thesis). Retrieved from UNLV Theses/Dissertations/Professional Papers/Capstones. (Paper 128). http://digitalscholarship.unlv.edu/thesesdissertations/128

Shaffer, D. K., Kelly, B., & Lieberman, J. D. (2010). An exemplar-based approach to risk assessment: Validating the Risk Management Systems instrument. *Criminal Justice Policy Review, 22*, 167-186.

Salient Factor Score

Description

The Salient Factor Score (SFS) is an actuarial risk assessment tool intended to inform decisions regarding whether an offender should be granted parole or not. The SFS is a 2nd generation risk assessment instrument.

There are at least four versions of the SFS, all of which measure static risk factors. Items have been adapted throughout the years to be consistent with research findings. The SFS74 contains nine items and content areas include history of antisocial behavior, circumstances at work or school, substance use problems, and housing. The SFS76 contains seven items and content areas include history of antisocial behavior, circumstances at work or school, and substance use problems. The SFS81 contains six items and content areas include history of antisocial behavior and substance use problems. The SFS98 includes six items and the only content area included is history of antisocial behavior. Unlike the prior versions, the SFS98 also considers whether the offender was older than 41 at the time of the current offense.

SFS assessments are completed through review of official records. Item ratings are summed to arrive at an overall risk score; a *higher* score indicating *lower* risk. These total scores are then used to place offenders within one of four risk categories: very good risk, good risk, fair risk, and poor risk. For further information contact the United States Parole Commission (http://www.justice.gov/uspc).

U.S. Research Evidence

As of December 2012, predictive validity of SFS74, SFS76, and the SFS81 assessments had been examined in 15 U.S. samples. Validity of SFS74 and SFS76 assessments in predicting general offending has ranged from good to excellent. SFS81 assessments also have shown excellent predictive validity across most studies, though the odds ratio was notably low in one evaluation (Howard, 2007). We did not find any evaluations of the predictive validity of SFS98 assessments that met our inclusion criteria.

To date, there have been no U.S. studies comparing predictive validity of the SFS instruments between total scores and risk classifications, assessments completed in research and practice contexts, or by offender race/ethnicity. We also did not find any evaluations of inter-rater reliability that met our inclusion criteria.

Practical Issues and Considerations

Though items are relatively straightforward to code, investigations of inter-rater reliability are needed to establish the consistency of assessments completed by different assessors.

Jurisdiction-specific adaptations include the Connecticut Salient Factor Score.

Selected References and Suggested Readings

Hoffman, P. (1996). Twenty years of operational use of a risk prediction instrument: The United States Parole Commission's Salient Factor Score. *Journal of Criminal Justice, 22*, 477-494.

Hoffman, P. & Adelberg, S. (1980). The Salient Factor Score: A nontechnical overview. *Federal Probation, 44*, 44-52.

Howard, B. (2007). *Examining predictive validity of the Salient Factor Score and HCR-20 among behavior health court clientele: Comparing static and dynamic variables*. (Unpublished doctoral dissertation).

Self-Appraisal Questionnaire

The Self-Appraisal Questionnaire (SAQ) is an actuarial risk assessment instrument to assess risk for general offending among male offenders (Loza, 2005).

The SAQ contains 72 dynamic and static risk factors. Content areas include attitudes, associates or peers, history of antisocial behavior, personality problems, and substance abuse problems. Items are divided across seven subscales. Scores on six subscales are calculated to provide an overall risk score. A seventh anger subscale is not used to assess risk for recidivism. Therefore, of the 72 total items, 67 items are used to predict recidivism. Total scores are used to place offenders in one of four risk categories: low, low-moderate, high-moderate, and high. The SAQ is a 3rd generation risk assessment instrument.

The SAQ is a true/false self-report questionnaire. Five items can be used to assess the validity of an offender's answers by comparing them against official records. The SAQ takes approximately 15 minutes to administer and five minutes to hand-score. The assessor does not need formal training, but scoring must be overseen by someone who has post-secondary training in psychological assessment. The SAQ can be purchased from Multi-Health Systems Inc. at www.mhs.com. Costs include those associated with the manual and assessment forms. For further information on pricing, see www.mhs.com.

U.S. Research Evidence

Two studies have evaluated the predictive validity of the SAQ in U.S. samples. These studies used low, moderate, and high risk categories rather than the four categories suggested by the assessment developer. Mitchell and Mackenzie (2006) found poor validity of the SAQ

assessments in predicting re-arrest and failed to find differences in total scores between recidivists and non-recidivists. In contrast, using a longer follow-up period and a larger sample, Mitchell, Caudy and Mackenzie (2012) found that SAQ assessments predicted time to first reconviction, though the effect size was small.

As of December 2012, there had been no studies comparing predictive validity in U.S. samples between total scores and risk classifications, assessments completed in research and practice, by offender sex, or race/ethnicity that met our inclusion criteria. Because the SAQ is a self-report instrument, inter-reliability is not relevant.

There have been many evaluations of the SAQ in Canada (e.g., Kroner & Loza, 2001; Loza & Loza-Fanous, 2000; Loza et al., 2005), but none have compared the predictive validity between total scores and risk classifications, research and practice contexts, by offender sex, or race/ethnicity.

Practical Issues and Considerations

The SAQ requires a 5th grade reading level. Prior studies of the validity of SAQ assessments in predicting violent outcomes, including institutional violence and violent recidivism (e.g., Campbell, French & Gendreau, 2009), as well as violent and non-violent recidivism in Canadian samples (e.g., Loza, MacTavish, & Loza-Fanous, 2007) have shown more promising results than those reported herein vis-à-vis validity in predicting non-violent offending in U.S. samples.

Selected References and Suggested Readings

Kroner, D., & Loza, W. (2001). Evidence for the efficacy of self-report in predicting violent and nonviolent criminal recidivism. *Journal of Interpersonal Violence, 16,* 168-177.

Loza, W., & Loza-Fanous, A. (2000). Predictive validity of the Self-Appraisal Questionnaire (SAQ): A tool for assessing violent and nonviolent release failures. *Journal of Interpersonal Violence, 15*, 1183-1191.

Loza, W. (2005). *The Self-Appraisal Questionnaire (SAQ): A tool for assessing violent and non-violent recidivism.* Toronto: Mental Health Systems.

Loza, W., Neo, L. H., Shahinfar, A., & Loza-Fanous, A. (2005). Cross-validation of the Self-Appraisal Questionnaire: A tool for assessing violent and nonviolent recidivism with female offenders. *International Journal of Offender Therapy & Comparative Criminology, 49,* 547-560.

Mitchell, O., Caudy, M., & Mackenzie, D. (2012). A reanalysis of the Self-Appraisal Questionnaire: Psychometric properties and predictive validity. *International Journal of Offender Therapy and Comparative Criminology 20,* 1-15.

Mitchell, O., & Mackenzie, D. (2006). Disconfirmation of the predictive validity of the Self-Appraisal Questionnaire in a sample of high-risk drug offenders. *Criminal Justice and Behavior 33,* 449-466.

Service Planning Instruments

Description

The Service Planning Instrument (SPIn) is an actuarial risk assessment tool intended to assess risk for offending and to identify service needs of male offenders. The SPIn-W was developed for use with female offenders.

Both the SPIn and SPIn-W are self-report, computer-based instruments. The SPIn includes 90 static, dynamic, risk, and protective factors. Content areas assessed include attitudes, associates or peers, history of antisocial behavior, relationships, circumstances at school or work, substance use problems, mental health problems, and housing. The SPIn-W includes 100 static, dynamic, risk, and protective factors. Content areas include attitudes, associates or peers, history of antisocial behavior, relationships, circumstances at school or work, leisure or recreational activities, substance use problems, mental health problems, and housing. The SPIn and SPIn-W are 4th generation risk assessment instruments.

For both instruments, software is used to calculate an offender's risk score which is presented graphically and narratively. The assessor must compare responses on static items to the offender's official records. Assessors are required to attend a two-day training session. Additional 2-day training program to help administrators better prepare for the case planning process, as well as data workshops, refresher courses, technical support, and quality assurance also are available. The SPIn and SPIn-W can be purchased from Orbis Partners Inc. (www.orbispartners.com). For information on pricing, see www.orbispartners.com.

U.S. Research Evidence

As of December 2012, there were no published studies assessing predictive validity of SPIn assessments in U.S. samples. Two studies have evaluated predictive validity of the SPIn-W assessments; performance ranged from poor to excellent.

There were no comparisons of predictive validity in U.S. samples between total scores and risk classifications, assessments completed in research and practice contexts, by outcome or by offender race/ethnicity that met our inclusion criteria. We also did not identify any U.S. evaluations of inter-rater reliability that met these criteria.

Practical Issues and Considerations

Current evidence regarding the predictive validity of SPIn-W assessments is both limited and mixed. More research is needed.

Selected References and Suggested Readings

Meaden, C. (2012). *The utility of the Level of Service Inventory-Revised versus the Service Planning Instrument for Women in predicting program completion in female offenders.*

(Unpublished Master's thesis). Retrieved from Central Connecticut State University Theses, Dissertations, and Special Projects.

Millson, B., Robinson, D., & Van Dieten, M. (2010). *Women Offender Case Management Model: An outcome evaluation.* Washington, DC: U.S. Department of Justice, National Institute of Corrections. Retrieved from: http://www.cjinvolvedwomen.org/sites/all/documents/Women%20Offender%20Case%20Management%20Model.pdf

Static Risk and Offender Needs Guide

The Static Risk and Offender Needs Guide (STRONG) is an actuarial risk assessment instrument intended to assess risk for general offending across offender populations (Barnoski & Drake, 2007).

The STRONG consists of three parts: 1) the Static Risk Assessment which contains 26 static risk factors; 2) the Offender Needs Assessment which contains 70 dynamic risk and protective factors; and 3) the Offender Supervision Plan, which is auto-populated based on the results of the Offender Needs Assessment. Content areas assessed in the Static Risk Assessment include history of antisocial behavior and substance use problems. Items scores are used to create three separate scores: Felony Risk Score; Non-Violent Felony Risk Score (high property risk/high drug risk); and Violent Felony Risk Score. These three scores are used to classify offenders in one of five categories: high risk violent; high risk property; high risk drug; moderate risk; and low risk. Content areas assessed in the Offender Needs Assessment include attitudes, associates or peers, personality problems, relationships, circumstances at work or school, substance use problems, mental health problems, and housing. Ratings on items included in the Offender Needs Assessment are not used to inform risk assessments, but instead guide the development of interventions designed to reduce risk of future criminal justice involvement. As such, the STRONG is a 4th generation risk assessment instrument.

STRONG assessments are completed by assessors using a web-based interface. Assessors must complete an initial training program as well as routine booster training sessions. The STRONG was developed by Assessments.com in collaboration with the Washington Department of Corrections. A very similar version can be purchased for use in other jurisdictions through www.assessments.com.

U.S. Research Evidence

Only one study that met our inclusion criteria has evaluated the predictive validity of STRONG assessments; assessments demonstrated excellent predictive validity overall as well as for male and female offenders separately (Barnoski & Drake, 2007). There were no U.S. studies comparing predictive validity as a function of offender race/ethnicity, type of recidivism outcome or between assessments completed in the context of research versus practice. We also did not find any evaluations of inter-rater reliability that met inclusion criteria.

Practical Issues and Considerations

Though findings are promising, predictive validity of STRONG assessments has only been evaluated in one study conducted by the instrument developer; independent replication is needed.

Selected References and Suggested Readings

Barnoski, R., & Drake, E. K. (2007). *Washington's Offender Accountability Act: Department of Corrections' static risk instrument.* Olympia, WA: Washington State Institute for Public Policy. Retrieved from http://www.wsipp.wa.gov/rptfiles/07-03-1201R.pdf

Wisconsin Risk and Needs Scales

Description

The Wisconsin Risk and Needs scales (WRN) is an actuarial risk assessment instrument intended to assess risk for general offending and violations across offender populations. A revised version (WRN-R) was designed specifically for use with probationers and parolees (Eisenberg, Bryl, & Fabelo, 2009). Both the WRN and WRN-R are 4th generation risk assessment instruments.

The WRN contains 53 static and dynamic risk factors. Content areas assessed include attitudes, associates or peers, history of antisocial behavior, relationships, circumstances at work or school, substance use problems, and mental health problems. Individual item scores are scored and summed for a total risk score ranging from 0 to 52. The total score is used to place the offender in a risk category based on predetermined cut-offs: Low = 0-7; Medium = 8-14; and High = 15+.

The WRN-R retained 52 of the WRN's items and covers the same content areas. The weights of the different factors have been revised from the original WRN based on the results of a validation study, and the revised total risk score has a range of 0 to 25. The total score is used to estimate risk level based on new cut-offs: Low = 0-8; Medium = 9-14; and High = 15+.

WRN assessments are completed using information obtained through interview. The WRN is non-proprietary and available through Justice Systems Assessment & Training (http://www.j-satresources.com/Toolkit/Adult/adf6e846-f4dc-4b1e-b7b1-2ff28551ce85).

U.S. Research Evidence

Predictive validity of the WRN assessments have ranged from fair (Eisenberg et al., 2009) to excellent (Connolly, 2003). WRN assessments appear to perform better when predictive violations (excellent) than general offending (good). Our comparisons between predictive validity of assessments completed in research versus practice failed to identify any differences. As of December 2012, no U.S. studies compared predictive validity between WRN total scores and risk classifications, by offender sex, or race/ethnicity. We also did not identify any U.S. evaluations of inter-rater reliability that met our inclusion criteria.

As of December 2012, predictive validity of WRN-R assessments had been evaluated in one U.S. study; assessments demonstrated good predictive validity. To date, there have been no studies comparing predictive validity in U.S. samples between WRN-R total scores and risk classifications, assessments completed in research and practice contexts, by recidivism outcome, offender race/ethnicity, or sex that met our inclusion criteria. We also did not identify any U.S. evaluations of inter-rater reliability of WRN-R assessments.

Practical Issues and Considerations

A high percentage of offenders are classified as high risk using the WRN due to the heavy weight given to convictions for an assaultive offense in the past five years. There is concern that such over-classification is "counter to the goal of risk classification: to differentiate the population by risk and allocate resources accordingly" (Eisenberg et al., 2009, p. iv).

In 2004, a new, automated assessment and case management system called the Correctional Assessment and Intervention System (CAIS) was developed based upon the WRN and the Client Management Classification tools (Baird, Heinz, & Bemus, 1979). This CAIS is an actuarial risk assessment instrument intended to assess risk for general offending and violations across offender populations, as well as to be used in the development of case management plans. Its predictive validity has not yet been evaluated.

Selected References and Suggested Readings

Baird, C., Heinz, R., & Bemus, B. (1979). *The Wisconsin Case Classification/Staff Deployment Project.* Madison, WI: Wisconsin Department of Corrections.

Eisenberg, M., Bryl, J., & Fabelo, T. (2009). *Validation of the Wisconsin Department of Corrections risk assessment instrument.* New York: Council of State Governments Justice Center. Retrieved from http://www.wi-doc.com/PDF_Files/WIRiskValidation_August%202009.pdf

OTHER TYPES OF INSTRUMENTS USED TO ASSESS RECIDIVISM RISK

Violence Risk Assessment Instruments

Violence risk assessment instruments, such as the Historical-Clinical-Risk Management-20 (HCR-20; Webster, Douglas, Eaves, & Hart, 1997) and Violence Risk Appraisal Guide (VRAG; Quinsey, Harris, Rice, & Cormier, 2006), are intended to assess risk of future violence specifically, but also are frequently used to assess risk of (non-violent) recidivism.

HCR-20

The HCR-20 is a structured professional judgment scheme comprised of 20 static and dynamic items that assess historical risk factors, clinical risk factors, and risk management factors. The individual item ratings are used to inform a final professional judgment of low, moderate, or high risk. Only one study has evaluated the validity of HCR-20 assessments in predicting recidivism in a U.S. sample (Barber-Rioja, Dewey, Kopelovich, & Kucharski, 2012). Overall, the assessment total score was found to have excellent validity in predicting both general offending and violations. The HCR-20 has been widely validated outside of the U.S. (see http://kdouglas.files.wordpress.com/2007/10/hcr-20-annotated-biblio-sept-2010.pdf).

VRAG

The VRAG is an actuarial instrument designed for use with previously violent, mentally disordered offenders. It consists of 12 items that gather information on static and dynamic risk factors. Individual item responses are weighted and summed for a total score, which is then used to estimate level of risk based on an actuarial table. The predictive validity of VRAG assessments for both general offending and violations also has been evaluated in only one U.S. sample (Hastings et al., 2011). Validity in predicting general offending ranged from good to excellent for male offenders, and fair to good for female offenders. Validity in predicting violations ranged from fair to good for male offender and poor to fair for female offenders. Like the HCR-20, much research completed outside of the U.S. has examined the validity of VRAG assessments. For more information, visit http://www.mhcp.on.ca/

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Personality Assessment Instruments

Personality assessment instruments, such as the Psychopathy Checklist-Revised (PCL-R; Hare, 2003), the Psychopathy Checklist: Screening Version (PCL:SV; Hart, Cox, & Hare, 1995), and the Personality Assessment Instrument (PAI; Morey, 1991), evaluate personality constructs that correlate with criminal offending (for a meta-analytic review see Singh & Fazel, 2010).

PCL Instruments

The PCL-R is a 20-item actuarial assessment that can be used to diagnosis psychopathy, a form of antisocial personality disorder characterized by a persistent pattern of severe and refractory callous-unemotionality. Individual items are scored through file review and semi-structured interview, then summed for total score ranging from 0 to 40 (where 30+ indicates the presence of psychopathy). The PCL:SV is a shorter, 12-item version. Again, individual item ratings are scored and summed, with a cutoff score of 18 typically used for classification of psychopathy. Research demonstrates excellent correspondence between the two measures in correctional samples (Guy & Douglas, 2006). Validity of PCL-R and PCL:SV assessments in predicting recidivism has been evaluated extensively in the U.S., with performance ranging from poor to good (e.g., Gonsalves, Scalora, & Huss, 2009; Salekin, Rogers, Ustad, & Sewell, 1998; Walters & Duncan, 2005). For more information on the PLC-R and PCL:SV, see http://www.hare.org/scales/.

PAI

The PAI contains 344 self-report items that are divided into 22 validity, clinical, treatment consideration, and interpersonal scales. Individual item responses within the scales are hand scored and assessed in conjunction with interpretive guidelines included in the professional manual (Morey, 2007). In U.S. studies assessing the predictive validity of the PAI, the assessment scale scores had fair to good validity in predicting general offending (e.g., Barber-Rioja et al., 2012; Walters, 2009; Walters & Duncan, 2005). For an overview and bibliography, see http://www4.parinc.com/Products/Product.aspx?ProductID=PAI.

Other Personality Assessment Instruments

Other instruments including the California Psychological Inventory: Socialization Scale (CPI:SO), Lifestyle Criminality Screening Form (LCSF), Minnesota Multiphasic Personality Inventory (MMPI), Neuroticism, Openness to Exposure Personality Inventory-Revised (NEO-PI-R), and the Peterson, Quay, and Cameron Psychopathy Scale (PQC) can produce valid assessments of recidivism risk, though performance varies widely (see Walters, 2003, 2006).

References and Suggested Readings

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Criminal Thinking Questionnaires

Criminal thinking questionnaires, such as the Psychological Inventory of Criminal Thinking Styles (PICTS; Walters, 1995) and the Texas Christian University Criminal Thinking Scales (TCU CTS; Knight, Simpson, & Morey, 2002), are designed to identify attitudes and thought patterns associated with criminal behavior.

PICTS

The PICTS is an 80-item, self-report measure composed of eight thinking pattern scales, two validity scales, four factor scales, two composite scales, and a General Criminal Thinking (GCT) scale. The validity of PICTS scores in predicting general offending has been evaluated in a number of U.S. studies with mixed findings. Performance of the GCT scale scores ranges from poor to good (e.g., Walters, 2009a, 2009b, 2011); however, other research suggests the eight thinking pattern scales have poor validity (Gonsalves, Scalora, & Huss, 2009).

TCU CTS

The TCU CTS is an actuarial, self-report instrument designed to measure criminal thinking. The instrument contains 37 items distributed across six thinking pattern scales: Entitlement, Justification, Power Orientation, Cold Heartedness, Criminal Rationalization, and Personal Irresponsibility. In one U.S. study, the six thinking pattern scale scores had poor validity in predicting both general offending and violations (Taxman, Rhodes & Dumenci, 2011). More information and a copy of the TCU CTS assessment materials are available from http://www.ibr.tcu.edu/pubs/datacoll/cjtrt.html.

References and Suggested Readings

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CONCLUSION

Summary of Findings

Our review of validation studies conducted in the United States did not identify one instrument that systematically produced more accurate assessments than the others. However, performance within and between instruments varied considerably depending on the assessment sample, circumstances, and recidivism outcome.

Overall, there were very few U.S. evaluations examining the predictive validity of assessments completed using instruments commonly used in U.S. correctional agencies. In most cases, validity of assessments completed using any given instrument had only been examined in one or two studies conducted in the United States, and frequently, those investigations were completed by the same people who developed the instrument. Moreover, only two of the 53 studies included in this review reported evaluations of inter-rater reliability. (We return to these two points later.)

Our selection criteria and, specifically, our focus on studies of predictive validity conducted in the United States resulted in the exclusion of some prominent and promising instruments, such as the LS/CMI or the Women's Risk/Need Assessment. Similarly, none of the reviewed studies examined the predictive validity of structured professional judgment, as opposed to actuarial, instruments, though we know of at least a few that are being used for the purposes of assessing recidivism risk (e.g., the Short-Term Assessment of Risk and Treatability, START, see Desmarais, Van Dorn, Telford, Petrila, & Coffey, 2012). Importantly, findings of the current review are not intended to suggest that these instruments do not produce reliable and valid assessments of recidivism risk and should not necessarily preclude their use in practice. Instead, we are simply asserting that they have yet to be evaluated as such in the United States. Indeed, decision makers interested in any risk assessment instrument should balance considerations of the empirical evidence, but also the practical issues we review in the following section.

Finally, risk classifications (e.g., identification of offenders as low, moderate, or high risk) generally outperformed total scores, yet total scores were evaluated much more frequently. This finding is consistent with prior research (e.g., Desmarais et al., 2012) and emphasizes the importance of using the instruments as they were designed to be used.

Selecting a Recidivism Risk Assessment Instrument

When deciding which recidivism risk assessment instrument to implement in practice, we recommend reviewing the empirical evidence, as well as answering the following questions:

What is your outcome of interest?

Our review revealed that some instruments performed better in predicting particular recidivism outcomes than others. Specifically, the SFS instruments performed particularly well in predicting general offending *including* violations, whereas the ORAS-CST, ORAS-CSST, PCRA, and

STRONG were excellent predictors of offenses *excluding* violations. WRN assessments stood out as the best predictors of violations alone.

What is your population?

Some instruments were developed to assess for specific populations; for example, the SFS instruments are specifically designed for use with parolees. Also, some instruments appear to perform better for some subgroups of offenders than others. The LSI instruments, for instance, produced assessments with only fair validity for female offenders, though predictive validity was generally good for male offenders. Other instruments, such as the COMPAS, ORAS and STRONG, produced assessments with good validity for both male and female offenders.

What resources are required to complete the assessment?

Answering this question includes considering characteristics of both the risk assessment tool as well as the setting; for instance, the information necessary to complete the assessment and whether this information is available. Some instruments, such as the IORNS, are completed based solely on offender self-report; other instruments, such as the PCRA and COMPAS, combine information derived from a variety of sources, including self-report, interview, and review of official records. Similarly, the time required to complete a risk assessment will depend not only on the nature and amount of information required, but also the number of items included. We found that the number of items varied broadly across instruments from four items (ORAS-CSST) to 130 items (IORNS). Decision makers should consider whether staff have the time and information required to complete the assessments. Other resource considerations include staff training and backgrounds. Some instruments, such as the PCRA, require that assessors complete training courses and are certified prior to implementation. Others, such as the LSI family of instruments, require that assessors be supervised by professionals with specific degrees and/or credentials. Last, but certainly not least, decision makers should consider the costs associated with implementing any given risk assessment tool. Costs may include those associated with purchasing materials and staff training, among others, and they may be fixed, one-time costs or costs that will continue to be incurred over time. Long-term sustainability of implementation will hinge, in part, on a *realistic* appraisal of the match between the available and required resources.

Additional Considerations

In addition to identifying the instrument best-suited to an agency's specific needs and constraints, there are additional issues to consider during the process of selecting and implementing a recidivism risk assessment tool.

First, caution is warranted when attempting to generalize the findings of research studies to the use of risk assessment instruments in practice. In research contexts, risk assessments are routinely conducted by graduate students, who may have more or less training than those who will be conducting the risk assessments in practice. Assessors in research studies also may be given more time and resources to complete risk assessments and may receive ongoing

supervision in the specific risk assessment protocol; these luxuries typically are not afforded to professionals in practice settings.

Second, there have been very few evaluations of predictive validity within specific offender subgroups. Indeed, only a handful of studies included in this review compared validity depending on offender sex or race/ethnicity and none examined predictive validity across psychiatric diagnostic categories. As such, there is insufficient evidence to conclude that assessments perform comparably or are equally applicable to specific offender subgroups. As described earlier, actuarial instruments estimate risk of recidivism through comparison of a given offender's total score against the recidivism rates of offenders with the same (or a similar) score in the construction sample. Race/ethnicity and sex are important factors associated with recidivism that may not be accounted for in these actuarial models. There is considerable evidence to suggest that race/ethnicity and sex are potentially important sources of assessment bias (Holtfreter & Cupp, 2007; Leistico, Salekin, DeCoster, & Rogers, 2008).

Third, allegiance, which occurs when at least one developer of the risk assessment instrument is an author on a study investigating that instrument's predictive validity, was present for many of the articles included in this review. Strong effects of allegiance on evaluations of assessment and treatment approaches, including risk assessment, have been found in many fields. In the violence risk assessment literature, a recent meta-analysis demonstrated the impact of allegiance on the predictive validity of three commonly used actuarial instruments (Blair, Marcus, & Boccaccini, 2008). Performance of the instruments was significantly better in studies conducted by the tool authors than in studies conducted by independent researchers. We were unable to test for allegiance effects due to the relatively small number of studies per instrument. Though the reasons for allegiance effects are unclear (e.g., bias, fidelity, see Harris & Rice, 2010), there is a critical need for independent evaluation of the predictive validity of risk assessments completed using the instruments included in this review.

Fourth, most studies included in this review reported statistics that speak to whether recidivists generally received higher risk estimates than did non-recidivists (known as *discrimination*). Very few studies reported statistics that speak to whether those offenders who were identified as high risk for recidivism went on to recidivate during follow-up and whether those offenders who were identified as low risk did not (known as *calibration*). This is not unique to the studies included in the current review; a recent review found that calibration estimates were reported in less a fourth of violence risk assessment studies (see Singh, Desmarais & Van Dorn, 2013). Discrimination and calibration are two sides of the same coin – both representing important qualities of an instrument's predictive validity – but address different issues (Singh, 2013).

Fifth, there was an almost complete lack of information regarding the inter-rater reliability of available recidivism risk assessment instruments. With the exception of LSI-R and LSI-R:SV, we do not have any information regarding whether assessments completed using the instruments reviewed in this report are consistent across assessors. This is not trivial; reliability has been referred to as "the most basic requirement for a risk assessment instrument" (Douglas, Nicholson, & Skeem, 2011, p. 333). Indeed, an assessment *must* be reliable in order for it to be valid (though the reverse is not true). Inter-rater reliability is relevant to any assessment in which

an assessor must rate or code items as part of the process; thus, inter-rater reliability should be examined for all instruments except those completed exclusively through offender self-report.

Sixth and finally, there have been few evaluations of the impact of implementing a risk assessment tool on recidivism rates. Though many of the instruments included in the present review have acceptable levels of predictive validity, the goal of risk assessment is not simply to predict, but, ultimately, to *reduce* recidivism. Achieving this goal will necessitate the following:

1. The risk assessment tool *must* be implemented in a sustainable fashion with fidelity. It is not as simple as deciding on a tool and applying it in practice. Successful implementation of a risk assessment tool involves completing a series of steps, from preparation to training and pilot testing to full implementation. This multi-step process requires ongoing supervision to ensure sustainability, including regular evaluations of fidelity and booster training for staff on a semi-annual basis (see Vincent, Guy & Grisso, 2012 for a guide to implementation).
2. Findings of the risk assessment *must* be communicated accurately and completely. Indeed, "Improper risk communication can render a risk assessment that was otherwise well-conducted completely useless or even worse, if it gives consumers the wrong impression." (Heilbrun, Dvoskin, Hart & McNiel, 1999, p. 94).
3. Information derived during the risk assessment process *must* be used to guide risk management and rehabilitation efforts, with particular attention to the steps described by the RNR model; specifically, assess offenders' risk of recidivism, with more restrictive and intensive efforts focused on high-risk offenders; match treatment and rehabilitation efforts to offenders' individual criminogenic needs (as identified in the risk assessment process) and deliver them in a way that is responsive to their individual learning style, motivation, personality and strengths. This will require regular review of staff performance. How performance, as well as fidelity, will be measured should be detailed in a comprehensive program evaluation plan established *prior to* implementation.

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APPENDIX A

List of Jurisdiction-Specific Risk Assessment Instruments

1. Alabama Risk and Needs Assessment
2. Allegheny County Risk Assessment
3. Arizona Risk Assessment Suite
4. Arkansas Post-Prison Board Transfer Risk Assessment
5. California Parole Violation Decision Making Instrument
6. California Static Risk Assessment
7. Colorado Actuarial Risk Assessment Scale
8. Connecticut Salient Factor Score
9. Delaware Parole Board Risk Assessment
10. Georgia Board of Pardons and Parole's Field Log of Interaction Data
11. Georgia Parole Behavior Response and Adjustment Guide
12. Georgia Parole Decisions Guidelines Grid System
13. Georgia Department of Corrections Offender Tracking Information System
14. Hawaii Risk and Needs Assessment
15. Illinois Risk Assessment Instrument
16. Illinois Risks, Assets and Needs Assessment Tool
17. Indiana Risk Assessment System
18. Kentucky Pretrial Risk Assessment Instrument
19. Kentucky Parole Guidelines Risk Assessment Instrument
20. Iowa Board of Parole Risk Assessment
21. Louisiana Risk Needs Assessment
22. Maryland Public Safety Risk Assessment
23. Michigan Parole Guidelines Score Sheet
24. Mississippi Parole Risk Instrument
25. Missouri Sentencing Assessment Risk Instrument
26. Missouri Parole Board Salient Factor Guidelines
27. Montana Risk Assessment Instrument
28. Nebraska Criminal History Assessment instrument
29. Nevada Parole Risk Assessment

30. New Mexico Risk and Needs Assessment
31. North Carolina Risk Needs Assessment
32. Oregon Criminal History/Risk Assessment
33. Public Safety Checklist for Oregon
34. Orange County Pretrial Risk Assessment
35. Rhode Island Parole Risk Assessment
36. South Carolina Parole Risk Assessment Instrument
37. South Dakota Initial Community Risk/Needs Assessment
38. State of Hawaii LSI-R Proxy
39. Tennessee Offender Risk Assessment/Needs Assessment
40. Tennessee Parole Grant Prediction Scale and Guidelines
41. Texas Parole Risk Assessment Instrument
42. Utah Criminal History Assessment
43. Vermont Parole Board Risk Assessment
44. Virginia Pretrial Risk Assessment Instrument
45. Virginia Risk Assessment Tool
46. Washington Risk Level Classification
47. West Virginia Parole Board Assessment

APPENDIX B

Glossary of Terms

Actuarial Risk Assessment

Mechanical approach to risk assessment in which offenders are scored on a series of items statistically associated with recidivism risk in the sample of offenders upon whom the instrument was developed. The total score is cross-referenced with a statistical table that translates the score into an estimate of recidivism risk during a specified timeframe.

Area Under the Curve (AUC)

Performance indicator measuring the probability that a randomly selected offender who recidivated during follow-up would have received a higher risk classification using a given risk assessment approach than a randomly selected offender who did not recidivate during follow-up.

Cohen's d

Performance indicator measuring the standardized mean difference between the estimated level of risk or total score of offenders who did and did not recidivate during follow-up.

Dynamic Factor

Changeable characteristics (e.g., substance abuse) that establish a relative level of risk and help inform intervention; they can be either relatively *stable*, changing relatively slowly over time (e.g., antisocial cognition) or *acute,* changing more quickly over time (e.g., mood state).

Kappa (k)

Measure of inter-rater reliability representing the percentage of categorizations (e.g., low, moderate or high risk) upon which multiple assessors agreed, statistically corrected for chance.

Intra-Class Correlation Coefficient (ICC)

Measure of inter-rater reliability representing the strength of agreement between multiple assessors on *continuous* variables (e.g., total scores), statistically corrected for chance.

Meta-analysis

Systematic review that includes a quantitative synthesis of the findings of *primary research.*

Observed Agreement

Measure of inter-rater reliability representing the percentage of categorizations (e.g., low, moderate or high risk) upon which multiple assessors agreed.

Odds ratio (OR)

Performance indicator measuring the odds of the risk estimate in an offender who recidivates during follow-up being one higher than the risk estimate of an offender who does not recidivate.

Parole

Conditional release of a prisoner before the expiration of his or her sentence subject to conditions supervised by a designated parole officer.

Performance Indicator

Statistical measure of predictive validity.

Point-Biserial Correlation Coefficient (r_{pb})

Performance indicator measuring the direction and strength of the association between a *continuous predictor* (e.g., total score) and a *dichotomous outcome* (e.g., recidivating vs. not).

Primary Research

Collection of new data that does not already exist.

Probation

Release of an offender from detention or sentence served in the community in lieu of detention, subject to conditions supervised by a probation officer.

Protective Factor

Characteristic of the offender (e.g., physical health, mental health, attitudes), his or her physical and/or social environment (e.g., neighborhood, family, peers) or situation (e.g., living situation) that is associated with a decrease in the likelihood of offending.

Recidivism

Relapse into criminal behavior by an individual who has previously been convicted of one or more offenses.

Risk Assessment

Process of estimating the likelihood an offender will recidivate to identify those at higher risk and in greater need of intervention. Also may assist in the identification of treatment targets and the development of risk management and treatment plans.

Risk Assessment Instrument

Instrument composed of empirically- or theoretically-based risk and/or protective factors used to aid in the assessment of recidivism risk.

Risk Factor

Characteristic of the offender (e.g., physical health, mental health, attitudes), his or her physical and/or social environment (e.g., neighborhood, family, peers) or situation (e.g., living situation) that is associated with an increase in the likelihood of offending.

Somer's d

Performance indicator measuring the direction and strength of the association between an *ordinal predictor* (e.g., estimate of risk as low, moderate or high) and a *dichotomous outcome* (e.g., recidivating vs. not).

Structured Professional Judgment

Structured approach to risk assessment focused on creating individualized and coherent risk formulations and comprehensive risk management plans. Assessors estimate risk through consideration of a set number of factors that are empirically and theoretically associated with the outcome of interest. Total scores are not used to make the final judgments of risk. Instead, assessors consider the relevance of each item to the individual offender, as well as whether there are any case specific factors not explicitly included in the list.

Static Factor

A historical or otherwise unchangeable characteristics (e.g., history of antisocial behavior) that help establish absolute level of risk.

Systematic Review

A process in which the empirical literature from multiple primary studies on a particular topic meeting pre-determined inclusion and exclusion criteria is descriptively analyzed.

Technical Violation

A breach of the conditions of parole or probation.

Unstructured Risk Assessment

A subjective assessment of recidivism risk based on the assessor's intuition, knowledge of theory, and professional experience.

TAB 42

Pretrial Release Risk Study, Validation, & Scoring: Final Report

April 2013

THE UNIVERSITY OF UTAH

Utah Criminal Justice Center

COLLEGE OF SOCIAL WORK
COLLEGE OF SOCIAL & BEHAVIORAL SCIENCES
UTAH COMMISSION ON CRIMINAL & JUVENILE JUSTICE
S.J. QUINNEY COLLEGE OF LAW

Pretrial Release Risk Study, Validation, & Scoring: Final Report

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April 2013

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Executive Summary

Background

The purpose of a pretrial risk assessment is to predict the likelihood of not showing up for court and/or committing a new offense during the pretrial period. The development of pretrial risk tools has come a long way and recently there has been a growing national movement to improve pretrial release supervision and risk assessments (Mamalian, 2011). Nonetheless, Mamalian notes that a 2009 survey of pretrial programs by the Pretrial Justice Institute (PJI) found that only 24% of programs rely solely on objective criteria for release decisions, while under half of those surveyed (48%) had validated their instruments, and merely one-third were using a tool developed specifically for their jurisdiction. One reason for the lack of validated pretrial risk instruments may be the difficulty predicting risk, which includes data quality issues, the relatively low occurrence of pretrial failure, and the short time frame of pretrial release, as well as the inability to accurately control for non-releases and suppression effects (e.g., influence of supervision or release conditions non-randomly assigned; Mamalian, 2011). In a meta-analysis of existing pretrial risk instruments, static factors (e.g., prior criminal history) rather than dynamic factors (e.g., employment or family relations) were better predictors of pretrial failure, although few factors were strong predictors of pretrial failure (Bechtel et al., 2011). Despite these challenges, work continues on improving pretrial release assessments, with research and experts recommending locally validated, objective instruments (Bechtel et al., 2011; Mamalian, 2011). As such, the current study was undertaken to examine the relationship between pretrial failure and a variety of self-reported and official factors for a sample of defendants released from the Salt Lake County jail.

Pretrial Failure and Proposed Release Instrument

In this study's random sample of pretrial releases (n=1,066), average time from jail release to case closure was over four months (Md = 125 days), with 46% of all released defendants (regardless of release status, e.g., own recognizance, bail, or supervision) failing to appear (FTA) for at least one of their scheduled hearings. Fifteen percent (15%) had a new charge during that period, with most having either a 2nd Degree Felony (28%) or Class B Misdemeanor (23%). The most common offense types were drug (42%) and property (41%). New charge bookings in the Salt Lake County jail, rather than new BCI arrests, were used as the outcome measure of pretrial recidivism. This decision was made due to the discovery that arrests for outstanding warrants are recorded similarly in the BCI database (and rap sheets) as new criminal conduct. As such, it would be too difficult for researchers (or pretrial jail screeners) to differentiate new crime commission from arrests for non-compliance.

Multiple factors from the pretrial pilot assessment (28 items) and official criminal justice records (Salt Lake County Adult Detention Center and statewide criminal history (BCI)) were examined in relation to pretrial failure in a randomly selected development sample (n=527). The strongest predictors, along with some theoretically-driven factors, were loaded into Classification and Regression Tree (CART) decision tree analyses predicting FTA (resulting in 5 significant variables) and recidivism (resulting in 4 significant variables, two overlapping with FTA). The results of these analyses were two pretrial risk scores: one for FTA and one for recidivism, each ranging from one to seven, with seven indicating highest risk of failure. Both risk scores had acceptable discriminant validity on both the developmental and validation samples and performed better than chance (based on AUC-ROC analyses).

Pretrial failure trends were examined for sub-groups by gender, minority status, and release type (e.g., no conditions, financial conditions, supervision). Risk scores generally demonstrated the expected relationship with pretrial failure across these sub-groups. Based on these analyses, the following is recommended as the Pretrial Release Instrument (PRI), although additional (non-scored) items may be added for purposes of assessing needs and providing services or conditions of release (e.g., employment, mental health). It should be noted that longer time to case closure was associated with increased pretrial failure, above and beyond individual risk score. In addition, those who had both District and Justice court cases at their release were more likely to recidivate during pretrial release (again, increased risk above and beyond the recidivism risk score).

Proposed Pretrial Release Instrument (PRI)

Source	Item
BCI	Total Number (#) of Prior Arrests in BCI Rap Sheet (leave blank if no rap sheet)
OMS	Has a New Property Charge Booking in Last 2 Years (Y = 1, N = 0)
OMS	Current Age (enter whole number)
OMS	Current Outstanding Warrants (WA, BW, SU; enter whole number, count by offense rows at this booking (not court cases))
OMS	Has Obstructing Law Enforcement New Charge at this booking (Y = 1, N = 0)
Offender Self-Report	Age at 1st Conviction (include juvenile; enter whole number)
Offender Self-Report	Do you believe you have a Substance Abuse problem? (Y = 1, N = 0)

A small non-released sample was also examined and it was determined that a substantial proportion of them scored low to moderate on the FTA risk score (53%), while 47% scored low to moderate on the recidivism risk score. As such, use of the proposed PRI may lead to more individuals qualifying for pretrial release. Additional validation of this proposed instrument should be conducted in the future, especially if it leads to modifications in the type or number of individuals released pretrial. The Pretrial Justice Institute also recommends that risk assessments not only be piloted and validated for the specific jurisdiction using them, but that they are also revalidated on a regular basis to ensure that they continue to retain their predictive validity over time (Clark, n.d.).

Background and Introduction

Pretrial Background

The history and purposes of pretrial release and supervision have been summarized many times in the literature. Two studies (Clarke, 1988; VanNostrand, 2007), in particular, provide comprehensive overviews of the main issues. There are six legal foundations to pretrial release/supervision, of which the sixth is the most important to the development and operation of pretrial supervision:

1. Presumption of innocence
2. Right to counsel
3. Right against self-incrimination
4. Right to due process of law
5. Right to equal protection under the law
6. Right to bail that is not excessive

The Bail Reform Act of 1966 further defined "bail that is not excessive" by outlining the common pretrial release conditions used today: 1) release on recognizance (ROR), defendant released pretrial without the constraint of bail on the promise that he/she will return for future court hearings; 2) conditional non-monetary pretrial release, including supervision and conditions imposed to reduce the risk of flight (the most common impression of pretrial supervision); and 3) monetary bail, which should only be imposed by the court if non-financial conditions are not sufficient enough to assure court appearance. In the Bail Reform Act of 1984, the limited use of preventive detention was further specified to address the concern of potential danger to the community. Furthermore, U.S. criminal code also allows for additional release conditions to be imposed if they are deemed likely to reduce risk of failure to appear (FTA) in court or pretrial recidivism. These conditions can include maintaining employment, participating in educational programs or psychiatric treatment, restricting personal associations or contact with alleged victims or witnesses, abstaining from alcohol/drug use or possessing a firearm, and reporting on a regular basis to a law enforcement agency.

The importance of offering pretrial release with the least restrictive barriers has also been noted in several studies that have demonstrated worse outcomes (more likely to be convicted, or harsher punishments if convicted) for defendants who remain detained pretrial (history of studies cited in Clarke, 1988; VanNostrand, 2007; Williams, 2003). In one such study, Williams (2003) used a logistic regression to control for several legal (e.g., degree of charge, number of current charges, conviction history) and extra-legal (e.g., demographics, having a private attorney) variables and still found that being detained pretrial was the strongest predictor of receiving incarceration as a sentence. In fact, after controlling for all of those other factors, being detained pretrial was associated with over six times greater likelihood of receiving incarceration at sentencing. Being detained pretrial has also been shown to be significantly related to the length of incarceration imposed (after controlling for other significant factors; Williams 2003).

Pretrial Release Decisions

Pretrial release and supervision agencies play a key role in the release decision-making process, acting as the "exchange service" between defendants and the criminal justice system (Worzella & Sayner, 1988). Nonetheless, pretrial supervision agencies face challenging and competing goals,

such as increasing opportunities for release to protect individual's personal freedom and reduce jail populations, while protecting public safety and lowering risk of pretrial failure (Worzella & Sayner, 1988; Lowenkamp, Lemke, & Latessa, 2008). Risk of pretrial failure is generally defined as the likelihood that an offender will fail to appear in court (FTA) and/or commit a new offense during the pretrial period. Typically some combination of current legal factors (e.g., type and degree of offense) and offender risk factors (criminal history, substance abuse, ties to community) are used by the pretrial agencies to calculate risk and determine release criteria.

Some research has been conducted to identify factors that are related to the likelihood of being released pretrial and many studies have found that factors used to make release decisions are not always the best predictors of pretrial success. For instance, Maxwell (1999) found the following factors to be significantly related to an increased likelihood of release on recognizance (ROR) instead of on bail: women, person and property offenders (vs. drug and weapons, who had the least likelihood of ROR), and those with no prior convictions or failures to appear (FTAs). However, females and property offenders were more likely to FTA, suggesting that they should have been released on more restrictive criteria (i.e., bail).

Petee (1994) also examined factors related to release on recognizance (ROR) and found that negative demeanor during the pretrial interview and minority status reduced the likelihood of a recommendation to ROR. According to Baradaran and McIntyre (2012), the primary factors that judges consider when deciding whether or not to release a defendant are: 1) the current offense, 2) the defendant's prior record, and 3) the defendant's current circumstances and character. Although a common consideration, extralegal factors such as the defendant's current circumstances, character, or demeanor introduce a large degree of subjectivity into the decision process that could easily lead to discriminatory release practices. These studies (Baradaran & McIntyre, 2012; Petee, 1994) demonstrate the significant influence that extralegal factors can play in release decisions and highlight the value of standardized pretrial risk instruments that can remove much of this subjectivity.

Pretrial Risk Assessments

Pretrial risk assessments are comprised of a number of factors that have been found to predict a person's risk of not showing up for court and/or committing a new offense during the pretrial period. The development of pretrial risk tools has come a long way, with several attempts made at creating and validating risk assessments (Goldkamp, 1983; Lowenkamp, Lemke, & Latessa, 2008; Siddiqi, 2002; VanNostrand, 2003). In fact, there has been a national movement to improve pretrial release supervision and risk assessments, with validated evidence-based risk tools being recommended for all jurisdictions (Mamalian, 2011). In her recent article, Mamalian (2011) highlights an important distinction that is worth noting; pretrial risk assessments do not predict whether a specific defendant will fail, rather they provide a statistical probability of failure for defendants that have a specific score.

A number of studies have found that pretrial risk assessments can be used to increase the number of pretrial releases from the jail without negatively impacting pretrial outcomes (Baradaran & McIntyre, 2012; Pretrial Justice Institute, 2011; Siddiqi, 2005). In their study of a national dataset of over 117,000 pretrial defendants in urban counties between the years of 1990 and 2006, Baradaran and McIntyre (2012) concluded that, as a whole, we are largely holding the wrong pretrial defendants and that "up to 25% more defendants can be released pretrial while maintaining the same level of pretrial crime if we release a larger number of older defendants, defendants with clean records, and defendants charged with fraud and public-order offense" (pg. 502-503).

Lowenkamp et al. (2008) suggest that pretrial risk assessments can also be used to identify low, medium, and high risk offenders and that these levels can be used to match offenders to appropriate supervision levels and services. The importance of matching interventions to an offender's risk level has been well documented and researchers have found that providing intensive supervision or services to low risk offenders is ineffective and may actually result in worse outcomes for these offenders (Bonta, Wallace-Capretta, & Rooney, 2000; Latessa, Lovins, & Smith, 2010; Lowenkamp & Bechtel, n.d.). Some researchers have even suggested that pretrial risk tools be used to help judges or supervising agents identify areas of need and to determine appropriate levels of supervision (Lowenkamp & Bechtel, n.d.); however, Clark (n.d.) notes that these tools are only designed to inform custody decisions and that other instruments are available that are specifically designed to identify areas of need.

There is general consensus in the criminal justice field that no pretrial risk assessment is universally applicable and that tools need to be modified and validated for each jurisdiction that is using them. The Pretrial Justice Institute goes one step further and recommends that risk assessments not only be piloted and validated for the specific jurisdiction using them, but that they are also revalidated on a regular basis to ensure that they continue to retain their predictive validity (Clark, n.d.). A relatively recent validation study of a proxy assessment in Salt Lake County (Hickert & Próspero, 2008) highlights the importance of piloting an assessment locally. The Proxy Score Risk Assessment is a three-item (i.e., current age, age at first arrest, and number of prior arrests) pre-screening tool that was developed to quickly identify the high risk offenders who require an additional assessment (Bogue, Woodward, & Joplin, 2006). Although validated and used in Hawaii (Davidson, 2005), these researchers found that the total score was not a consistent predictor of recidivism for offenders booked into the Salt Lake County jail (Hickert & Próspero, 2008).

Locally validated pretrial risk assessments are valuable tools that offer a standardized and objective method of decision-making. Nevertheless, these tools are not foolproof, and a number of researchers have noted the importance of putting in place procedures that allow professional discretion to override the tool when appropriate (Austin, 2004; Andrews, Bonta, & Hoge, 1990; Latessa, Smith, Lemke, Makarios, & Lowenkamp, 2009). In fact, Austin (2004) suggests that when properly exercised, professional discretion can be used to prevent false positives or negatives. Nevertheless, these overrides should be an infrequent occurrence and should be monitored on a regular basis to ensure that individuals are not being mis-categorized and that the assessment tool does not need to be modified to meet an emerging need.

Pretrial Risk Factors

Several studies have examined pretrial risk and have found that the following factors increase a person's likelihood of pretrial failure: prior FTAs (Lowenkamp, Lemke, & Latessa, 2008; Siddiqi, 2002; VanNostrand, 2003), prior convictions (Baradaran & McIntyre, 2012; Bonta, Wallace-Capretta, & Rooney, 2000; Levin, 2011), current property offense (Austin, Krisberg, & Litsky, 1985; Baradaran & McIntyre, 2012; Maxwell, 1999), substance abuse (Lowenkamp, Lemke, & Latessa, 2008; VanNostrand, 2003), and younger age (Austin, Krisberg, & Litsky, 1985; Levin, 2007; Lowenkamp, Lemke, & Latessa, 2008). Pretrial research has also consistently found that people with current person and/or violent offense(s) are actually less likely to recidivate or miss court than other types of offenders (Lash, 2003; Levin, 2007; Maxwell, 1999). Although there has been some debate within the criminal justice field regarding which factors should be included on risk

assessments, recent studies seem to point toward static factors being better predictors of pretrial risk than dynamic factors (Bechtel, Lowenkamp, & Holsinger, 2011; Pretrial Justice Institute, 2011).

Although not a public safety issue, pretrial defendants who do not appear in court are not being held accountable and waste valuable court, law enforcement, and jail resources by dragging out the court process. Failure to appear (FTA) rates were on the higher end of the range (20-43%) in the recently conducted Salt Lake study (Hickert, Becker, & Prospero, 2010), compared to other jurisdictions that reported FTA rates between 10% (VanNostrand, 2003) and 42% (Goldkamp, 1983). Similarly, a 2009 national survey of county pretrial programs reported an FTA rate of 43% for felony-level pretrial defendants in Salt Lake County (Pretrial Justice Institute, 2009). According to this report, the FTA rate reported for Salt Lake was significantly higher than all of the other counties. In fact, the combined average FTA rate for all 40 counties reported on (including Salt Lake) was only 20%.

Nevertheless, safety is of utmost concern to the public and to judges, who researchers have shown place far greater weight on the perceived dangerousness of the offender than their likelihood of showing up for court when making pretrial release decisions (Baradaran & McIntyre, 2012). Research seems to indicate that, as a whole, defendants who are released pretrial pose very little risk to public safety. Recidivism rates among pretrial defendants in the Salt Lake study (Hickert, Becker, & Prospero, 2010) were on the lower end of the range (7-15%) compared to rates reported in the literature (12%: Austin, Krisberg, & Litsky, 1985; 28%: Goldkamp, 1983). Although improvements have been made in the field, much of the variance in recidivism is still not accounted for in the current risk tools that are available (Andrews, Bonta, & Wormith, 2006; Bonta, 2002; Gottfredson & Moriarty, 2006). Furthermore, prediction of risk (whether FTA or recidivism) becomes more difficult as base rates (e.g., percent FTA) deviate from 50% (Gottfredson & Moriarty, 2006).

The Current Study

At the beginning of 2011, the Salt Lake County Division of Criminal Justice Services (CJS) worked with Utah Criminal Justice Center (UCJC) researchers and consultants with the Salt Lake County Criminal Justice Advisory Council (CJAC) to create a list of pretrial pilot items for potential inclusion in the Pretrial Release Instrument (PRI). These items were compiled from previously validated instruments (e.g., VPRAI - VanNostrand, 2003; ORAS – Latessa et al., 2009) and covered many of the nine areas recommended by the National Association of Pretrial Service Agencies (NAPSA) in their 2004 Standards of Pretrial Release (Bechtel, Lowenkamp, & Holsinger, 2011).

The pretrial pilot items are completed by CJS screeners at the jail through an interview process that is typically conducted during the booking process. Certain items (e.g., jail booking reason, current offense drug-related, criminal history) are collected from official records, while others (e.g., age at first conviction, employment, substance abuse) are self-reported by offenders (see Table 3 on page 9 for the full list of pilot items and response categories). The current study was undertaken to determine which pilot items are significantly related to pretrial risk (as measured by FTA and recidivism) for the Salt Lake County jail population. In addition, UCJC examined several official criminal justice measures (e.g., prior arrests and bookings) to examine their predictive validity with pretrial failure. The purpose of this study is to identify a set of risk factors that best predicts pretrial failure and develop a new pretrial release instrument (PRI) that only includes those necessary pretrial screening items.

Methods

Sample Selection

CJS Jail Screeners implemented the new pretrial pilot items in July 2011. The three month period of August through October 2011 was selected for sample collection. During this time period, CJS jail Screeners conducted 4,986 pretrial pilot assessments. Just over 90% of them (4,494; 90.1%) were complete assessments, with answers entered on all items. From these complete assessments, 1,500 were randomly selected for inclusion in this study. Because court case numbers and hearing outcomes had to be gathered manually, a manageable, yet representative, random sample was flagged. Those 1,500 were randomly split into a developmental sample and a validation sample.

Further winnowing of included assessments occurred through the following steps in data cleaning and analysis. First, when those 1,500 assessments were merged with jail booking data, a few bookings had multiple assessments. In those instances, the more recent (later) assessment was selected (N = 1,496). The next step removed persons who were in the sample more than one time (duplicate bookings per person). The first booking per person was selected for inclusion in the study (N = 1,456). These bookings/assessments were split into two samples for analyses (Developmental sample = 727, Validation sample = 729; N = 1,456). These bookings are referred to as the Qualifying Booking (QB) in the remainder of the report.

The sample for tracking post-release failure to appear (FTA) was further limited to those cases that had court hearings prior to "case closure" where the individual was not incarcerated (at Salt Lake County Adult Detention Center (ADC) or another facility (e.g., USP, other county jail)). For the purposes of this study, "case closure" is defined as the first Sentencing (for unsentenced cases) or Order to Show Cause (OSC) hearing (for post-dispositional cases) occurring after the QB. This additional step was taken in order to ensure that FTA rates were only calculated for hearings occurring while the individual was "out in the community" so that hearings occurring while they were still incarcerated on the QB or on subsequent bookings were not counted for or against them. These additional steps reduced the sample for calculating FTA to 1,066 bookings/assessments (Developmental sample = 527, Validation sample = 539).

Sample Representativeness

At each point in the sample selection process, comparative analyses were conducted to determine if the remaining sample was significantly different from the previous one on key characteristics of the qualifying booking (QB). Not surprisingly, those bookings where pretrial pilot assessments were conducted (N = 4,986) were significantly different than those bookings during the same three month period (Aug-Oct, 2011) where assessments were not conducted by pretrial jail screeners (N = 2,981). Those who did not have pretrial pilot assessments were less likely to have new charges and more likely to have commitments, as well as more likely to be released after "time served" and less likely to be released to CJS supervision or bail/bond/cash/fine. These differences merely suggest that pretrial assessments are less likely to be conducted with those inmates who have the least likelihood of pretrial release (e.g., commitments).

Those who had complete pretrial pilot assessments (N = 4,494) did not differ significantly from those with incomplete assessments (N = 492) on any of the QB details. This suggests that there is no measurable bias on QB factors related to the completion of pretrial assessments. As expected, the randomly selected sample of completed assessments (N = 1,456) did not differ significantly from all

completed assessments on any of the QB details (i.e., booking types, release types, charge severity). Nor did the two samples (developmental and validation) within those 1,456 bookings differ significantly on any of the QB details. Lastly, those bookings that were included in the post-release failure to appear (FTA) analyses (N = 1,066), were compared to those that were excluded (N = 390). Offenders who were included in FTA analyses were significantly different than those who were not. Primarily, those included in the FTA analyses had even more characteristics of a typical pretrial release group (such as higher percent new charges, lower percent warrants/holds/commitments; more likely to be released on pretrial status (CJS supervision, bail/bond/cash/fine); lower severity of new offenses).

Data Sources

The following table (Table 1) lists the primary data sources for this study. Official criminal history measures from jail booking history (OMS) and statewide arrest and conviction history (BCI) were included as predictors in addition to items from the pretrial pilot items. The primary outcomes were failures to appear (FTAs) and pretrial recidivism, defined as a new charge booking between jail release and sentencing of court case(s) from the QB. In addition, a secondary outcome of short-term recidivism, defined as a new charge booking in the three months following QB release, was examined. This additional standard measure was included due to the varying lengths of time for court case resolution and the impact that variation has on recidivism.

In order for a data source to be of utilitarian value (in addition to predictive value), it must be easy to interpret during the course of a pretrial interview. For this reason, BCI data was thoroughly vetted by examination of the actual paperwork a pretrial jail screener would see when conducting an evaluation (e.g., rap sheet). This review led to the conclusion that BCI data was an unreliable measure of pretrial recidivism, as new arrests in a rap sheet or the BCI database could represent either new charges or arrests on warrants from old charges. As such, BCI arrests are not a reliable measure of new crime commission. However, this blended measure of arrests (either for new charges or warrants) was examined as a potential predictor of pretrial failure, as were convictions from BCI.

Table 1 Data Sources

Data Source	Description
Salt Lake County Sheriff's Office - OMS	
Jail Bookings	Jail booking history, including booking date, type, charges, and release date. Some information on release type, offender demographics, and court case numbers.
Criminal Justice Services (CJS) - C-track	
PTR Risk Assessment	28 items from PTR risk assessment implemented for this study
Pretrial Screening Table	Information about release type and exit status if CJS supervised
Utah Administrative Office of the Courts - CORIS/XChange	
Court Outcomes	Court case outcomes, including FTAs, dates of hearings, disposition, and sentencing for cases occurring in Utah courts.
Bureau of Criminal Identification (BCI)	
Statewide Criminal History File	Statewide arrest and conviction history by person by arrest date, type, and degree.

Analyses

The following analyses were conducted on the developmental sample that had post-release court appearances to track for failure to appear (n = 527). First, all potential predictors from the pilot items and official criminal history records were each examined in relation to failure to appear (FTA) and recidivism with bivariate tests to identify statistical significance. The individual factors that were examined comprised eight domains (see Table 2).

Table 2 Domains for Pretrial Risk Predictors

Domain	Description
Current Charges	Number, maximum severity, and type(s) (e.g., person, property, drug) at current booking
Current Noncompliance	Number of warrants at booking and current supervision (e.g., already on pretrial, probation, or parole)
Criminal History	Prior bookings, charge types and severity; arrest history, including number, types, and felony or misdemeanor; conviction history, including number, types, and severity; self-reported age at first conviction (including juvenile)
Noncompliance History	Prior warrant bookings and self-reported FTAs
Current Stability	Employment status, living situation, time in area
Substance Abuse and Mental Health	History and current problems with drugs, alcohol, and mental health issues
Demographics	Age and marital status
Other	Verification and current appearance items from PTR risk tool

The individual items that were statistically significantly related to pretrial failure (FTA and/or recidivism, up to case closure and/or up to 90 days post-release) were sorted on the strength of their relationship with pretrial failure. Items that had the strongest bivariate relationship with pretrial failure were selected for initial release tool modeling. Some additional predictors that were not initially strongly related to pretrial failure were included if they were common factors from the fourteen (14) pretrial risk instruments that were reviewed for this study and theoretically linked to pretrial failure.[1]

Decision tree analysis, specifically a classification and regression tree (CART) analysis, was used in order to develop a logic based decision model for the prediction of FTA and recidivism. Decision tree procedures like CART are a preferred method of determining the logic behind a binary decision rule. They are frequently used in medicine as a diagnostic tool to predict outcomes such as getting the flu (Afonso et al., 2010) or predicting periodontal disease (Nunn et al., 2000). In addition to having clinical relevance, they have also been utilized to build models predicting failure to appear

[1] These fourteen studies are indicated with an asterisk in the References list at the end of this study

in court (Winterfield, Coggeshall, & Harrell, 2003) and re-offending in the criminal population (Liu, Yang, Ramsay, Li, & Coid, 2011; Winterfield et al., 2003).

Decision tree methods such as CART are generally regarded as superior to other binary outcome modeling procedures (such as logistic regression) because they (1) are model free (there are no assumptions about linearity, for example), (2) accept any variable type (variables can be categorical, ordered, or continuous), and (3) are easily applied in decision making (one simply follows a decision tree to a terminal node or decision). In contrast, linear, curvilinear and logistic regression modeling procedures require assumptions about the data structure, can be difficult to translate between research and practical decision making, and yield global models that fail to consider complicated interactions unless they are modeled in advance ("Classification and Regression Trees," 2009).

The CART procedure, on the other hand, uses recursive partitioning, a technique which recognizes that different models may be necessary to represent outcomes at varying levels of the predictor variables. The CART procedure creates nodes, like branches from a tree, which maximize homogeneity within a node. Predictor variables are split, in a recursive fashion, until final or terminal nodes are as similar as possible with respect to the outcome and its predictors. The same variable can be split more than one time (hence the recursive partitioning), if subsequent splits yield better outcome prediction at various levels of other predictor variables. CART analysis, therefore, automatically detects important interactions across multiple levels of all predictors.

The resulting risk categories from the FTA CART and recidivism CART were examined by their defining characteristics (variables that created the nodes). Both models resulted in 8 terminal nodes. A single node was removed from each model due to the relatively small sample represented in each node, the statistical unimportance of the final delineating variable in the respective models, and/or the lack of theoretical basis for the removed nodes.

The two final risk scores (7 category FTA and 7 category recidivism) were compared against their respective outcomes (FTA prior to case closure and recidivism prior to case closure) to examine correct classification, sensitivity, and specificity. The AUC-ROC (Area Under the Curve-Receiver Operating Characteristics) method was used to assess both risk scores' predictive ability. The AUC methodology as an evaluation of overall measure performance is commonly used in medical research in which predicting binary outcomes is common (e.g., cancer screening), but is also commonly used in criminal justice as a method to evaluate a tool's efficacy in recidivism prediction (e.g., Cadigan, Johnson, & Lowenkamp, 2012; Ringland, 2011; Watkins, 2011).

The AUC value provided by such an analysis yields a measure of probability that a randomly selected positive instance of an outcome (here FTA or recidivism) will rank higher on the developed release measure than a randomly selected negative outcome. Although the value of the statistic, because it is a probability, varies from 0.0 to 1.0, a value of .5 is identical to guessing the outcome. A value that is significantly greater than .5 is desired for a measure with good discriminant validity, and typically a value of .7 is considered "good" in recidivism research (see Cadigan, Johnson, & Lowenkamp, 2012; though the value also depends on the field).

Once the instrument's AUC values were calculated on the developmental sample, the decision tree logic was applied to the validation sample in order to assess if the models were equally predictive with the new sample. The predictive ability with the validation sample was also tested using AUC-ROC procedures. Details of these test outcomes are discussed in the results section of this report.

Finally, analyses were performed to examine whether the instrument was equally valid for both males and females and for minority as well as non-minority groups. To examine whether these variables moderated predictive utility, logistic regressions were conducted with either gender or minority status added as a predictor of FTA or recidivism in addition to the respective risk score. As discussed in the results' section, differences in base rate FTA and recidivism were very similar between males and females and minority/non-minority groups. Though the groups are similar with respect to the rate at which these outcomes occur, the path to the outcomes might be different. Accordingly, a power analysis was conducted to determine the sample sizes required for future studies to detect significant differences between gender and minority status, and to perhaps differentially model risk by these groups.

Results

Pilot Risk Assessment Items

This section of the report presents pilot risk item results for both the developmental sample and the validation sample combined (prior to the removal of duplicate persons; N = 1,496). The two randomly selected samples were compared on all of the items presented in Table 3 and there were no statistically significant differences between the two groups. As the two groups were each randomly selected from the three month sample of pilot assessments, this lack of statistically significant differences was expected. The statistical equivalency of these two groups suggests that they both equally represent the larger pilot risk assessed sample from the three month period. The aggregate similarity of the two samples is also important for their use as the developmental and validation samples. Furthermore, responses to these pilot risk items were examined for the final 1,066 bookings that were tracked for FTA through case closure. The responses for this smaller group varied by 5% or less on each of the items. This indicates that the figures presented in Table 3 are also representative of those who have hearings following release from jail.

Table 3 Pretrial Pilot Items and Scores

PTR Risk Item (self-report unless otherwise noted)	Variables	Percent (unless noted)
1. OMS Booking Number [1]	--	--
2. Reason client booked into jail. [1]	New Charge	66
	Warrant	57
	Commitment/Other	3
3. Are you currently under any Court Ordered supervision?	No Supervision	80
	Salt Lake County Probation	3
	Pre-Trial Supervision	3
	AP&P Probation	12
	AP&P Parole	0.3
	Other Supervision	4
4. Are you currently ordered to complete a Pre-Sentence report?	Yes	2
5. *Do you have any charges pending in any court at the present time? [3]	Yes	18

PTR Risk Item (self-report unless otherwise noted)	Variables	Percent (unless noted)
6. Age of first Conviction.	Yes, prior Conviction(s)	72
	Age of first (Mn (Sd))	21 (7)
7. *How many times in the last two (2) years have you missed a scheduled court appearance?	0 times	63
	1 time	21
	2+ times	16
8. Marital Status	Single	58
	Married	18
	Divorced/Separated	19
	Widowed	1
	Domestic Partner/Cohabitating	4
9. *Employment status.	Full Time	45
	Part Time	13
	Student	3
	Caregiver/Stay at home parent	1
	Retired/Disabled	4
	Unemployed	34
10. Time in current Employed/Unemployed status? (*in years*)	Employed Full Time (Mn (SD))	3.3 (5.0)
	Employed Part Time (Mn (SD))	2.4 (3.3)
	Unemployed (Mn (SD))	1.5 (3.5)
11. *During the last two years have you been Unemployed for longer than 30 days?	Yes	61
12. Time in Salt Lake County? (*in years*)	(Mn (SD))	18.8 (14.8)
13. Where do you currently live?	Permanent Housing	88
	Temporary Housing	7
	Homeless	5
14. *How long have you been at your current Residence? (*in years*)	Permanent Housing (Mn (SD)	4.5 (6.7)
	Temporary Housing (Mn (SD)	1.2 (3.7)
	Homeless (Mn (SD)	1.5 (3.6)
15. Do you have any Mental Health issues for which you are currently being treated?	Yes	15
16. Do you have a History of treatment for Mental Health issues?	Yes	11
17. Are you having any thoughts of Suicide?	Yes	1
18. Is the use of Alcohol related to current offense? [1]	Yes	30
19. Is the use of Illegal Drugs or Non-Prescribed Drugs related to the current offense? [1]	Yes	27
20. *Do you have a History of using Illegal Drugs?	Yes	47
21. Have you participated in treatment for Substance Abuse?	Yes , previously in treatment	32
	Yes, currently in treatment	5

PTR Risk Item (self-report unless otherwise noted)	Variables	Percent (unless noted)
22. Have you used illegal drugs (or non prescribed medications) in the last 30-days?	Yes	24
23. Do you believe you have a Substance Abuse problem?	Yes	20
24. Do you believe that you would benefit from Substance Abuse treatment?	Yes	23
25. Is there an alleged Victim of the current offense?	Yes	27
26. The client appeared? [2]	Stable	91
	Cooperative	98
	Other	8
27. Criminal History. [1]	Yes, prior conviction(s)	70
28. Verified Residence and/or Employment with References.	Did not attempt to contact	59
	Unsuccessful in contacting	8
	Successful in contacting	33
	Residence verified	71
	Employment verified	67

*Indicates items from the Virginia Pretrial Risk Assessment Instrument (VPRAI) (Van Nostrand, 2003)
[1] Based on official records (e.g., law enforcement, jail, state criminal history (BCI))
[2] Based on pretrial jail screener's perception and observations
[3] Marked as "yes" if offender had at least one pre- adjudicated case pending that was not part of their current booking

Offender Characteristics

A majority of offenders reported that they were single (58%) or divorced/separated (19%) at the time of their booking. Over half were employed either full-time (45%) or part-time (13%), and had been in their current job for two or three years on average. About one-third of offenders (34%) reported that they were currently unemployed at the booking; however, 61% of offenders reported being unemployed for longer than 30 days at some point during the previous two years. Most offenders claim to have been in the area for many years (average 18.8 years in Salt Lake County) and to be stably housed (88% in permanent housing, average of 4.5 years).

Criminal/Court History

Offenders who completed the pilot items were most often booked into the jail on a new charge (66%) or warrant (57%, warrant of arrest or bench warrant). A majority of offenders (80%) were not on any type of court ordered supervision and only 2% reported that they had been ordered to complete a Pre-Sentence report. Only 18% of offenders reported that they had pending charges at the time of their booking. This percent was much smaller than researchers were expecting, and upon closer examination it was determined that screeners were only marking "yes" if the offender had at least one pre-adjudicated case pending that was not part of their current booking. In other words, any active warrants of arrest (WA) or bench warrants (BW) that were part of this jail booking were not included in this figure.

In an attempt to determine the accuracy of the self-reported "charges pending" data, UCJC researchers conducted sub-analyses on offenders who were booked into the ADC during the first week that pilot assessments were conducted (August 1-7, 2011). All offenders who were booked into the jail on a WA or BW were flagged as having a pending charge and Court records were searched for all other individuals to determine if they had any other open cases (pre- or post-adjudication) at the time of this booking. Individuals found to have pending charges in the court records were added to those booked with WA or BWs for the sample of offenders with any charges pending at the time of the booking. Based on these broader selection criteria, 72% of the offenders booked into the jail during this week were found to have pending charges at the time of their booking, compared to the 18% of the subsample that self-reported pending charges. During this one week time period, the self-reported pending charge(s) matched the official record less than half of the time (42%); however, as was stated in the previous paragraph, this drastic difference is most likely due, in part, to the different definitions used by the jail screeners and the researcher to determine what qualified as "pending charges." Furthermore, the VPRAI item that item #5 "pending charges" is supposed to replicate is defined as follows:

> "Pending Charge(s)—Select yes if the defendant had one or more charges pending in a criminal or traffic (not civil) court at the time of arrest. Pending charge(s) require that the defendant was previously arrested for one or more charges and had a future court date pending at the time of arrest. Select no if the defendant had no pending charge(s) at the time of arrest." (Van Nostrand, 2003, p. 19)

Nearly three-quarters (72%) of offenders reported a prior conviction and, on average, their first conviction was at age 21. Just over one-third (37%) of offenders reported that they had missed at least one scheduled court appearance during the previous two years. In order to check the accuracy of this item, researchers compared self-reported and official court data for the first week of August. For this subsample, 42% of offenders reported missing any court appearances during the previous two years and half of these offenders (21%) reported missing two or more. Official court records show a significantly higher percent of offenders with any missed court appearances (66%) during the previous two years, and a surprising high percent (50%) of offenders with two or more. Self-report and official records matched for just over half (51%) of offenders and closer examination suggests that offenders who self-report no missed court appearances often had one, while those who reported missing one actually missed two or more.

Mental Health and Substance Abuse

Few offenders reported current (15%) or previous (11%) treatment for mental health issues and only 1% of offenders reported having any thoughts of suicide at the time of their booking. About one- third of the bookings included a current offense that was related to the use of alcohol (30%) or illegal drugs (27%, including non-prescribed medications). It should be noted that these two items are not mutually exclusive, and some offenders may have had offenses related to both alcohol and drugs. Nearly half (47%) of offenders reported a history of drug use and 24% reported recent (within the past 30 days) drug use. About one-third (32%) of offenders reported previous participation in substance abuse treatment and only 5% were currently enrolled in treatment. Most respondents identified themselves as not having a drug problem (80%) and felt that they would not benefit from substance abuse treatment (77%); however, a few (5%) said that although they do not believe that they have a drug problem, they do think they would benefit from treatment.

Official Record Items

In addition to the pilot items, several measures from official records were included as potential predictors of pretrial failure. This section presents descriptive statistics for the developmental and validation samples combined (N = 1066) for many of the items that were statistically significantly related to pretrial failure in the bivariate analyses. Some additional variables from official records (e.g., demographics) are also included in this section to further describe the sample. The developmental (n = 527) and validation (n = 539) samples did not differ statistically significantly on any of the factors in this section. Again, this illustrates the statistical equivalence of these two randomly selected groups.

As shown in Table 4, most of the pretrial release sample were male, White, and an average of 32 years old at their release. Table 5 shows that the most had either a new charge (66%) or warrant (60%) at their qualifying booking (booking types in Table 5 are not mutually exclusive).

Table 4 Demographics for Pretrial Release Sample

Demographics	
Gender (%)	
Female	25
Male	75
Race/Ethnicity (%)	
White	66
Hispanic	20
African American	5
Asian	2
Pacific Islander	4
Native American/Alaskan Native	3
Age	
Mn (SD)	32.8 (10.7)
Age Groups: (%)	
Under 21	10
21 to < 25	18
25 to <30	20
30 to <40	27
40+	25

Table 5 Qualifying Booking Types for Pretrial Release Sample

	Number at Qualifying Booking				
	0	1	2	3	4+
Warrants (%)	40	22	14	11	13
Holds (%)	97	2	<1	<1	<1
New Charges (%)	34	17	21	16	12

Of those with a new charge at the qualifying booking (QB), most were misdemeanors, while traffic, DUI, and person were the most common offense types (see Table 6). The largest percent of the

pretrial release sample was released with no conditions specified[2] (41%), this means that they were released on own recognizance, order of release, or some other release category in OMS that indicated no supervision or criteria. Just over a quarter (28%) were released on some type of financial criteria (i.e., bail, bond, fine, or cash), while one quarter (25%) were released to CJS supervision (pretrial release by CJS staff at jail or court ordered to pretrial supervision at CJS).[3] Only 6% were released to "another authority." For these cases, OMS records indicated that the person was released to Utah Department of Corrections (UDC), Adult Probation and Parole (AP&P), federal agency (e.g., ICE), or another jurisdiction (e.g., county or state). The majority of the sample (51%) had only Justice court cases at their pretrial release, while 29% had only District court cases, and 20% had both District and Justice cases. The average length of time from pretrial release until final case closure[4] was over 5 months (Md = 4 months).

Table 6 Qualifying Booking Details for Pretrial Release Sample

Qualifying Booking	
Maximum Severity of New Charge(s) (%)	
No new charges	34
Misdemeanor	43
Felony	23
New Charge Type (%)	
Person	18
Domestic Violence[1]	5
Violent[1]	17
Property	17
Drug	16
DUI	20
Traffic	21
Obstructing Law Enforcement	7
Weapon	2
Release Type (%)	
No Conditions Specified	41
Bail/Bond/Cash/Fine	28
CJS Supervision	25
Other Authority	6
Court Cases at Release (%)	
District Case(s) Only	29
Justice Case(s) Only	51
Both District & Justice Cases	20

[2] Multiple release categories in OMS were examined for each qualifying booking and the "most restrictive" was selected based on this order of least to most restrictive: no conditions, financial conditions, CJS supervision, release to other authority.

[3] CJS release categories were comprised of those who had CJS release indicated in their OMS record and confirmed in CJS C-track records. If there was a discrepancy, CJS C-track records were used to identify cases as CJS supervised.

[4] Final case closure is the latest/final disposition or sentence date for all of the court cases that the person had at their qualifying booking. One hundred forty eight (148) of the 1066 releases (14%) had at least one court case that was not yet closed at the time of the follow-up period ending. For those cases, final case closure date was set as the follow-up period end date (10/31/12) and only hearings up to that date were included in the FTA analyses. For those, 14% of releases, average follow-up from jail release to 10/31/12 was 13 months (Mn = 398 days; Md = 402 days).

Qualifying Booking	
Days from Jail Release to Final Case Closure	
Mn (SD)	167 (132)
25th Percentile	60
50th Percentile	125
75th Percentile	258

[1]Offenses flagged as domestic violence and violent fell entirely within person offenses and are presented for descriptive purposes only

The next two tables describe the official criminal justice history for the pretrial release sample. Both two year and five year OMS booking histories were examined for the sample. All of the two year measures had the same relationship with pretrial failure as the five year measures. Because of this, two year measures were selected for reporting, as they will be more convenient for pretrial screeners to look-up than a longer jail history.

Most of the sample (56%) had not been booked into the jail during the previous two years; however, one quarter (25%) had two or more bookings (see Table 7). The sample had an average of three (3) prior convictions (see Table 8); however, it ranged from 0 to 59, with 37% not having any prior convictions (not shown in Table 8). There was an average of 7.5 prior statewide arrest episodes (BCI; Median = 4). Each new arrest date was counted as a single arrest episode. As previously noted, an arrest in the BCI record could indicate new charge(s) or an arrest on an outstanding warrant.

Table 7 Two Year Jail History for Pretrial Release Sample

	In 2 Years Prior to Qualifying Booking		
Percent with (%)	0	1	2+
Total Bookings	56	19	25
Warrant Bookings	66	17	17
New Charge Bookings	67	21	12
Commitment Bookings	85	11	4
Bookings w/ these offense types:			
Person	90	8	2
Violent[1]	91	8	1
Property	87	10	3
Drug	87	11	2
Public Order	92	5	3
Obstructing Law Enforcement	95	4	1

[1] Offenses flagged as violent fell entirely within person offenses and are presented for descriptive purposes only

Table 8 BCI Arrest and Conviction History for Pretrial Release Sample

	Mn (SD)	Md	Min-Max
Conviction History			
Total	3.0 (4.6)	1	0-59
Misdemeanor[1]	2.2 (3.4)	1	0-50
Felony	0.5 (1.2)	0	0-10

	Mn (SD)	Md	Min-Max
Person	0.4 (1.0)	0	0-9
Violent[2]	0.4 (0.9)	0	0-9
Arrest History			
Lifetime Total Episodes	7.5 (9.7)	4	0-118
Lifetime Misdemeanor Episodes[3]	4.7 (6.9)	3	0-90
Lifetime Felony Episodes	2.1 (3.1)	1	0-21
2-Year Prior Episodes	2.8 (3.1)	2	0-33

[1]Misdemeanor convictions are those where the most serious offense on the OTN was a misdemeanor

[2]Violent convictions included most person convictions, including simple assault

[3]Misdemeanor arrest episodes are those where the most serious offense on the arrest date was a misdemeanor

FTA and Recidivism Rates

The primary sample for this study includes the 1,066 persons/bookings (Developmental sample = 527, Validation sample = 539) that had court appearance/failure to appear (FTA) tracked for all of the court cases that were part of their qualifying booking (QB) and had hearings following release from jail. This primary sample is necessary so that the two outcomes of interest, FTA and recidivism, can be predicted within the same persons/bookings. The FTA and recidivism rates reported in this section are for the Developmental (n = 527) and Validation (n = 539) samples combined. The two groups were compared on FTA and recidivism rates and, as expected, did not differ significantly on any of the outcomes.

Through Case Closure

As shown in Table 9, on the following page, 46% of all releases (regardless of type; e.g., own recognizance, bail, pretrial supervision) failed to appear (FTA) at one or more of their hearings following jail release (n = 491). All hearings following QB release where the person was not in custody (e.g., not re-booked into ADC or in-custody at another jail or prison) were tracked through case closure. Case closure was defined as the sentencing date for new charges that were convicted, the disposition date for new charges that were dismissed, and the re-sentencing date for warrants/old charges that had hearings to resolve the case after release from jail. Although nearly half (46%) of the sample missed at least one scheduled court appearance, very few attended none of their hearings (13%) or less than half (29%).

Recidivism prior to case closure was less frequent (see Table 9), with only 15% (n = 164) having a new charge booking prior to their case(s) being closed. The most severe offense among recidivists was usually a 2nd Degree Felony (28%), followed by a Class B Misdemeanor (23%). Multiple offense types could be present at recidivism events. Drug (42% of recidivists) and property (41%) were the most common types of new offenses. Offenses were given additional flags if they were domestic violence, sex, or violent offenses. Ten recidivists (6% of 164) had a domestic violence related offense, while 1% had a sex related offense, and 23% had violent offenses (most person offenses were flagged as violent, including simple assault). Pretrial recidivism was limited to new charge bookings at the ADC, as new BCI arrests could occur for either a new criminal offense *or* an arrest on an outstanding warrant. As such, BCI arrests would inflate the measure of new criminal conduct.

Combined pretrial status failure was 49%, indicating that almost half of the offenders released pretrial (across all release types; e.g., own recognizance, bail, pretrial supervision) either failed to appear for one or more of their scheduled court hearings and/or had a new charge prior to case closure.

Table 9 FTA and Recidivism Rates – Through Case Closure for Pretrial Release Sample

Failure to Appear (%)	**46**
Appearance Rate (%)	
No Appearances	13
1-25% of Hearings	3
26-50% of Hearings	13
51-75% of Hearings	11
76-99% of Hearings	6
100% of Hearings	54
Recidivism – New Charge Booking (%)	**15**
Of those, maximum severity (%)	
Class C Misdemeanor	10
Class B Misdemeanor	23
Class A Misdemeanor	13
3rd Degree Felony	21
2nd Degree Felony	28
1st Degree Felony	5
Of those, types (%)	
Person	25
Property	41
Drug	42
Public Order	21
DUI	7
Combined Pretrial Failure (%)	**49**

Up to 90 days Post-Release

Pretrial failure rates were somewhat less when only tracked through 90 days following QB release. For those that had at least one hearing date within 90 days post-release (n = 944 of 1066), the FTA rate was 42% (n = 400), with 18% attending no hearings. Within 90 days of release, 10% (n = 104 of 1066) recidivated. Within this shorter time-frame, the most severe offense was usually a Class B Misdemeanor (29%), followed by a 2nd Degree Felony (23%). Property offenses were the most common, with 47% of those who recidivated having that type of offense. Four recidivists (4% of 104) had a domestic violence related offense, while 3% had a sex related offense, and 18% had violent offenses (most person offenses were flagged as violent, including simple assault).

Table 10 FTA and Recidivism Rates – Up to 90 Days Post-Release for Pretrial Release Sample

Failure to Appear (%)	**42**
Appearance Rate (%)	
No Appearances	18
1-25% of Hearings	2
26-50% of Hearings	12
51-75% of Hearings	8
76-99% of Hearings	2
100% of Hearings	58
Recidivism – New Charge Booking (%)	**10**
Of those, maximum severity (%)	
Class C Misdemeanor	11
Class B Misdemeanor	29
Class A Misdemeanor	15
3rd Degree Felony	18
2nd Degree Felony	23
1st Degree Felony	4
Of those, types (%)	
Person	23
Property	47
Drug	36
Public Order	23
DUI	8
Combined Pretrial Failure (%)	**42**

Factors Related to FTA

The developmental sample (n=527) was used to identify factors that were related to pretrial failure to appear (FTA). The factors that had the strongest relationship to FTA in bivariate analyses,[5] as well as a few additional predictors that were theoretically important, were entered into a CART decision tree analysis. Eight (8) variables were loaded into the CART analysis and five (5) were significant in classifying the resulting risk categories (see Table 11). As shown in Table 11, no factors relating to "current stability" were included in the model, as there were no variables from this domain that were strongly related to FTA in the bivariate analyses.

The CART decision tree resulted in eight (8) terminal nodes (risk categories). However, a single risk category was removed from the final FTA risk variable due to its lack of theoretical basis.[6] Cases in this node were forced into preceding nodes based on logical criteria (i.e., based on the group to which the cases belonged before the split into the deleted terminal node). The remaining seven risk categories were coded into a single FTA risk variable that ordered the seven categories from least

[5] See Appendix A for a list of all of the factors that were examined in relation to pretrial failure and their statistical significance in bivariate analyses.

[6] The deleted node was defined by only two criteria: having 1+ warrants at the qualifying booking and being > 29.5 years old at first self-reported conviction.

to most FTA risk. The final FTA risk variable also used whole numbers for the defining factors, rather than the decimal-level factors in the original CART tree (e.g., < 52 rather than <= 51.833 years old at the booking). Table 12 presents the final 7-level FTA risk variable and the defining characteristics for each of the seven (7) levels from least (Risk Level 1) to most (Risk Level 7) FTA risk.

Table 11 Factors Related to FTA

Domain	Variables into CART Decision Tree Analysis
Current Charges	Obstructing Law Enforcement Charge (Y/N)*
Current Noncompliance	Number of Warrants at QB*
Criminal History	Age at First Conviction (including juvenile, self-report)*
	New Charge Bookings in Last 2 Years (0, 1, 2+)
Noncompliance History	Warrant Bookings in the Last 2 Years (Y/N)
	FTAs in the Last 2 Years (self-report, 0, 1, 2+)
Current Stability	--
Substance Abuse and Mental Health	Substance Abuse Problem (self-report, Y/N)*
Demographics	Current Age*

*variable significant in classifying resulting risk categories in CART analysis

As shown in Table 12 on the following page, the group who has the least risk of failing to appear (FTA) during the pretrial release period (Risk Level 1) do not have any warrants at the current booking, do not have a new obstruction of law enforcement offense at the current booking (e.g., resisting arrest or false information to police), and were 16 or older at the time of their first self-reported conviction. Appendix B presents the distribution of the sample across the seven (7) risk levels, as well as the percent who fail to appear (FTA) at each level. The lowest risk group (Level 1) comprises 33% of the developmental sample (that the model was created from), with 22% of this group failing to appear for at least one of their scheduled hearings during pretrial release. As previously noted in Table 9 on page 17, 46% of the overall sample had an FTA, so the lowest risk group is less than half as likely to FTA as the overall sample. On the other hand, the group who has the most risk of FTA is defined by having one or more warrants at their current booking and self-reporting a substance abuse problem (see Risk Level 7 in Table 12). This highest risk group is only 12% of the developmental sample, but 72% of them have an FTA (shown in Appendix B).

The validation sample is also graphed in Appendix B and shows a similar relationship between FTA risk level and likelihood of FTA; however, the discriminant validity was not as strong with the validation sample. The AUC-ROC test that examined the average sensitivity (ability to correctly identify true positives: those who FTA) and specificity (the ability to correctly identify true negatives: those who do not FTA) of the FTA risk score on the validation sample had an overall test value of .66 (compared to .70 for the developmental sample). Values of .70 or greater are considered to have good predictive and discriminant validity for a tool in recidivism research (see Cadigan et al., 2012). Though lower than ideal, the value still suggested that the tool was significantly different from a model based on chance ($p<.001$), and the values of the two independent AUC curves (developmental and validation) were not statistically different from one another ($p=.140$).

Table 12 FTA Risk Level Descriptions

FTA Risk Level	Defining Characteristics from CART Decision Tree Analysis
1	No Current Warrants No Current Obstruct LE offenses Age at 1st Conviction >= 16 or doesn't have a prior conviction
2	Has 1+ Current Warrants No Substance Abuse Problem (self-report) Current Age >= 52
3	No Current Warrants No Current Obstruct LE offenses Age at 1st Conviction < 16
4	Has 1+ Current Warrants, but less than 4 No Substance Abuse Problem (self-report) Current Age < 52
5	No Current Warrants Has Current Obstruct LE offense(s)
6	Has >= 4 Current Warrants No Substance Abuse Problem (self-report) Current Age < 52
7	Has 1+ Current Warrants Has Substance Abuse Problem (self-report)

Factors Related to Pretrial Recidivism

The developmental sample (n=527) was used to identify factors that were related to pretrial recidivism (defined as having a new charge booking between release and final court case closure). The factors that had the strongest relationship to recidivism in bivariate analyses,[7] as well as a few additional predictors that were theoretically important, were entered into a CART decision tree analysis. Eleven (11) variables were loaded into the CART analysis and four (4) were significant in classifying the resulting risk categories (see Table 13). As shown in Table 13, no factors relating to "current noncompliance" were included in the model, as there were no variables from this domain that were strongly related to recidivism in the bivariate analyses.

The CART decision tree was modeled weighting false negatives (saying individuals were not recidivists, when in fact they were) as four times more costly than false positives (saying individuals were recidivists when in fact they were not). This method was employed to emphasize the importance of correctly identifying pretrial recidivists in this model (as a matter of public safety), and was important due to the low base rate of pretrial recidivism in the sample (only 15% overall recidivated pretrial).

The CART decision tree resulted in eight (8) terminal nodes (risk categories). However, a single risk category was removed from the final recidivism risk variable due to (1) the lack of statistical importance of the predictor that created this node in the CART model (relative importance was .8% for self-reported substance abuse), and (2) the small sample size in the node (which creates

[7] See Appendix A for a list of all of the factors that were examined in relation to pretrial failure and their statistical significance in bivariate analyses.

susceptibility to over-fitting). Cases in this node were forced into preceding nodes based on logical criteria (i.e., based on the group to which the cases belonged before the split into the deleted terminal node).

Table 13 Factors Related to Recidivism

Domain	Variables into CART Decision Tree Analysis
Current Charges	Property Charge (Y/N)
Current Noncompliance	--
Criminal History	Lifetime prior arrest episodes (BCI)*
	Age at First Conviction (including juvenile, self-report)*
	New Charge Bookings in Last 2 Years (0, 1, 2+)
	Property New Charge Booking in Last 2 Years (Y/N)*
	Person New Charge Booking in Last 2 Years (Y/N)
Noncompliance History	Warrant Bookings in the Last 2 Years (0, 1, 2+)
Current Stability	Current Employment Status
Substance Abuse and Mental Health	Substance Abuse Problem (self-report, Y/N)
	History of Using Drugs (self-report, Y/N)
Demographics	Current Age*

*variable significant in classifying resulting risk categories in CART analysis

The remaining seven risk categories were coded into a single recidivism risk variable that ordered the seven categories from least to most recidivism risk. The final recidivism risk variable also used whole numbers for the defining factors, rather than the decimal-level factors in the original CART tree (e.g., >= 33 rather than >= 33.388 years old at the booking). Table 14 presents the final 7-level recidivism risk variable and the defining characteristics for each of the seven (7) levels from least (Risk Level 1) to most (Risk Level 7) recidivism risk.

As shown in Table 14 on the following page, the group with the least risk of pretrial recidivism (Risk Level 1) has six (6) or fewer lifetime prior BCI arrests, no property new charge bookings in the last two years (OMS), and is currently 24 years old or older. Appendix C presents the distribution of the sample across the seven (7) risk levels, as well as the percent who recidivate at each level. The lowest risk group (Level 1) comprises 43% of the developmental sample (that the model was created from), with 5% of this group recidivating. As previously noted in Table 9 on page 17, 15% of the overall sample recidivated, so the lowest risk group is about one-third as likely to recidivate as the overall sample. For risk levels five (5) and six (6), the likelihood of pretrial recidivism is just over 30%, which represents twice the likelihood of recidivism as the overall sample (which is 15%). However, it should be noted that, for these risk levels, the outcome means there is still almost a 70% likelihood that these groups *will not* recidivate during the pretrial release period. This suggests a relatively low overall risk and highlights why these individuals were released pretrial and, therefore, included in our sample to track pretrial success/failure.

The validation sample is also graphed in Appendix C and shows a similar relationship between recidivism risk level and likelihood of recidivism; however, the discriminant validity was not as strong with the validation sample. The AUC-ROC test that examined the average sensitivity (ability to correctly identify true positives: recidivists) and specificity (the ability to correctly identify true negatives: non-recidivists) of the recidivism risk score on the validation sample had an overall test value of .71 (compared to .76 for the developmental sample). However, both are above .70, which is

considered to indicate good predictive and discriminant validity for a tool in recidivism research (see Cadigan et al., 2012). Though the AUC value was lower in the validation sample, the values of the two independent AUC curves (developmental and validation) were not statistically different from one another (p=.225).

Table 14 Recidivism Risk Level Descriptions

Recidivism Risk Level	Defining Characteristics from CART Decision Tree Analysis
1	6 or fewer lifetime prior arrests (BCI) No property new charge bookings in last 2 years (OMS) Current Age >= 24
2	More than 6 lifetime prior arrests (BCI) No property new charge bookings in last 2 years (OMS) Age at 1st Conviction < 21 or doesn't have a prior conviction Current Age >= 33
3	6 or fewer lifetime prior arrests (BCI) No property new charge bookings in last 2 years (OMS) Current Age < 24
4	More than 6 lifetime prior arrests (BCI) No property new charge bookings in last 2 years (OMS) Age at 1st Conviction < 21 or doesn't have a prior conviction Current Age < 33
5	More than 6 lifetime prior arrests (BCI) No property new charge bookings in last 2 years (OMS) Age at 1st Conviction >= 21
6	27 or fewer lifetime prior arrests (BCI) Has a property new charge booking(s) in the last 2 years (OMS)
7	More than 27 lifetime prior arrests (BCI)

Validation Sample

As noted in the previous two sections and displayed in Appendices B and C, both the FTA risk level and the recidivism risk level showed a similar relationship between higher risk scores and more pretrial failure in the validation sample (n = 539) as they did with the developmental sample (n = 529) that was used for the risk model creation. However, the predictive ability was not as strong within the validation sample and the relationship between higher risk scores and higher pretrial failure was not perfectly linear. The difference in pretrial failure between the developmental and validation samples was especially noticeable in the risk levels with the fewest releases (FTA risk levels 2, 3, and 5; recidivism risk levels 2, 4, 5, and 7). For example, only 4% of the developmental sample and 3% of the validation sample fell within recidivism risk level 7. Within the developmental sample, 70% of risk level 7 recidivated compared to 47% of the validation sample. Although this difference was quite large between the two samples, risk level 7 did have the highest recidivism by far (compared to the previous risk levels) in both samples. As previously noted in the AUC-ROC tests, both the FTA and recidivism risk levels performed reasonably well in both samples, and significantly better than chance.

Predictive Ability by Gender and Minority Status

The validation sample was also used to examine whether the FTA risk instrument and recidivism risk instrument performed equally well with males and females, as well as White and minority groups. In the FTA and recidivism models, gender and minority status failed to reach statistical significance, suggesting that the predictive utility of the risk tools was not moderated by either gender or minority status. However, because of the relative similarity in pretrial failure rates between males and females, as well as Whites and minorities (see Table 15), and because of the relatively low squared multiple correlations between these outcomes and the risk instruments, identifying statistically significant differences as a function of these variables would have been unlikely. Additionally, modeling these demographic variables as a function of the risk score was beyond the scope of this study.[8]

Despite a lack of significant differences, pretrial failure for each group was graphed by FTA risk level (see Appendix D) and recidivism risk level (see Appendix E) and examined for trends. As shown in Appendix D, the trend of increased likelihood of FTA by increasing risk level held true for the four groups (male, female, White, minority) when the largest categories (risk level 1 and 4) and extreme categories (risk level 1 and 7) were examined. However, among the categories that made up a small percent of the samples, the trend between risk level and FTA was not as clear. A similar pattern was observed for the four groups on pretrial recidivism (see Appendix E), with higher risk scores, in general, being associated with more recidivism, but much variation present in the risk levels with few cases.

Table 15 Pretrial Failure by Demographics for Validation Sample

Overall Failure to Appear (%)	**46**
Females	48
Males	45
White	44
Minority	49
Overall Recidivism (%)	**15**
Females	14
Males	15
White	13
Minority	18

Proposed Items for Risk Assessment and Risk Scores

A seven (7) item pretrial release instrument (PRI) is suggested that includes the five (5) variables that were in the significant FTA CART model and the four (4) variables that were in the significant recidivism CART model (two variables overlapped). As shown in Table 16, the suggested PRI would include one item for the jail screeners to look up in the official BCI record, four items for the jail

[8] If future studies want to examine whether the prediction of FTA or recidivism, as measured by these tools, is gendered or dependent on minority status, the following sample sizes (calculated using Gpower with z-tests and logistic regression, r-squared values of .001, and power set to .8) are recommended based on obtained power in the current sample: gender and FTA, 9,600; gender and recidivism, 52,800; minority status and FTA, 2,210; minority status and recidivism, 944.

screeners to look up in the previous jail booking history (OMS data), and two items for the jail screeners to ask in their interview. Based on the answers to these seven (7) items, both a FTA risk score and recidivism risk score can be computed. UCJC has created an Excel spreadsheet that automatically computes both risk scores when the answers to these items are entered in the spreadsheet. Computations for both risk scores based on these seven items will also be provided to CJS to use in creating the PRI within their database (C-track).

Table 16 Proposed Pretrial Release Instrument (PRI)

Source	Item
BCI	Total Number (#) of Prior Arrests in BCI Rap Sheet (leave blank if no rap sheet)
OMS	Has a New Property Charge Booking in Last 2 Years (Y = 1, N = 0)
OMS	Current Age (enter whole number)
OMS	Current Outstanding Warrants (WA, BW, SU; enter whole number, count by offense rows at this booking (not court cases))
OMS	Has Obstructing Law Enforcement New Charge at this booking (Y = 1, N = 0)
Offender Self-Report	Age at 1st Conviction (include juvenile; enter whole number)
Offender Self-Report	Do you believe you have a Substance Abuse problem? (Y = 1, N = 0)

Combined Risk Scores

Salt Lake County may also include additional non-scored items on their pretrial interview and screening that are not related to pretrial failure (i.e., FTA or recidivism risk) for purposes of assessing needs and providing services or conditions of release. For example, although employment, living situation, and mental health were not significantly related to pretrial failure, they may be important items for addressing needs upon release, as well as inform the type of conditions (i.e., call-in vs. in person check-ins) required during pretrial release. Stakeholders should examine what additional items they would like included in the pretrial interview, although they should not be used to increase or decrease FTA and recidivism risk scores.

Based on the seven (7) items in Table 16 above, both a FTA risk score (range 1-7) and recidivism risk score (range 1-7) will be created. Appendices B and C show the corresponding probabilities of failure associated with each of those scores. In addition, because individuals are released based on information about *both* their FTA and recidivism likelihood, pretrial failure by combined risk scores are presented in Appendices F and G. Combined risk scores were created by examining the percent of jail releases (for the entire pretrial release sample; n = 1066) across the two risk scores (see Table 17 on the following page). Suggested cut-points for low, moderate, and high are also displayed in Table 17. These cut-points were developed based on the distribution of cases across these levels (see Table 17), as well as the percent of failures across the levels (see Appendices B and C) and the balance of sensitivity and specificity[9] at each risk score.

[9] Sensitivity is the ability to correctly classify true positives (e.g., identifying recidivists as recidivists), while specificity is the ability to correctly classify true negatives (e.g., identifying non-recidivists as non-recidivists). The placing of cut-points along the release measure is as much theoretical as it is statistical. Increasing or decreasing cut-points necessarily creates a tradeoff between true positives and false positives. For example, if a cut-point is set to a lower point on the release measure, it will capture more true FTA and recidivist cases, but it will also

Table 17 Pretrial Release Sample by FTA and Recidivism Risk Levels

		FTA Risk Levels						
		Low	Moderate				High	
Recidivism Risk Levels		1	2	3	4	5	6	7
Low	1	19%	38%				12%	
Moderate	2							
	3							
High	4		18%				10%	
	5							
	6							
High-2	7	4%						

Appendix F displays the combined risk score with six (6) levels. It includes individuals who are (1) low on both FTA and recidivism risk (19% of pretrial release sample, see Table 17), (2) low or moderate on both (38% of sample), (3) high on FTA but low/moderate on recidivism (12% of sample), (4) low/moderate on FTA but high on recidivism (18% of sample), (5) high on both (10% of sample), and (6) extremely high on recidivism (High-2 in Table 17), regardless of FTA risk (4% of sample). The probability of pretrial failure corresponds well with these six (6) combined risk levels. The first risk level (Low FTA/Low recidivism) has a recidivism probability of 4% and an FTA probability of 20%, while the highest combined risk level (High-2 on recidivism, regardless of FTA level) has a 60% recidivism probability and a 73% FTA probability (see Appendix F for entire range of pretrial failure probabilities). Appendix G further collapses the combined risk categories into three levels; however, the likelihood of pretrial failure is not very different between the moderate and high risk groups. As such, a three-category combined risk level is not recommended.

Predictive Validity by Sub-Groups

Release Type

The predictive validity of the FTA risk level and recidivism risk level was examined by pretrial release type for the entire pretrial release sample (n = 1066). As noted in Table 6 on page 14, 41% of the pretrial release sample was released from jail with no supervision conditions specified, 28% were released on financial conditions (e.g., bail, bond, cash, fine), 25% were released to CJS supervision, and 6% were released to another authority (e.g., AP&P, ICE).

When jail release type was added to a logistic regression predicting pretrial FTA, it was not significantly related to FTA after controlling for FTA risk level. A logistic regression for pretrial recidivism was also conducted, resulting in a similar finding. After controlling for recidivism risk level, there was not a significant relationship between jail release type and pretrial recidivism.

The distribution of FTA risk levels and probability of FTA within each release type is graphed in Appendix H. Releases to "other authority" were not included in Appendix H due to the small

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falsely flag more non-FTA and non-recidivist cases as FTA or recidivist, respectively. Output from the AUC-ROC allows an examination of the best location of cut-points depending on the goals of the instrument and the actual prevalence rates of the outcome. If increasing community safety is deemed most important, cut-points can be set at a lower value to prevent recidivism opportunity.

number of releases into that category. As shown in Appendix H, most people, regardless of jail release type, were FTA risk level one (1) or four (4), with increasing FTA risk scores typically in line with increasing probabilities of failing to appear for court across the three jail release categories.

Appendix I displays the distribution of recidivism risk levels and probability of recidivism within each release type. Most people, regardless of jail release type, were recidivism risk level one (1) or three (3). In general higher recidivism risk scores were associated with higher probabilities of recidivism; however, for some groups with extremely small samples (i.e., financial releases in risk level 7 had only 5 individuals) the trend did not hold.

Court Case Types

The predictive validity of the FTA risk level and recidivism risk level was also examined by the types of court cases individuals had upon their release from the jail (for all 1066 pretrial releases). As noted in Table 6 on page 14, 29% of the pretrial release sample had only District Court case(s) at their release, 51% had only Justice Court case(s), and 20% had both District and Justice Court cases at their release. Bivariate analyses showed that pretrial failure varies by the type of court case(s) a defendant has at their release (see Appendix A). As shown in Table 18, below, both FTA and recidivism were highest among those who had both District and Justice Court cases at their release. However, individuals with both District and Justice cases also had the longest average time until all of their cases were closed (also shown in Table 18); as such, they would have a longer follow-up time to accrue pretrial failure.

Table 18 Pretrial Failure by Court Case Type at Release for Pretrial Release Sample (n = 1066)

	FTA (%)	Recidivism (%)	Days to Final Case Closure (Md (SD))
Court Cases at Release			
District Case(s) Only	37	12	142 (125)
Justice Case(s) Only	45	13	174 (132)
Both District & Justice Cases	63	25	186 (136)

A logistic regression was conducted to look at the relationship between length of time to case closure and court case types at release with likelihood of FTA, after controlling for the FTA risk level. The length of time to case closure was statistically significantly related to likelihood of failing to appear, even after controlling for the significant impact of FTA risk level. This finding is not surprising, as having a longer opportunity for failure is often related to more failure. After controlling for both FTA risk level and length of time to case closure, court case type was not statistically significantly related to likelihood of FTA. This suggests that it is not the court case type that influences likelihood of FTA, but rather the speed of processing of court cases that is different between Justice and District cases.

A logistic regression was also conducted to look at the relationship between length of time to case closure and court case types at release with likelihood of recidivism, after controlling for the recidivism risk level. Again in this model, length of time to case closure was statistically significantly related to likelihood of recidivism, even after controlling for the significant impact of recidivism risk level. However, in this model, court case type was also significantly related to increased likelihood of recidivism, even after controlling for recidivism risk level and time to case closure. In this finding, individuals who had both District and Justice court cases at their release

were more likely to commit new crimes during the pretrial release period than those who had only District cases or only Justice cases. This suggests that the type of offender who is released with ongoing cases in both jurisdictions may be the type of offender who is more actively involved in multiple levels of criminal behavior and, therefore, more likely to continue in that pattern of offending in the short-term. Again, it should be noted that the importance of this factor was in addition to the significant relationships between recidivism risk score and time to case closure with recidivism.

Non-Released Sample

From the original sample of 1,456 jail bookings with pretrial release screenings, there were 390 bookings that did not have any court case hearings after the individuals were released from jail and, as such, could not be included in the development and validation of the pretrial release instrument (resulting in the 1,066 that were in those samples). However, after the FTA and recidivism risk levels were created, they were calculated for this non-released sample to determine if they had different risk score distributions than the pretrial release group. As previously noted in the Methods section, the 390 who did not have hearings after their jail release were those who were more likely to be in the jail on a commitment, warrant, or hold; less likely to have new charges at that booking, but have more severe offenses when they did have new charges.

As shown in Table 19, this non-released sample did score noticeably higher on the FTA risk level, with a higher proportion of this sample having scores of six (6) or seven (7). This indicates that perhaps some individuals in this group were not released pretrial due to jail screeners and judges having some information about them that indicated that they were at increased risk for pretrial failure. On the other hand, as shown in Table 19, there are a substantial proportion of individuals in this non-released sample who are low to moderate on the FTA and recidivism risk levels; as such, these individuals may be good candidates for pretrial release, based on the low probability of pretrial failure for individuals who have these scores on the pretrial release instrument.

Table 19 FTA and Recidivism Risk Level for Non-Released Sample Compared to Pretrial Release Sample

	Pretrial Release Sample		Non-Released Sample
	Developmental	Validation	
Sample by FTA Risk Levels (%)			
1	33	35	7
2	4	2	5
3	3	4	1
4	35	34	39
5	3	3	1
6	10	10	22
7	12	13	25
Sample by Recidivism Risk Levels (%)			
1	43	41	25
2	8	9	10
3	18	19	12
4	8	8	13
5	7	8	7
6	12	11	25
7	4	3	8

As shown in Table 20, 3% of the non-released sample would score "low" on both the FTA and recidivism risk levels, while an additional 25% would score low-moderate on both. It is expected that these groups would demonstrate similar pretrial failure rates as those who are already released at these risk levels. Of course, additional validation with larger released samples is recommended. Although pretrial FTA and recidivism could not be tracked for this group, recidivism at 90 days post-release was examined. The general trend between increasing recidivism risk scores and increasing probability of short-term recidivism was observed (from recidivism risk scores 1-7, 90-day recidivism was 6%, 13%, 2%, 10%, 12,%, 14%, 32%).

Table 20 Non-Released Sample by FTA and Recidivism Risk Levels

<table>
<tr><td colspan="2"></td><td colspan="8">FTA Risk Levels</td></tr>
<tr><td colspan="2"></td><td>Low</td><td colspan="5">Moderate</td><td colspan="2">High</td></tr>
<tr><td colspan="2">Recidivism Risk Levels</td><td>1</td><td>2</td><td>3</td><td>4</td><td>5</td><td>6</td><td>7</td></tr>
<tr><td>Low</td><td>1</td><td>3%</td><td colspan="5" rowspan="2">25%</td><td colspan="2" rowspan="2">18%</td></tr>
<tr><td rowspan="2">Moderate</td><td>2</td></tr>
<tr><td>3</td><td colspan="6">25%</td><td colspan="2">18%</td></tr>
<tr><td rowspan="3">High</td><td>4</td><td colspan="6" rowspan="3">20%</td><td colspan="2" rowspan="3">25%</td></tr>
<tr><td>5</td></tr>
<tr><td>6</td></tr>
<tr><td>High-2</td><td>7</td><td colspan="8">8%</td></tr>
</table>

Discussion

The purpose of a pretrial risk assessment is to predict the likelihood of not showing up for court and/or committing a new offense during the pretrial period. The development of pretrial risk tools has come a long way and recently there has been a growing national movement to improve pretrial release supervision and risk assessments (Mamalian, 2011). Research and experts recommend using locally validated, objective instruments (Bechtel et al., 2011; Gottfredson & Moriarty, 2006; Mamalian, 2011). As such, the current study was undertaken to examine the relationship between pretrial failure and a variety of self-reported and official factors for a sample of defendants released from the Salt Lake County jail. Official statewide criminal history factors (BCI; e.g., lifetime and two-year arrests, convictions, person offenses, etc.) were examined in relation to pretrial failure; however, only lifetime prior arrests were included as a possible predictor in the proposed Pretrial Release Instrument (PRI). This decision was made based on the complexity of BCI rap sheets and the likelihood that collecting more detailed elements from BCI rap sheets would be too time-consuming and potentially inaccurate.

The result of this study is a proposed PRI, consisting of seven (7) items, that gives two risk scores (one for FTA and one for pretrial recidivism), each ranging from one (lowest risk) to seven (highest risk). Both risk scores had acceptable discriminant validity on both the developmental and validation samples and performed better than chance (based on AUC-ROC analyses). Those in the lowest risk group on the FTA risk score had less than a 30% chance of failing to appear in court, compared to the 49% base rate, while those in the highest risk group had a greater than 60% chance of FTA. Similarly, the lowest scoring group on the recidivism risk score had a 5% probability of recidivism, compared to the 15% base rate. Although higher risk scores were associated with higher probabilities of pretrial failure, a substantial proportion of the higher risk groups *do not* exhibit pretrial failure. For example, over 60% of individuals scoring 5-6 on the recidivism risk

score do not recidivate. Similarly, probability of FTA is around the overall sample average of 50% for those who score 3-5 on the FTA risk score. It is worth reiterating that pretrial risk scores are not a prediction for a specific individual, but rather a statistical probability of pretrial failure for *all* individuals with that score. As such, there will be some people in the lowest risk groups who do exhibit pretrial failure, while some in even the highest risk groups will not. Prediction of risk is difficult with low occurrence events (e.g., pretrial recidivism) (Gottfredson & Moriarty, 2006).

The proposed PRI was based on a sample of individuals who were released from the Salt Lake County jail pretrial and performed relatively well across sub-groups by gender, minority status, and release type (e.g., no conditions, financial conditions, supervision). A small non-released sample was also examined and it was determined that a substantial proportion of them scored low to moderate on the FTA risk score (53%), while 47% scored low to moderate on the recidivism risk score. As such, use of the proposed PRI may lead to more individuals qualifying for pretrial release.

The implementation of the proposed PRI may lead to a change in the type or number of defendants who are released pretrial. This may result in a greater variety of individuals who are released and, consequently, the potential for additional risk factors to be identified. Furthermore, it may result in changes in expected probabilities of pretrial failure by risk levels. The "true" base rate for pretrial failure cannot be known, as changes in release policies and supervision criteria result in selection bias (Gottfredson & Moriarity, 2006).[10] It is recommended that Salt Lake County revalidate the new PRI and further examine its discriminant validity for sub-groups (e.g., gender, minority, release types) with this larger released population. The Pretrial Justice Institute also recommends that risk assessments not only be piloted and validated for the specific jurisdiction using them, but that they are also revalidated on a regular basis to ensure that they continue to retain their predictive validity (Clark, n.d.).

[10] Gottfredson and Moriarity (2006) note the difficulty of predicting offender risk as risk instruments/models are created and validated from existing samples that do not have equal likelihood of being included. For example, not all offenders are released pretrial, nor are all of them randomly assigned to various conditions that may impact failure (e.g., supervision vs. own recognizance). As such, understanding the "true" failure rate is difficult.

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*Indicates that the study was included in the fourteen used to compare standard pretrial risk assessment items and guide additional items tested for inclusion in the pretrial release instrument (PRI) in this study

Appendix A Factors Related to Pretrial Failure in Bivariate Analyses

		90 days Post-Release		Through Case Closure	
Domain	Variable Description	FTA	Recidivism	FTA	Recidivism
Current Charge(s)					
	# of New Charge(s) at QB [13]			**	
	Max Severity of New Charge(s)				
	New Charge Type: (Y/N)				
	Person [13]	***		***	*
	Property		***		***
	Drug				*
	DUI[13]	***	**	***	**
	Traffic[13]		**		
	Obstructing LE	**		**	
	Obstruct Justice				
	Escape from Custody				
	Public Order				
	Commercial Sex				
	Weapon		*		
	Other Charge				
	New Charge Flag: (Y/N)				
	Violence[13]	***		***	
	Domestic Violence[13]	**		*	
	Sex				
	Liquor				
Current Non-Compliance					
	# of Holds at QB[13]		***		
	# of Warrants at QB	***		***	
	Pending Charges at QB (Y/N)			*	
	Current Supervision: (Y/N)[5]				
	AP&P Parole				
	AP&P Probation				
	County Probation				
	Pretrial Supervision				
	Other Supervision		*		
	None				
	Pre-Sentence report ordered (Y/N)[5]				
Criminal History – 2 years pre-QB					
Arrests[1]	# of prior arrest episodes		***	***	***
	# of prior misdemeanor arrests[2]	***	***	***	***
	# of prior felony arrests	**	***		***
	Offense type: (Y/N)				
	Person				
	Violent				
	Sex				

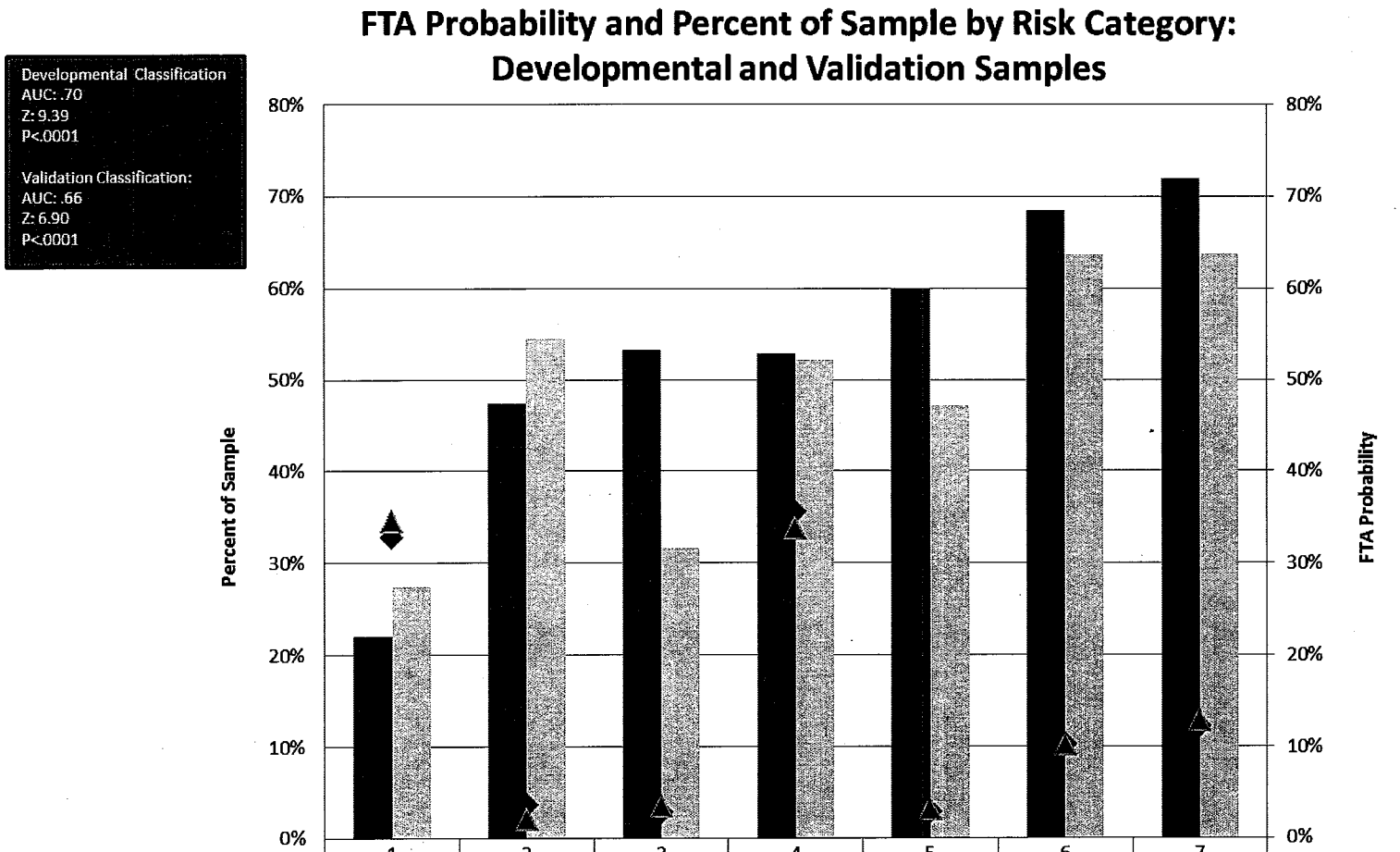
		90 days Post-Release		Through Case Closure	
Domain	Variable Description	FTA	Recidivism	FTA	Recidivism
Jail Bookings	Prostitution				
	Weapon		*		
	Property	***	***	**	***
	Drug	*	***	**	***
	DUI				
	Liquor	***	***	**	***
	Traffic				
	Other	*	***	**	***
	# of Bookings	***	*	***	***
	# of Commitment Bookings				**
	# of Hold Bookings				
	# of New Charge Bookings	***	*	***	***
	Max Charge Severity				
	Offense Type: (Y/N)				
	Person		*		**
	Property	**	*	**	**
	Drug			*	
	DUI				
	Traffic				
	Obstructing LE	**		**	*
	Obstruct Justice				
	Escape from Custody				
	Public Order	**		**	*
	Commercial Sex				
	Weapon				
	Other Charge				
	New Charge Flag: (Y/N)				
	Violence		*		**
	Domestic Violence				
	Sex				
	Liquor	**		**	**
Criminal History – Lifetime					
Arrests[1]	# of prior arrest episodes	***	***	***	***
	# of prior misdemeanor arrests[2]	***	***	***	***
	# of prior felony arrests		***	**	***
	# of arrests for offense type:				
	Person		***	**	***
	Violent	*	***	**	***
	Sex				
	Prostitution				**
	Weapon		***		**
	Property	***	***	***	***
	Drug	*	***	*	***

		90 days Post-Release		Through Case Closure	
Domain	Variable Description	FTA	Recidivism	FTA	Recidivism
Convictions	DUI				
	Traffic		**		
	Other	*	***	**	***
	Age at 1st conviction[3 5]		**		
	# of prior convictions	*	***	**	***
	# of misdemeanor convictions[4]	*	***	**	***
	# of person misdemeanor conv.		*	*	*
	# of non-person misdemeanor conv.		***	**	***
	# of felony convictions	*	**	*	***
	# of person felony conv.				
	# of non-person felony conv.	**		*	***
Non-Compliance History - 2 years pre-QB					
	# Warrant Bookings	***	*	***	***
	# of FTAs[5]	***		***	
Current Stability[5]					
	Employed[13]		*		*
	# of years at employment status	*			
	Unemployed	*			*
	Current Living Situation[6]				*
	# of years in Current Residence				*
	Housing Stability[7]				
	# of years in Salt Lake County				
Substance Abuse and Mental Health					
Substance Abuse (SA)	Current offense alcohol-related[13]	*	*	**	**
	Current offense drug-related				**
	History of Drug Use (Y/N)[5]	**		**	**
	Drug Use last 30 days (Y/N)[5]				
	SA problem (Y/N)[5]	**		**	**
	Combined Drug History (Y/N)[5 8]				**
	No History of SA Treatment (Y/N)[5 13]		***		**
	Previous SA Treatment (Y/N)[5]		**		**
	Currently in SA Treatment (Y/N)[5]				
	Benefit from SA Treatment (Y/N)[5]	*		*	**
Mental Health (MH)	Previous MH Treatment (Y/N)[5]				
	Currently in MH Treatment (Y/N)[5]				
	Current suicidal thoughts[5]				
Demographics at QB					
	Age				
	Marital Status[5]				
	Current offense has victim[9 13]	**		*	
	Attempts to contact reference(s):				
	Successful		*		
	Residence verified				

		90 days Post-Release		Through Case Closure	
Domain	Variable Description	FTA	Recidivism	FTA	Recidivism
Other					
	Employment verified				
	Unsuccessful				
	No attempt(s) made		**		
	Client appeared:[10]				
	Stable				
	Cooperative				
	Other				
	Release Type[11]				
	Court Case(s) at Release[12]	***		***	
	Time to maximum case closure			***	***

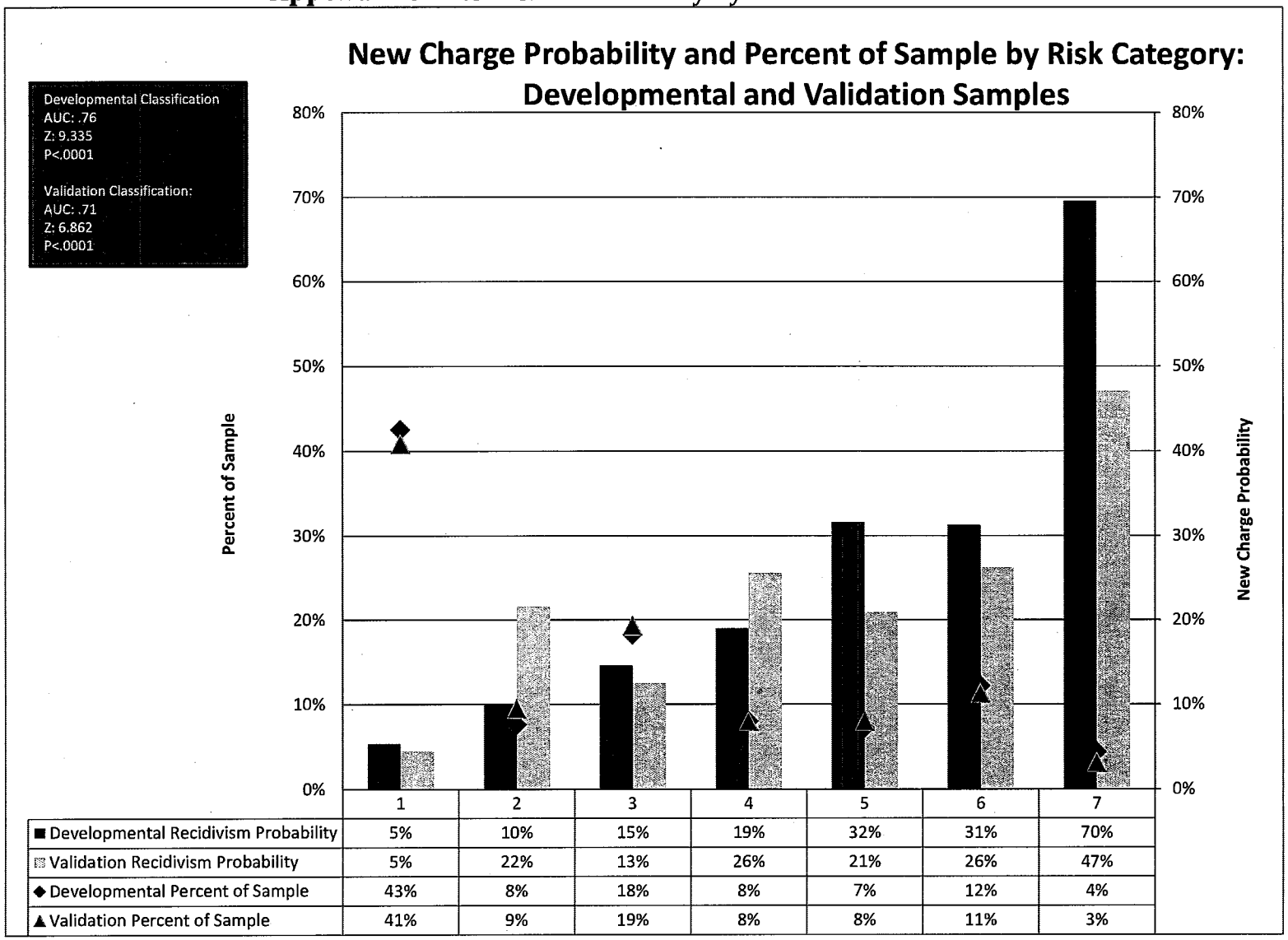
*p <= .05
**p <= .01
***p <= .001
[1] An arrest in the BCI record could indicate new charge(s) or an arrest on an outstanding warrant
[2] Misdemeanor arrest episodes are those where the most serious offense on the arrest date was a misdemeanor
[3] Only for those with any prior convictions
[4] Misdemeanor convictions are those where the most serious offense on the OTN was a misdemeanor
[5] Self-reported
[6] 3 categories: Permanent Housing, Temporary Housing, Homeless
[7] Combined variable from pilot items #13 (living situation) and #14 (current residence)
[8] Combined variable from pilot items #19 (current offense drug-related) and #20 (self-reported history of drug use)
[9] Only for person offenses
[10] Based on pretrial jail screener's perception and observations
[11] 4 categories: No Conditions Specified, Bail/Bond/Cash/Fine, CJS Supervision, Other Authority
[12] 3 categories: District case(s) only, Justice case(s) only, Justice and District cases
[13] Factor decreases likelihood of pretrial failure

Appendix B FTA Probability by FTA Risk Level



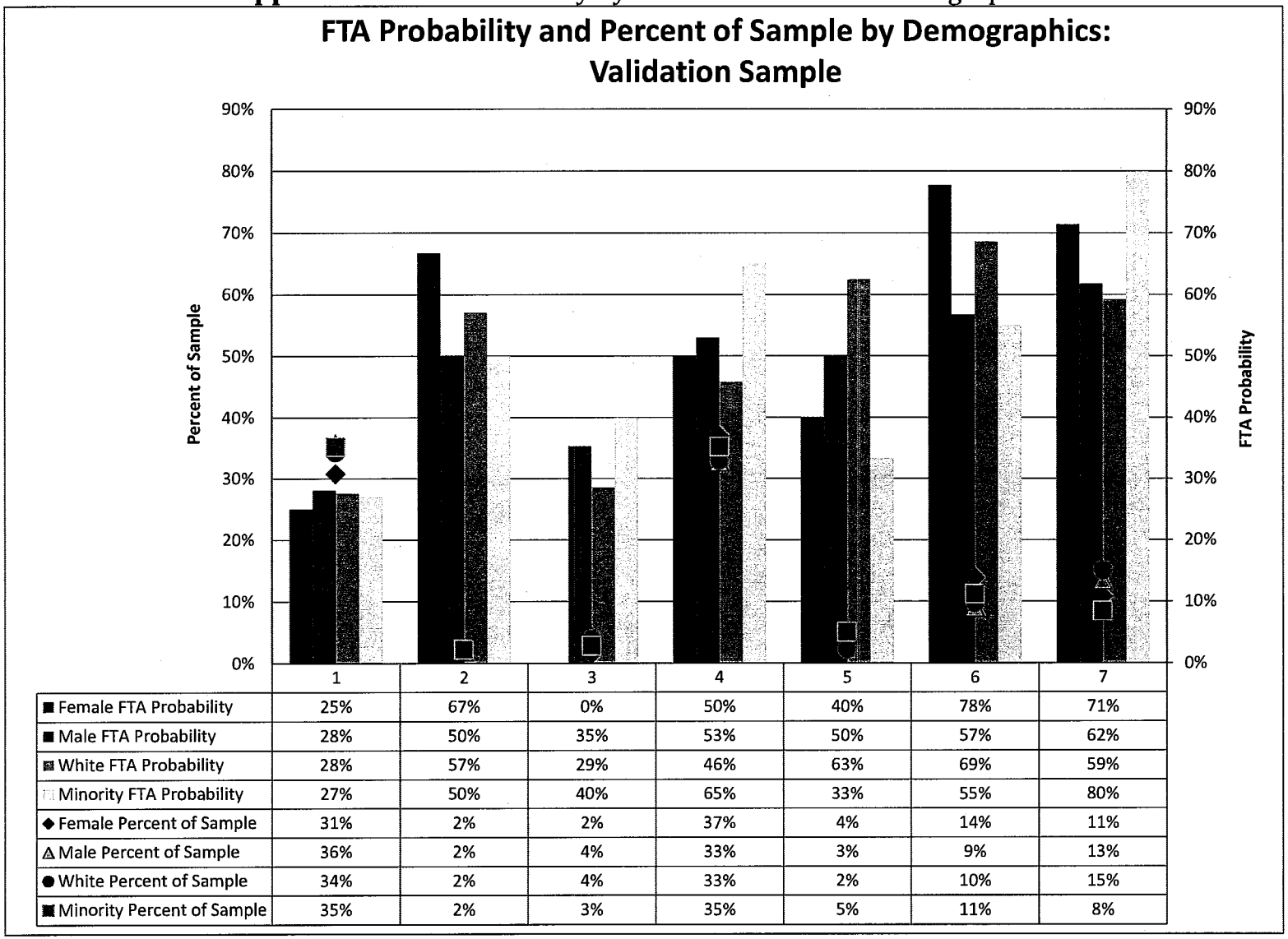
	1	2	3	4	5	6	7
■ Developmental FTA Probability	22%	47%	53%	53%	60%	69%	72%
▒ Validation FTA Probability	27%	55%	32%	52%	47%	64%	64%
◆ Developmental Percent of Sample	33%	4%	3%	35%	3%	10%	12%
▲ Validation Percent of Sample	35%	2%	4%	34%	3%	10%	13%

Appendix C Recidivism Probability by Recidivism Risk Level



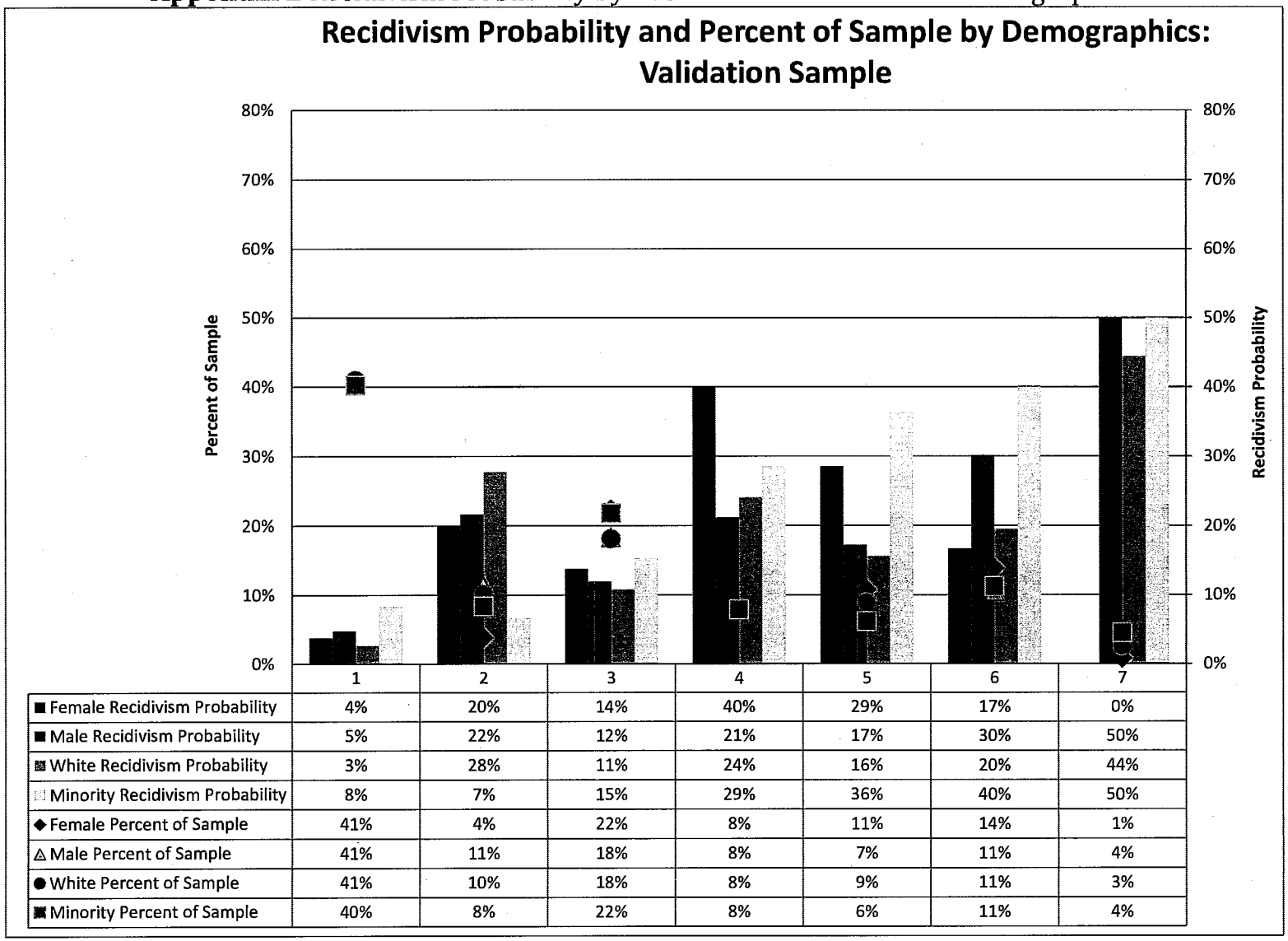
	1	2	3	4	5	6	7
■ Developmental Recidivism Probability	5%	10%	15%	19%	32%	31%	70%
▒ Validation Recidivism Probability	5%	22%	13%	26%	21%	26%	47%
◆ Developmental Percent of Sample	43%	8%	18%	8%	7%	12%	4%
▲ Validation Percent of Sample	41%	9%	19%	8%	8%	11%	3%

Appendix D FTA Probability by FTA Risk Level and Demographics



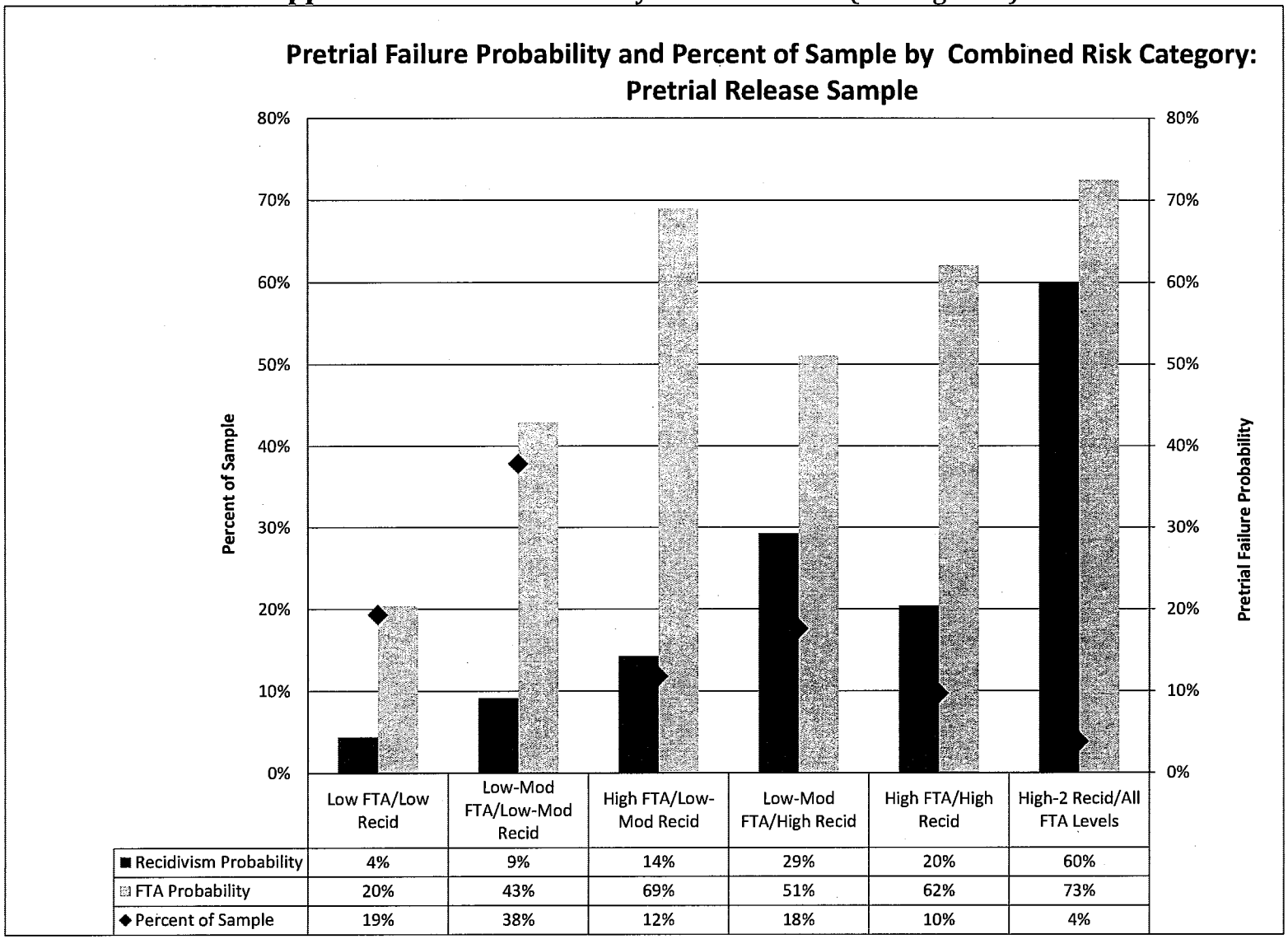
	1	2	3	4	5	6	7
■ Female FTA Probability	25%	67%	0%	50%	40%	78%	71%
■ Male FTA Probability	28%	50%	35%	53%	50%	57%	62%
▩ White FTA Probability	28%	57%	29%	46%	63%	69%	59%
▩ Minority FTA Probability	27%	50%	40%	65%	33%	55%	80%
◆ Female Percent of Sample	31%	2%	2%	37%	4%	14%	11%
◬ Male Percent of Sample	36%	2%	4%	33%	3%	9%	13%
● White Percent of Sample	34%	2%	4%	33%	2%	10%	15%
■ Minority Percent of Sample	35%	2%	3%	35%	5%	11%	8%

Appendix E Recidivism Probability by Recidivism Risk Level and Demographics



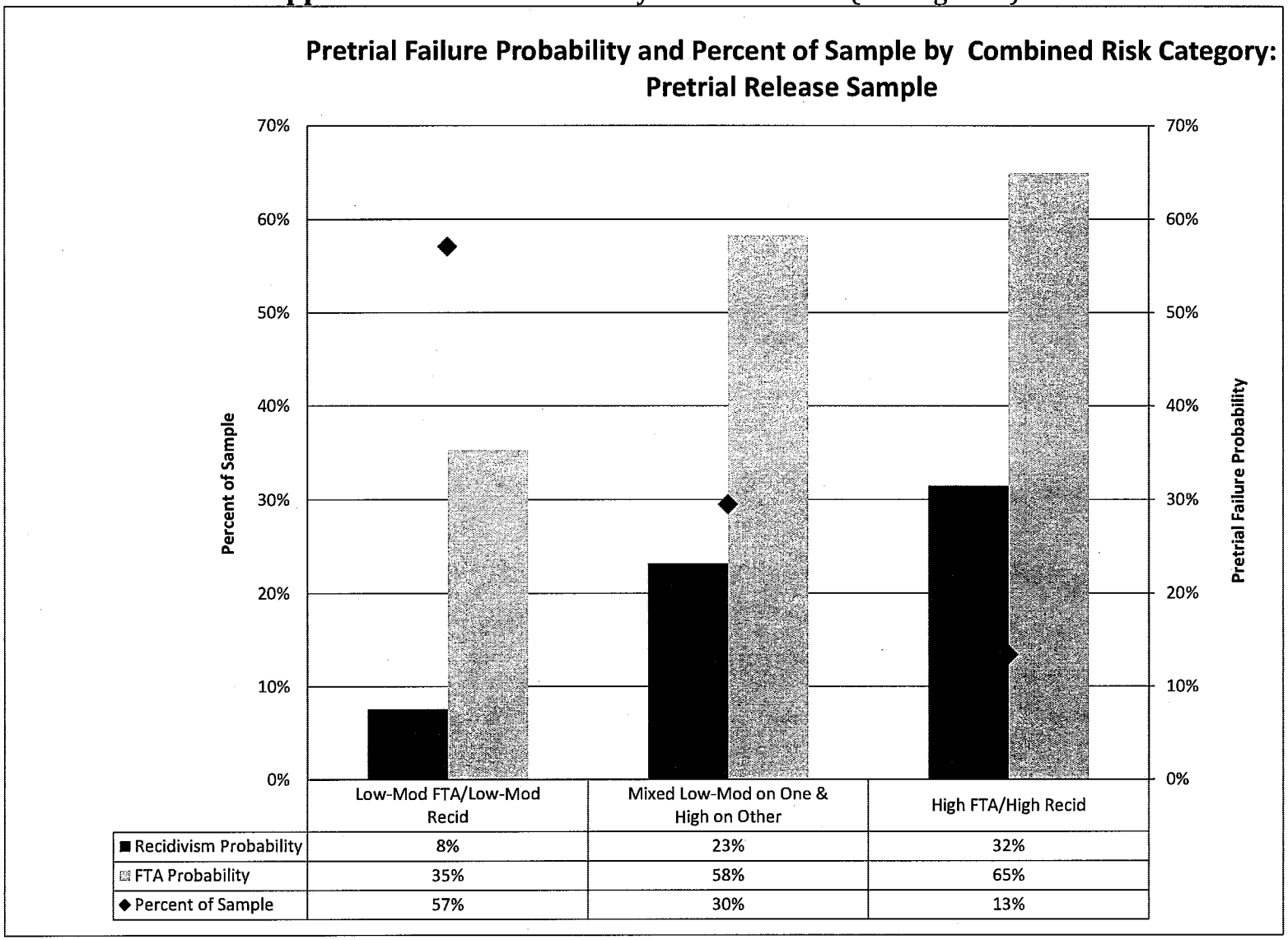
	1	2	3	4	5	6	7
■ Female Recidivism Probability	4%	20%	14%	40%	29%	17%	0%
■ Male Recidivism Probability	5%	22%	12%	21%	17%	30%	50%
▩ White Recidivism Probability	3%	28%	11%	24%	16%	20%	44%
▨ Minority Recidivism Probability	8%	7%	15%	29%	36%	40%	50%
◆ Female Percent of Sample	41%	4%	22%	8%	11%	14%	1%
△ Male Percent of Sample	41%	11%	18%	8%	7%	11%	4%
● White Percent of Sample	41%	10%	18%	8%	9%	11%	3%
▩ Minority Percent of Sample	40%	8%	22%	8%	6%	11%	4%

Appendix F Pretrial Failure by Combined Risk (6 categories)

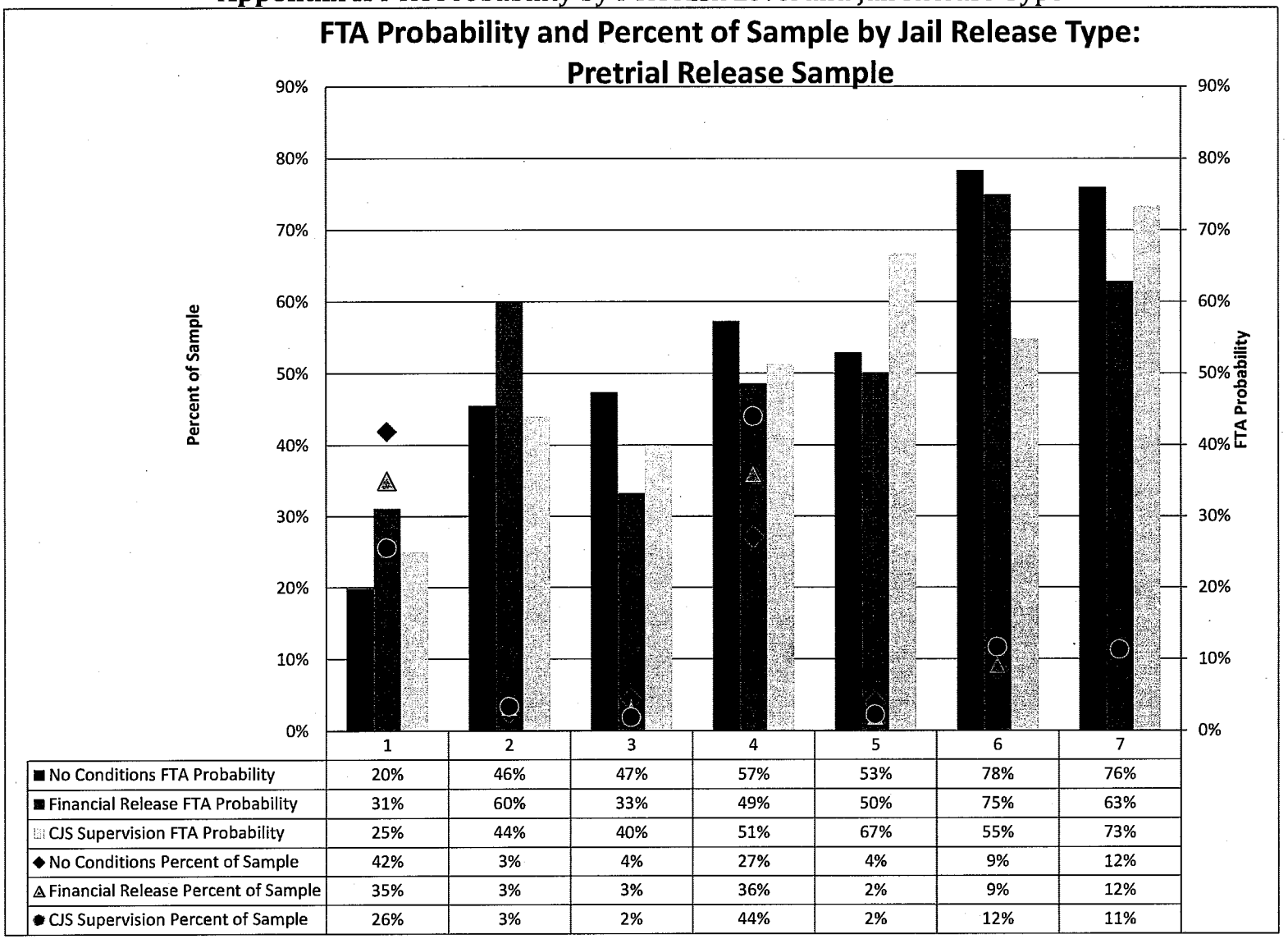


	Low FTA/Low Recid	Low-Mod FTA/Low-Mod Recid	High FTA/Low-Mod Recid	Low-Mod FTA/High Recid	High FTA/High Recid	High-2 Recid/All FTA Levels
■ Recidivism Probability	4%	9%	14%	29%	20%	60%
▒ FTA Probability	20%	43%	69%	51%	62%	73%
◆ Percent of Sample	19%	38%	12%	18%	10%	4%

Appendix G Pretrial Failure by Combined Risk (3 categories)

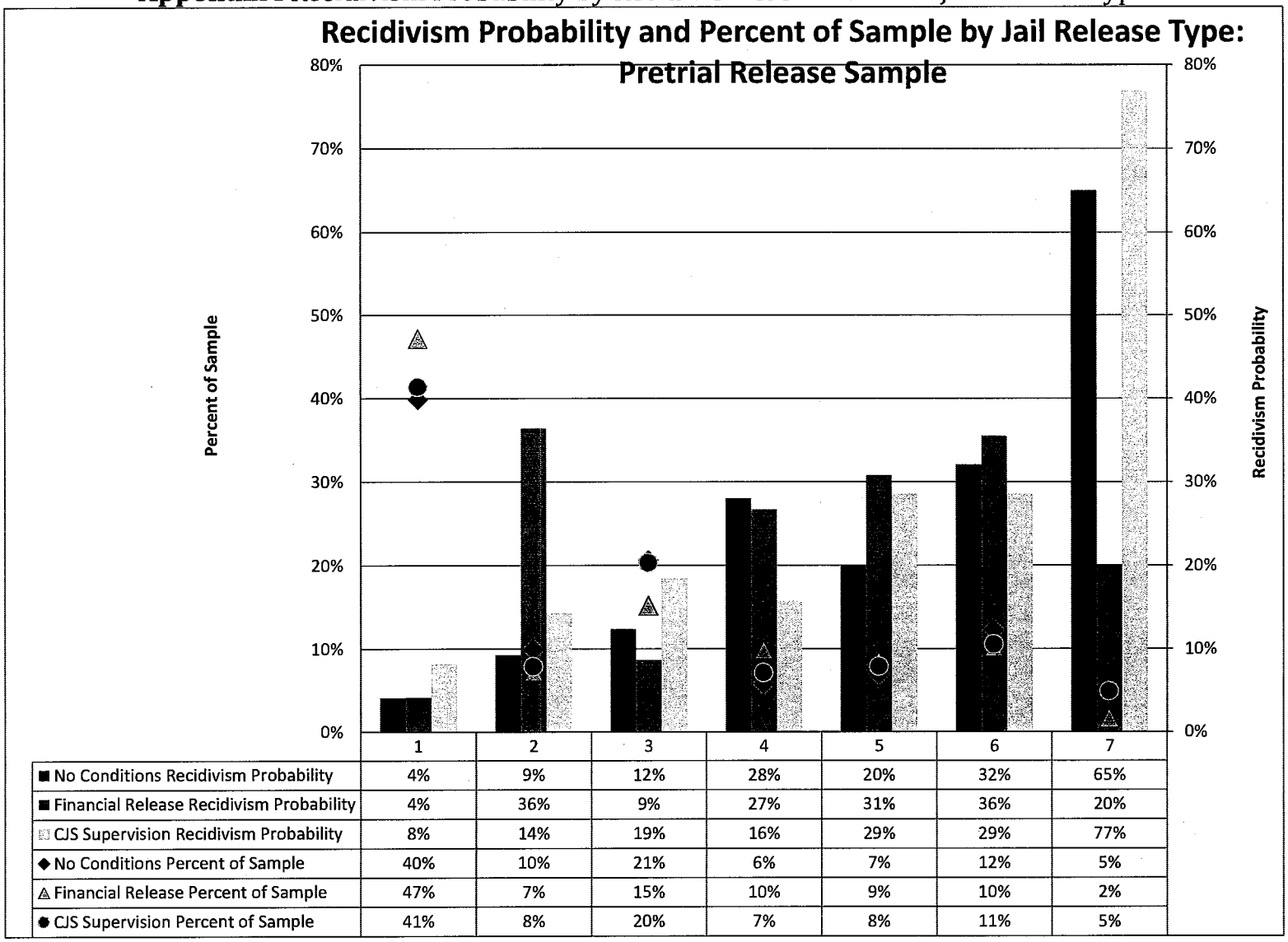


Appendix H FTA Probability by FTA Risk Level and Jail Release Type



	1	2	3	4	5	6	7
■ No Conditions FTA Probability	20%	46%	47%	57%	53%	78%	76%
■ Financial Release FTA Probability	31%	60%	33%	49%	50%	75%	63%
▒ CJS Supervision FTA Probability	25%	44%	40%	51%	67%	55%	73%
◆ No Conditions Percent of Sample	42%	3%	4%	27%	4%	9%	12%
◬ Financial Release Percent of Sample	35%	3%	3%	36%	2%	9%	12%
● CJS Supervision Percent of Sample	26%	3%	2%	44%	2%	12%	11%

Appendix I Recidivism Probability by Recidivism Risk Level and Jail Release Type



	1	2	3	4	5	6	7
■ No Conditions Recidivism Probability	4%	9%	12%	28%	20%	32%	65%
■ Financial Release Recidivism Probability	4%	36%	9%	27%	31%	36%	20%
▒ CJS Supervision Recidivism Probability	8%	14%	19%	16%	29%	29%	77%
◆ No Conditions Percent of Sample	40%	10%	21%	6%	7%	12%	5%
◬ Financial Release Percent of Sample	47%	7%	15%	10%	9%	10%	2%
● CJS Supervision Percent of Sample	41%	8%	20%	7%	8%	11%	5%