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# Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services

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**T**HE PRETRIAL services recommendation function is not well evaluated in isolation from the larger goals and issues of pretrial release and detention. The more one attempts to discuss the topic narrowly, the more the explanation begins to resemble the children's story, *If You Give a Mouse a Cookie*,<sup>1</sup> in which each action in the story begets another ("If you give a mouse a cookie, he is going to ask for a glass of milk. When you give him the milk, he'll probably ask you for a straw. . ."). The story unfolds a chain of events in which one action is sequentially related to the next until, lo and behold, the story has unwittingly returned to its original point of departure—to start again (when, after having become thirsty, the mouse asks for another glass of milk which leads to another cookie, and if you give a mouse a cookie, then...).

So it is that narrow questions about an aspect of the pretrial services function (e.g., the release recommendation) are tied to broader questions about the purpose of the pretrial services function, and those are tied to larger questions about "bail reform," its aims and impact. Current questions about the status of bail reform recall questions about the original aims of bail reform—and the reasons for pretrial services agencies in the first place. Making sense of pretrial services recommendation schemes needs to start by recalling the original aims of the pretrial services function.

When the original aims of the pretrial services invention are revisited, it becomes clear that there should be no pretrial services recommendation function. The fact that in 1993 we would be discussing a pretrial services "recommendation" function demonstrates that we have forgotten or never understood the role these agencies were designed to play in American criminal justice, or maybe that, with the passing of time, form has been mistaken for substance and that, in some cases, pretrial services agencies exist because they have been existing.

However, goal confusion on the part of pretrial services is merely symptomatic of the underlying lack of judicial direction and leadership in managing the *judicial* pretrial release decisionmaking function. The following eight propositions are intended briefly to place questions about the pretrial services role in the larger context of judicial responsibility for the

fairness and effectiveness of pretrial release and detention in the United States, as well as to place questions about the pretrial services recommendation function (which doesn't or shouldn't exist) in the context of the role of pretrial services.

***The role of pretrial services agencies cannot be understood independently of the legitimate aims of the pretrial release decision.***

The role of pretrial services agencies at the pretrial release stage should be understood in the context of the purposes of pretrial release and from the perspective of the issues of (un)fairness and (in)effectiveness that have characterized pretrial release and detention practices in the United States for most of this century. With what is by now a considerable body of research literature, legal commentary, and case law to inform examination of this important decisionmaking stage in the processing of criminal cases, it is reasonable to view the aims of the pretrial release (a.k.a. the "bail") decision as assuring the *maximum responsible release* of criminal defendants that will ensure attendance in court at required proceedings and that will minimize the threat to public safety and the integrity of the judicial process posed by released defendants. After several decades of debate and revision of relevant law, with the exception of a handful of states which still acknowledge only the purpose of assuring appearance of defendants in court, public safety concerns have moved from occupying a powerful *sub rosa* status to being explicitly recognized as appropriate, almost pre-eminent goals of pretrial release determinations.

A student of the history of bail reform in the United States might argue that the debate over the legitimacy of the "danger" or public safety aims of pretrial release was more theoretical and academic than practical. It was widely documented—and widely known—that judges and other judicial officials were strongly influenced by public safety and related concerns in bail determinations. In retrospect, the rationale in favor of "pretrial detention" laws (popularly referred to as what they are, "preventive detention" laws) that sought to deal openly with confinement decisionmaking at the pretrial stage by treating the public safety agenda explicitly appears to have been a noble gambit. The reasoning was that by placing the "real" operating concerns of pretrial release decisionmaking "on the table," one could introduce procedural safeguards to

assure the fairness of release practices. (Thus, one could enunciate criteria by means of which presumptively "dangerous" defendants could be identified and then conduct hearings at which the threat posed by the defendant could be openly evaluated and argued.) The real target of this strategy was the anachronistic but firmly entrenched role of cash bail in American criminal justice (and all the inequities associated with it). Remarkable in its idealism, therefore, was the language in the Federal Bail Reform Act of 1984 (the model Federal preventive detention law) that prohibited the use of financial bail to detain defendants, thus seeking to force open and explicit detention decisions: "the judicial officer may not impose a financial condition that results in the pretrial detention of the person."<sup>2</sup>

***Pretrial release decisionmaking is a judicial function. Continuing problems of unfairness and ineffectiveness in pretrial release can be traced to two key aspects of the judicial role: the relatively free exercise of discretion and the difficulties associated with predictive decisionmaking.***

Pretrial release decisionmaking at its core is a judicial function. A large part of the emphasis of "bail reform" was on developing pretrial services-type agencies to improve judges' decisions. To the extent that reform focused on the development of support agencies but not on changing judicial attitudes and habits (i.e., not on the judicial function), it missed its mark. In fact, the near imperviousness of bail practices to meaningful reform in jurisdictions even today can be best explained by failure adequately to address two properties of the judicial role in pretrial release: the wide discretion enjoyed by pretrial release decisionmakers and the unreconstructably predictive nature of the pretrial release decision. Reliance on financial bail options as the common mode of pretrial release/detention decisions in most jurisdictions melds the undesirable side-effects of unfettered judicial discretion and the drawbacks of imperfect predictions into a judicial decision function that stubbornly resists change.

The mantle of discretion attached to the judicial role derives ultimately from the status of the judiciary as a separate and independent branch of government in the United States. Attempts to control judicial discretion by legislatures—in sentencing as well as at the pretrial release stage—are often, and sometimes rightfully, seen by judges as attempts to remove judicial discretion and, thus, to diminish the independence of the judicial branch. The informed exercise of discretion is an essential component of the judicial function, including at the pretrial release stage. What is problematic, however, is unguided discretion or abuse of discretion that allows decisionmakers to be unac-

countable to the legitimate goals of the decision tasks at hand. Many of the most difficult problems related to bail practices in the United States can be traced to the fact that historically judges and their judicial surrogates have had near total freedom of discretion to conduct pretrial release determinations—the enactment of two generations of bail reform legislation notwithstanding.<sup>3</sup>

The litany of unacceptable side-effects springing from this tradition of judicial improvisation in pretrial release is long and, by now, well-known. At its worst, the cloak of judicial discretion has given license to the biases and arbitrariness of judges, magistrates, and commissioners against society's most disenfranchised in allocating pretrial liberty. At its best, unguided judicial discretion produces pretrial release and detention decisions that are uneven overall and often decidedly suboptimal. As court systems struggle to manage the drug-related caseloads in contemporary America, the words of Arthur Beeley (1927, p. 160) still hold true 65 years later: "the system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe."

Even if the goals of the pretrial release decision were universally agreed upon, the essentially predictive nature of pretrial release determinations would still pose a mighty challenge to fairness and effectiveness. While characterizing the pretrial release decision as tantamount to "fortune-telling" might be overly dramatic and comparisons to weather-forecasting or gambling might be more apt, much of the difficulty surrounding pretrial release determinations stems from the fact that they are based on predictions of future behavior of defendants. The judge, magistrate, or commissioner making these decisions is basically trying to divine how a given defendant might act if granted provisional liberty pending proceedings under particular conditions of release.

Just as judges may argue that their job is by definition to exercise discretion, by which they mean human judgment, psychologists and psychiatrists have argued that the expert predictions about human behavior that they are called upon to make in their fields are best made on the basis of clinical judgment. Just as judges may argue at bail and sentencing determinations that there is no substitute for judicial experience and wisdom, the *je-ne-sais-quoi* of discretion, clinicians have argued that there is no replacement for their professionally accumulated subjective expertise. Contrary to the intuitive appeal of this notion that the judicial, clinical, or subjective judgment is preferable in making decisions based on anticipations of human behavior, the literature on prediction resoundingly finds that human beings are not very good at predicting future events. That literature is further unequivocal-

cal in its finding that predictions assisted by empirical methods always outperform subjective or "clinical" judgments.

This social science truism, which is fundamentally annoying to judges and "clinicians" alike, means that, when it comes to the accuracy of a body of predictive decisions, actuarial tables will be more accurate than judicial hunches at bail every time.<sup>4</sup> Thus, despite the conventional judicial wisdom that good decisionmaking requires a great deal of discretion and relies heavily on judicial "sense" (subjectivity or intuition), the road to optimal pretrial release decisionmaking may lie instead in the direction of a structured use of discretion and an empirically aided prediction of likely defendant misconduct.

This brief discussion of the "root causes" of problems with pretrial release, unguided judicial discretion and the difficulties associated with predictive decisionmaking, is intended to point to two principal areas where strategies to improve pretrial release function need to be focused. What else was the invention of pretrial services agencies, if not a strategy for assisting the judiciary in this critical area of criminal justice decisionmaking? It is by serving as a resource for informing the exercise of judicial discretion, improving predictive decisions, and managing pretrial release-related tasks that pretrial services agencies should be playing a major role.

***Even after decades of bail reform, serious questions about the fairness and effectiveness of pretrial release in the United States have not been resolved. Continued reliance on financial bail as the currency of release decisions is a major reason.***

The problems resulting from the exercise of unfettered judicial discretion and from the difficulties inherent in making predictive decisions in pretrial release determinations are essentially problems of fairness and problems of effectiveness, problems having to do with how justice is experienced at the pretrial stage.

Characterization of pretrial release (bail) decisionmaking in legal commentary and research in the last two-thirds of a century has not, on the whole, been favorable. Bail decisionmaking has been depicted as highly discretionary (amounting to a *sub rosa* system of preventive detention), as being transacted on the basis of questionable and little useful information, and as institutionalizing cash bail (and the parasitic role of the bondsman as the entrepreneur of pretrial release). In short, serious questions about the equity of bail practices and the use of pretrial detention have been continuously raised.

The concepts of fairness and equity are not, of course, interchangeable. *Equitable treatment* of defen-

dants under the law forms a subcategory of the broader concerns about fairness, which include access to fair procedures and to meaningful prospects for pretrial release.<sup>5</sup> Evaluation of the equity of pretrial release decisions, to determine, in effect, that similarly situated defendants have been treated comparably, requires some discussion of what "similarly situated" means at the bail stage.

Contrary to traditional assumptions that the seriousness of a defendant's charges provides such a framework—as exemplified by the bail or bond schedule—the application of this concept to questions of pretrial release decisionmaking is not self-evident. The demand for equitable treatment of the criminally accused is not satisfied by establishing a fixed inventory of release "prices" for defendants' criminal charges, setting bail for robbery at, say, \$10,000 and bail for burglary at \$11,000. Rather, a framework for the definition of "similarly situated" in the context of pretrial release decisionmaking cannot be established except in relation to the goals of pretrial release and the criteria that form the basis for differentiating among defendants in pretrial release determinations in light of those goals. (See, for example, Goldkamp, 1979; Goldkamp & Gottfredson, 1985; Goldkamp, 1985.)

Bail practices have been characterized by a level of disparity (much of it judge-based) easily the match of that found to be associated with sentencing decisions, when the discovery of sentence disparity helped launch widespread efforts to reform sentencing during the 1970's and 1980's in the United States. In addition, the use of the dollar as the principal currency of pretrial release determinations has ensured that release from jail would be available only for defendants who were not the poorest of the poor and, then, that release would occur regardless of the likelihood of misconduct. It is still a current truism that a relatively small amount of cash bail will hold most defendants in most American jurisdictions, regardless of the risks they may or may not pose. It is a corollary that a relatively large amount of cash bail will not hold serious criminals who have easy access to cash. This state of affairs is a testament to the ultimate failure of bail reform in the United States to construct fair release procedures. The fact that criminal defendants are disproportionately poor and disproportionately minority continues to place questions of equity in pretrial release practices at the center of controversy in the 1990's.

Given the inequity it fosters, it is difficult to defend the use of cash bail as a means for detaining criminal defendants in this country. But the financial bail option is undesirable for another important reason: Reliance on cash bail also contributes to the overall

*ineffectiveness* of cash bail practices. Although many decisionmakers (and bail bondsmen) argue that the requirement of posting cash bail offers a unique inducement to defendants to comply, the research literature has not, on the whole, shown the hypothesized benefits.

While choosing among various amounts of cash bail has been shown greatly to influence the prospects that defendants will be detained (in many jurisdictions, amounts over \$500 translate into a certainty that defendants will be detained), it has not been shown to have an impact on reducing failures-to-appear in court or rearrests by released defendants. In fact, the use of cash leaves to chance (or to the defendant's ability to tap cash resources, legitimate or otherwise) the determination of who will or will not actually achieve release and then affords the court no meaningful means for restraining defendants who have purchased their release. The main reason for the survival of cash bail in pretrial release determinations is therefore not its demonstrated effectiveness in controlling defendant misconduct.

Why it survives is an interesting question. There can only be two reasons for its endurance in American criminal justice. The first is its essential link to preserving maximum judicial discretion: Cash bail provides judges an all-purpose decision option that has the appearance of an actual decision, but is really a handy "fudge-factor" that permits great flexibility in allocating pretrial detention without having to be accountable for it. The second is that a powerful and anachronistic American industry, bail bonding, depends for its existence on the use of cash bail. Both explanations stand in the way of efforts to improve the effectiveness of pretrial release practices.

In recent years the most common criticisms of pretrial release practices—centering on the belief that they permit the release of defendants too many of whom either fail to appear in court or are rearrested for new crimes—have been questioning the effectiveness of pretrial release. On the one hand, the integrity of the judicial process and the ability to prosecute criminal cases is threatened. On the other, the public safety is threatened. An equally important and increasingly common criticism, however, has been that pretrial release practices have played a major role in jail crowding due to the unnecessary detention of defendants who could safely be released to the community. Both of these criticisms, one about unsafe pretrial release, one about unnecessary pretrial detention, are complaints about the effectiveness of pretrial release practices.

Effective release may be most simply defined as decision practices that foster the release of as many defendants as possible who do not fail to appear in

court at required proceedings or commit crimes during the pretrial release period. Ineffective release stems from needlessly detaining defendants who, if released, would not have engaged in either form of misconduct, as well as from mistakenly releasing defendants who then go on to abscond from proceedings or commit crimes. If 100 percent of all defendants could be released in a given jurisdiction without a subsequent failure-to-appear or rearrest for crime during the pretrial period, pretrial release in such a jurisdiction would be 100 percent effective. To the extent that defendants are detained and/or defendants are "erroneously" released to engage in pretrial misconduct, the effectiveness of pretrial release drops to a level less than 100 percent.

***Improvement in pretrial release and detention practices is in large part the responsibility of the judiciary. Chronic problems with pretrial release and detention in the United States will never be effectively addressed without judicial leadership and accountability in the pretrial release function.***

If it is reasonable to conclude that the chief problems—fairness and effectiveness—associated with pretrial release practices are inextricably tied to problems of judicial discretion and prediction, then it follows that the responsibility for addressing them and the main hope for correcting them lie with the judiciary. There is an important role for judicial leadership in examining the role of judicial decisionmaking and its impact on pretrial release practices and in coming to grips with the challenges of predictive pretrial release decisionmaking.

There is a need for the judiciary to develop policy to structure the exercise of discretion in pretrial release determinations and to attend to its consequences as a matter of judicial administration. Judicial leadership should form policy to fill the gap between what the law says in general terms about bail and pretrial release and what judges do—improvisationally—in practice. This policy should assist judicial decisionmakers individually in the performance of the pretrial release function and assist the court as a whole in meeting the aims of pretrial release and detention. Such a policy should also have the effect of making individual decisionmakers accountable for their decisions and answerable to overall court policy as defined by judicial leadership. The truth is that the responsibility for reforming pretrial release rests primarily with the judiciary; it always has.

***Either the judiciary develops court-based approaches to improving management of the pretrial release function, or others (i.e., legislatures) will mandate their own versions of system improvements.***

The most often tried approach to improving the judicial pretrial release function has been through legislation. Laws on state and Federal levels have attempted to reform pretrial release by clarifying its aims, enunciating principles and procedures guiding release and the selection of conditions of release, and listing criteria thought to be appropriate for judges to consider in making pretrial release decisions. Laws vary in each of these areas in the kinds of provisions they have enacted. They range from laws which say very little about bail and pretrial release to laws that specify criteria in such great detail as to provide little actual meaningful instruction. (See Goldkamp, 1985.)

These laws have in common the fact that they have either not intended to affect judicial discretion much or they have done it in a fashion that would not ultimately interfere with a relatively free exercise of judicial discretion. Some of the best ideas that have found their way into legislation, such as the principle of release under least restrictive alternatives and the prohibition against causing pretrial detention through cash bail, have been easy for decisionmakers to ignore or circumvent in day-to-day practice. However, the prospect that legislatures may adopt approaches to pretrial release analogous to mandatory sentencing laws or sentencing guidelines that limit judicial discretion almost entirely is not a promising one from the perspective of addressing the problems of fairness and effectiveness in pretrial release. Of these approaches, judiciaries should be rightfully wary.

The other alternative is for courts to address the inadequacies of the pretrial release function themselves, within the room for interpretation and implementation left by state and Federal laws. The experiments to develop court-based *pretrial release (bail) guidelines* in several jurisdictions, notably Philadelphia, Maricopa County (Phoenix), Dade County (Miami), and Boston, were precisely an attempt to develop such a judicially based approach by means of which the pretrial release function could be managed and improved. The aim of these innovations was to formulate an operational, court-based, pretrial release policy, to guide the exercise of discretion, to incorporate a means for improving predictive aspects of decisionmaking, and to provide feedback to the court on the impact of pretrial release decisions. (See Goldkamp & Gottfredson, 1985.)

The pretrial release guidelines approach is designed as a self-help or court-based policy approach designed to allow judiciaries to review performance in the area and to devise a decisionmaking resource to guide day-to-day pretrial release decisionmaking. The approach combines an explicit statement of the goals of the decision, a clearly specified policy spelling out the kinds of information to be considered (and how infor-

mation should be weighed) in pretrial release considerations, and a rational scheme for designating release conditions for specific categories of defendants. Under this approach, a judicial working committee examines the transaction of pretrial release and its impact with the assistance of researchers and designs a policy framework that spells out how pretrial release ought generally to be decided. The initial versions of pretrial release guidelines have incorporated empirically derived risk-classifications into the organizing frameworks, thus increasing the likelihood that predictive decisionmaking will be improved.

One weakness so far in the development of pretrial release guidelines is that judiciaries appear inclined to retain the use of cash bail, at least for certain categories of defendants. Although the guidelines have by design reduced the range of defendants for whom cash bail options (and hence *de facto* detention) would still be appropriate, one could argue that the use of cash bail at all in pretrial release guidelines defeats the overall purpose of having an explicit decisionmaking process under the control of the court system. Since we have learned that manipulating amounts of cash bail has little impact on defendant performance during pretrial release, we can only conclude that it remains in the guidelines to provide the judges with the familiar all-purpose tool that allows detention to be decided on a *sub rosa* basis. It remains for future efforts to incorporate some of the better features of pretrial detention laws, such as eliminating the cash bail option entirely, into court-based pretrial release guidelines approaches.

The promise of the guidelines approach, though, lies not only in its potential for addressing traditional problems relating to poor prediction and inequity, but also in its ability to devise conditions of release that could replace the use of cash bail on a category-specific basis.

***The pretrial services mission is to "staff" the judicial pretrial release function and to provide the wherewithal to manage the fair and effective use of pretrial release and detention.***

For various reasons, judiciaries in the United States have increasingly been forced to recognize the importance of the judicial pretrial release function. Just as the world has become "smaller" and more interconnected, so the criminal justice system in American localities has become smaller. It is hard for the courts to escape the impact of institutional crowding on their own ability to manage the criminal caseload, for example. Inappropriate uses of confinement cause delays in scheduling and processing of cases; the needs for pretrial and postconviction confinement resources compete for the same finite capacity. Inappropriate release translates into a high rate of absenteeism in court-

rooms and ineffective caseload management. New crimes by released defendants not only threaten the public safety but multiply the number of times defendants will play a part in the future criminal caseload, as the new and old offenses are adjudicated. The traditional not-my-problem approach of courts is not only inappropriate (as it clearly always was), but it is self-defeating—because it does not work.

Pretrial services can best be understood as the single most important tool that judiciaries could have in implementing strategies for improving pretrial release and detention decisionmaking in the critical areas we have discussed. Having established the policies to guide court-based decisionmaking approaches, clear agreement on goals, release options, and eligibility criteria, it is the mission of pretrial services to perform the support work required to implement them.

Two capabilities are essential to achieving a high rate of fair and effective pretrial release in any jurisdiction: a) a capacity to assess accurately the risk of misconduct defendants pose; and b) a capacity to impose conditions of release that can adequately control or counterbalance the level and kind of risk posed. The capacity to assess risk presumes a validated risk classification scheme that ranks defendants according to the risk of flight or crime posed. The ability to assign appropriate conditions of release presupposes a knowledge of the kinds of release conditions that are usually appropriate for different types of defendants. Both of these functions depend on a clearly defined policy approach to the gathering, preparation, and use of information, including risk classification and conditions selection. Pretrial services agencies should have a major role in each of these areas.

***A central task of the pretrial services function is the collection, summarization and presentation of reliable information necessary to support the pretrial release decisionmaking and management function.***

In the modern, 21st century court system, the pretrial services agency should be seen as a critical information resource that sits at the gateway to the criminal process and begins the information functions that serve as the building blocks for the processing of criminal defendants (and their cases) through the early stages. (Perhaps a more complete title for such agencies would be “pretrial defendant information and release management agencies.”) The first critical function performed by the pretrial services agency is to gather information required to support the very early release decisions and to compile the information that will be necessary at subsequent release reviews. Just what kinds of information ought to be collected through defendant interview, criminal history check, and other searches (e.g., contacts with probation or

parole) is a matter for court policy to spell out. Arguably, the information should permit the pretrial services staff to provide the information judicial decisionmakers require for the pretrial release decision and should support other key decisions about defendants or cases, such as diversion or early case tracking, that occur at the earliest stages of processing. The tasks involved in collecting reliable information and conducting the interagency contacts necessary to present up-to-date information require a highly efficient and speedy information processing capacity.

Assuming that court policy has outlined the way the pretrial release decision is conceived and the criteria (kinds of information) serving as the basis on which release options will be selected, the first task of pretrial services is to assemble the information gathered in the proper, easily usable (decisionmaker-friendly) format. Assuming further that estimations of the likelihood of defendant risk of flight or crime during pretrial release form a major dimension of the release decision, pretrial services staff would have the responsibility for classifying defendants according to the court’s risk classification scheme and indicating the condition of release generally suggested by court policy for each type of defendant.

Under the court-based pretrial release guidelines approach, the pretrial services information function is most appropriately viewed as a classification function. That is, according to the criteria specified by court policy (e.g., risk of misconduct and relative severity of charges), defendants are placed within designated “presumptive” decision categories that would generally be appropriate for particular types of defendants. The information summarization/classification function further requires that other unusual information about defendants be pointed out for consideration by the decisionmaker so that the most appropriate decision can be made. Finally, it is the responsibility of pretrial services to indicate when particular supervisory or other special conditions of pretrial release would be appropriate—based on a court-approved typology of conditions. Pretrial services also serves as the primary data collector regarding the use and impact of pretrial release decisions, so that these can be analyzed and reported back to the judicial leadership on a periodic basis. This pretrial release decision monitoring function serves as the basis for future modifications of court policy regarding pretrial release and provides a means for assuring accountability for the pretrial release function.

As defendants move through the criminal process toward completion of their cases, and have successfully or unsuccessfully completed conditions of pretrial release, the pretrial services information function con-

tinues to update the defendants' files so that prompt action may be taken when necessary (when it appears that a defendant is not complying with conditions of release) and future decisions will be based on complete information about the defendants' background and performance.

***Subjective recommendations by pretrial services staff are irrelevant to fair and effective pretrial release decisionmaking.***

Given the larger context outlined in this essay, it can be easily seen that the information-gathering and management functions of the modern pretrial services agency are of critical importance in developing judicially based capacities to improve the fairness and effectiveness of pretrial release and detention practices. It is also clear that no role for a pretrial services recommendation function has been identified. That is because, while there is a major need for information to support the judicial function (and the classification of defendants based on that information), there is no need to add even less-seasoned subjective input—in the form of pretrial services recommendations—to the judicial discretion that is in need of improved management.

It may be understandable from an historical perspective how pretrial services agencies developed the practice of making recommendations for pretrial release. Pretrial release recommendation schemes have their origins in the innovations of the Vera Institute in the first bail reform program in the United States. Strangely, versions of this first approach, intended to present the New York judges with recommendations regarding the defendant's suitability for release on personal recognizance in the early 1960's are found in court systems in the United States today. The Vera approach claimed to employ an objective point scale to rate defendant's suitability for recognizance release. Interestingly, the "objective" point scale system was not derived from empirical study of the correlates of defendant flight or rearrest, but was assembled as someone's subjective view of what an objective approach might look like.

The Vera approach pioneered in the effort to improve the information available to judges at the pretrial release stage and in the effort to expand the use of release options other than financial bail. In so doing, the Vera Institute marked for future initiatives key issues to be targeted by bail reform. Unfortunately, it is more the form than the substance of the Vera innovation that remains after the ensuing decades. While the issues of better information and alternative release options were formulated decades earlier by others (e.g., Arthur Beeley, Caleb Foote), Vera attempted to translate these ideas into action-reform. The further development and sophistication of these very

information responsibilities designed to improve the judicial pretrial release function lie at the heart of the mission of the modern pretrial services agencies—not the formulation of agency "recommendations."

Much of what has been said in this essay serves merely as a call back to the basics of what bail reform was originally about. To learn about the information function that should be performed by pretrial services agencies, it is useful to recall the experience—and the strengths and weaknesses—of the early Vera approach to obtain some historical perspective. However, enhanced by such an historical appreciation, pretrial services professionals should not be fooled into believing that, just because pretrial services is currently found on a certain path, the path necessarily leads in the direction of greater fairness and effectiveness in pretrial release and detention practices. In some respects, by merely following our feet over these years, we may find ourselves back at the beginning. There is good news and bad news in this predicament. The good news is that there is an important chance to re-examine the mission of pretrial services in the United States at the turn of the century. The bad news is that, without such a re-examination, there is danger of repetition, and, well, *if you give a mouse a cookie. . . .*

#### NOTES

<sup>1</sup>Numeroff and Bond, New York: Harper and Row, 1985.

<sup>2</sup>18 U.S.C.A § 3142 (c) (Supp. 1985).

<sup>3</sup>It can be argued that "bail reform" has experienced at least two generations since its inception in the early 1960's—the first aimed at fostering greater use of nonfinancial forms of pretrial release, at establishing presumptions favoring pretrial release and pretrial release under the least restrictive conditions, and at encouraging consideration of a broader base of information relating to defendants' backgrounds and community ties. The second generation of reform focused on the public safety or "danger" agenda and efforts to make it explicit and legitimate through amendment of state constitutions, state and Federal legislation, and various versions of preventive detention laws. It is questionable ultimately to what extent the two generations of reform succeeded in addressing the questions posed by the unguided exercise of judicial discretion at the pretrial release stage. (See Goldkamp, 1985.)

<sup>4</sup>This was neatly demonstrated in the field of pretrial release in the Harvard study by Angel et al. (1971) in which the impact of the then new District of Columbia preventive detention law on pretrial crime and pretrial detention was tested.

<sup>5</sup>There is an interesting question, for example, about the extent to which procedural safeguards can really redress inappropriate pretrial release and detention decisions, even under recent preventive detention measures. In fact, even under the new Federal procedures, defendants who "win" reviews of their custody status may find that they have already been detained for considerable periods by the time they are granted release or modification of conditions or that the relief has come too late and been made moot by the adjudication of their charges.

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# Pretrial Risk Assessment

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Under Contract No. GS-10F-0114L, Order No. 2008-F\_08151

October 18, 2010



**BJA**  
Bureau of Justice Assistance  
U.S. Department of Justice

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# Research Summary: Pretrial Risk Assessment

*Pretrial risk assessments are conducted to provide information about the risk of failure that a given defendant poses if released before disposition of his or her case and to provide standardized measures for determining pretrial dispositions. Current research indicates that actuarial risk assessment instruments provide significant predictive benefits for pretrial decisions. However, further refinement is required to introduce actuarial instruments to pretrial services across a majority of U.S. jurisdictions.*

## DEFINITION AND GOALS

Pretrial risk assessments are designed to provide information about the risk of failure that a given defendant poses if released before adjudication of his or her case. Typically, *failure* is defined as failure to appear (FTA) for the scheduled court date and/or re-arrest for further criminal violations prior to adjudication.

A *pretrial risk assessment instrument* (PRAI) can be used to classify defendants based on their flight risk and their threat to community safety. At the pretrial stage, defendants may be classified into one of four categories:

1. *Low risk*—individuals who can be released with little or no supervisory conditions with reasonable assurances that they will appear in court and will not threaten community safety.
2. *Moderate risk*—individuals who can be released with conditions placed on them with reasonable assurances that they will appear in court and will not threaten community safety.
3. *High risk*—individuals who can be released only with the most stringent conditions placed on them with reasonable assurances that they will appear in court and will not threaten community safety.
4. *Highest risk*—individuals who cannot be released with any reasonable assurance that they will appear in court or that they will not be a threat to community safety (VanNostrand and Rose, 2009).

PRAIs have two primary goals: (1) to standardize pretrial recommendations/decisions and (2) to maximize the number of successful pretrial decisions (Coopridner, 2009; VanNostrand and Keebler, 2009; Winterfield, Coggeshall, and Harrell, 2003).

## Standardization

The goal of standardization is to make risk assessments and subsequent pretrial decisions more consistent across jurisdictions and regardless of which pretrial officers and judicial officers are involved. Without standardized metrics for risk assessment, defendants are categorized based on the subjective judgments of pretrial officers, which often results in inconsistent, disparate, and potentially arbitrary recommendations (Coopridner, 2009). These judgments are not consistent with the standards set out in the Bail Reform Act of 1984 and the pretrial recommendations of the American Bar Association (ABA), the National Association of Pretrial Services Agencies (NAPSA), and the National Institute of Justice (NIJ) (Lowencamp et al., 2008). PRAIs offer consistent standards regarding the factors that should be included in the decisionmaking process. *Actuarial pretrial risk assessment instruments* (APRAIs) provide a rating of risk factors based on their ability to predict failure to appear at the pretrial stage, thus further reducing the likelihood of subjective judgments and inconsistent outcomes (Lowenkamp and Whetzel, 2009). PRAIs provide greater transparency in pretrial recommendations by clearly outlining the factors to be considered (Lowencamp et al., 2008).

## Success Maximization

The second main goal of PRAIs is to maximize pretrial decision success. This is done by maximizing the number of defendants who are released before they are tried, without negatively affecting appearance in court rates or public safety. This goal addresses community safety interests as well as the presumption of innocence that is afforded to the accused (Lowencamp et al., 2008). Because PRAIs comprise a set of risk factors that are consistently applied, and because the outcome of each pretrial decision is eventually known, it is possible to conduct empirical research to ascertain the efficacy of each of the factors. This represents a notable shift toward the use of evidence-based practices within pretrial services (VanNostrand and Keebler, 2009) and to the use of quantitative statistical techniques to evaluate the likelihood of an offender's pretrial failure based on factors that have been shown to be predictive of FTA and rearrest (Lowencamp et al., 2008).

## WHAT WORKS—KEY RISK FACTORS AND FORMS OF PRAIS

### Key Risk Factors

While the standardization of pretrial risk assessments is relatively new, several common risk factors have been identified as being correlated with a heightened risk of pretrial failures. By examining more than 500,000 legal cases that were processed through the Federal pretrial services system, VanNostrand and Keebler (2009) found several factors that were consistent indicators of pretrial risk: the nature of the charge(s) pending at time of arrest, history of criminal arrests and convictions, active community supervision at time of arrest (e.g., pretrial, probation, and parole), history of failure to appear, history of violence, residence stability, employment stability, community ties, and substance abuse (VanNostrand and Rose, 2009).

## Forms of PRAIS

PRAIs can be qualitative, quantitative (including APRAIs), or a mixture of both measures. Qualitative risk assessments have fallen out of favor because they are less consistent across multiple assessors, and they have been shown to have less predictive value than quantitative measures, particularly when compared with actuarial risk assessments (Harris, 2006).

Quantitative PRAIs assign numerical values to various risk factors and evaluate risk based on the total point values assigned to a given individual. Quantitative PRAIs offer the advantages of consistency, the potential to directly compare the risks posed by individuals, and an empirical examination of the selected risk factors and their relative weights in the PRAI (Cooprider, 2009; Harris, 2006).

Actuarial pretrial risk assessment instruments (APRAIs) are a type of quantitative PRAI that represents the direct application of evidence-based practice to the construction of PRAIs. They use statistical analyses of risk factors to determine (a) which factors are predictive of pretrial failure, (b) the degree to which they are predictive, and (c) the relationships between these risk factors. This process allows for the construction of risk assessment instruments that categorize individual defendants more accurately than more basic quantitative measures. To date, only a few APRAIs have been implemented in pretrial services. These include the Virginia Pretrial Risk Assessment; the Ohio Pretrial Assessment Tool; and APRAIs in Hennepin County (MN), Harris County (TX), Philadelphia (PA), and Lake County (IL).<sup>1</sup> APRAIs also have been developed based on data from the New York City Risk of Recidivism (ROR) system and the Federal Court system.

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<sup>1</sup> See VanNostrand (2007) for discussions of Harris County, Texas; Hennepin County, Virginia; and Philadelphia. See Siddiqi (2009) for information about New York. See Cooprider (2009) for discussion of Lake County, IL. See Latessa et al. (2010) for discussion of Ohio (ORAS).

## EFFICACY OF PRAIS

Despite 30 years of research, the efficacy of PRAIs of all types is still relatively unknown (VanNostrand, 2007). This is particularly the case for APRAIs, as they are not yet in widespread use within pretrial services. Recent research by Levin (2007) has provided evidence that quantitative risk assessment instruments provide more accurate information about a defendant's failure to appear and risk of reoffense than qualitative risk assessments. By examining a national sample of pretrial programs, Levin found that jurisdictions using quantitative assessments (or a combination of quantitative and qualitative assessments) had fewer FTAs and rearrests than jurisdictions that either did not have an assessment tool or relied solely on qualitative risk assessments (Levin, 2007). Thirty percent of the jurisdictions that used quantitative assessment tools operated in areas with jails that were over capacity, whereas 50 percent of jurisdictions that used a combination of quantitative and qualitative techniques experienced overcrowding. Overcrowding was highest (60 percent) in jurisdictions that used only qualitative techniques (Coopridner, 2009). Given the percentages of those incarcerated awaiting trial, this provides reasonable evidence that the use of more effective PRAIs could reduce jail populations.

APRAIs can be useful for evaluating the efficacy of pretrial practices even when not actively used for risk assessments. In comparison with the risk categories developed by VanNostrand and Rose (2009), Federal pretrial officers who relied solely on qualitative risk assessments significantly over-recommended detention for offenders in all risk categories and recommended unnecessarily high levels of supervision for low-risk offenders who were released (VanNostrand and Keebler,

2009).<sup>2</sup> Using quantitative risk assessment instruments may allow law enforcement to better allocate their resources to those offenders with the highest risk.

The use of APRAIs shows significant promise for improving these outcomes in pretrial services. The instrument developed by the Urban Institute for the D.C. Pretrial Services Agency achieved up to 80-percent accuracy in risk assessments for both FTA and rearrest (Winterfield et al., 2003). Findings from a study validating the Virginia Pretrial Risk Assessment Instrument (VPRAI) showed that eight risk factors could be used to reliably classify offenders by risk level:

1. Primary Charge Type
2. Pending Charge(s)
3. Criminal History
4. Two or More Failures to Appear
5. Two or More Violent Convictions
6. Length at Current Residence (reverse scored such that less time at a residence results in a higher score)
7. Employed/Primary Caregiver
8. History of Drug Abuse

Higher scores on these factors resulted in higher risk-level classification and were predictive of higher failure to appear rates (VanNostrand and Rose, 2009). Lowencamp and Whetzel (2009) developed a pretrial screening tool that successfully correlated pretrial assessment scores with risk for FTA and rearrest ( $r=.26$  and  $r=.24$ , respectively). These correlations represent statistically significant improvement compared with the nonactuarial risk assessments made by pretrial officers. These instruments have the added advantage of being based on data and

<sup>2</sup> Additional supervision has been shown to *increase* pretrial failure rates for defendants at lower risk levels. For example, the pretrial failure rate for low-risk defendants is 11–33% higher if substance abuse treatment is added as a condition of release, 30–56% higher if third-party monitoring is required, and 46–112% higher if location monitoring is required.

methodologies that are open to peer review (Conroy, 2006).

One criticism of using APRAIs is that standard APRAIs may not be particularly effective at predicting the risks posed by certain types and subgroups of offenders. Some categories of sex offenders, for example, tend to be categorized as low-risk despite being likely to reoffend while awaiting trial because they score low on the Risk Prediction Index (RPI), which is a quantitative pretrial risk assessment measure (Muller, 2009).<sup>3</sup> There is also substantial variation by demographic subgroups such as age, race, and gender that may indicate these measures are not equally effective for all groups (Siddiqi, 2009).

## HOW TO SELECT/IMPLEMENT PRETRIAL RISK ASSESSMENT INSTRUMENTS

### Selecting Appropriate Instruments

- ▶ PRAIs should be consistent with the jurisdictional standards of relevant criteria for bail considerations, particularly with regard to race, ethnicity, gender, and financial status (VanNostrand, 2007).
- ▶ Risk factors included in the PRAI need to be demonstrably related to FTA and rearrest rates, not solely to recidivism or general criminogenic factors (VanNostrand, 2007).
- ▶ Risk factors and assessment terms should be clearly and unequivocally defined to ensure consistent evaluations (Cooprider, 2009).
- ▶ The instrument should be simple enough to use under day-to-day circumstances. Instruments that require specialized knowledge or overly time-intensive data collection are likely to be too burdensome for most jurisdictions' use (VanBenschoten, 2008).

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<sup>3</sup> Muller's cautionary note is based largely on the failure of some post-conviction risk assessment tools to adequately show the risk posed by certain categories of sex offenders and two cases of pretrial failure with sex offenders despite pretrial monitoring efforts.

- ▶ APRAIs must be validated and/or revised for the implementing jurisdiction. Jurisdictional variations in risk factors are likely (Latessa et al., 2010).
- ▶ Pretrial risk assessment instruments should be relatively easy for criminal justice personnel to understand and administer (Latessa et al., 2010).

## FURTHER ISSUES REGARDING THE USE OF PRAIS/APRAIS IN PRETRIAL CONTEXTS

### Issues with Definitions and Goals

- ▶ Failure conditions are not standardized. For example, current instruments vary in whether or not technical violations are considered pretrial failure. Rearrest as generally used may not be the best measure of community safety, as offenders may not be rearrested but will instead face revised charges, plea bargains, etc. (Muller, 2009).
- ▶ Most current PRAIs provide only an assessment of the likelihood of failure. For a full evaluation of the risk to community safety posed by an offender, research is needed on the severity or type of risk identified by PRAIs (VanNostrand, 2007; VanBenschoten, 2008).<sup>4</sup>
- ▶ Risk assessment outputs should be linked to specific variables so that case officers can identify the risks posed and make the best pretrial recommendation (VanBenschoten, 2008).
- ▶ The role of professional discretion for pretrial officers using PRAIs should be clarified. Particular attention should be given to the possibility that heuristic and anchoring biases may skew professional judgments to give undue weight to certain risk factors.
- ▶ Current PRAIs focus almost exclusively on risk factors. Protective factors—those variables that can be shown to decrease the

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<sup>4</sup> See Siddiqi (2009) for some data on the severity of the risks posed by types of offender.

likelihood of failure—should be studied and considered for inclusion in the instruments to further clarify the risks posed by individual defendants (Campbell, 2003).

### **APRAI-Specific Issues**

- ▶ Revalidation studies are needed for APRAIs that are currently in use to ensure validity over time within jurisdictions (Latessa et al., 2010).
- ▶ We should examine the possibility that current APRAIs include measurement errors. These instruments usually are based on structured interviews by professional researchers (rather than case officials) with offenders who agreed to participate (possible selection bias).
- ▶ APRAIs should incorporate oversampling of underrepresented groups (i.e., women, sex offenders, Native Americans) to adjust for small subsample sizes in initial samples (Latessa et al., 2010).
- ▶ Further research should be done on the portability of APRAIs across jurisdictions (VanNostrand, 2007). The VPRAI model has been adapted to Ohio and Lake County, Illinois, with validity intact. Additional portability studies should be conducted.
- ▶ For some APRAI packages, the initial validation was done on small sample sizes, which presents a base rate problem and raises issues with the representativeness of the construction sample (VanBenschoten, 2008).

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# STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT

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**March 2011**

*This project was supported by Grant No. 2009-DB-BX-K021 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, the Community Capacity Development Office, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.*



## FOREWORD

Procedural fairness is the cornerstone of a criminal justice system that supports the guarantees of our legal system—innocent until proven guilty. Since the first bail reform experiment in the 1960's, jurisdictions have struggled to identify how to accurately predict who is likely to appear in court and remain law-abiding if released pending trial. Good public safety practice and sound fiscal management of local resources, like jails and courts, suggests the need for a renewed approach to decision making at pretrial.

Modern data management has shown that validated pretrial risk assessments are within the reach of every community and evidence-based tools that inform the pretrial release decision produce better outcomes than by relying on a standard bond schedule.

The Bureau of Justice Assistance is committed to assisting local jurisdictions as they strive to meet national, evidence-based standards on pretrial release. As part of this commitment, the Bureau convened leading researchers and professionals in the field of pretrial justice to discuss the efficacy and implementation of pretrial risk assessment. The purpose of the meeting was to determine how best to successfully assist local systems in the development and use of an evidence-based approach to pretrial justice. This document raises many questions and issues worthy of further investigation and study, but it also demystifies much of the misunderstandings involved in the development and application of these useful tools.

Our thanks to the Pretrial Justice Institute for organizing the meeting and continually supporting the use of validated pretrial risk assessments in every jurisdiction and the National Institute of Justice for its participation in this meeting.

James H. Burch, II  
Acting Director  
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## INTRODUCTION

The most important decision that is made with respect to a newly arrested defendant is whether to release that defendant into the community while awaiting trial; getting that decision right is critically important for both the defendant and the community at-large. In June 2010, the Pretrial Justice Institute (PJI) and the Office of Justice Programs' Bureau of Justice Assistance (BJA) convened a meeting of researchers and practitioners to discuss the current state of the science and practice of pretrial justice. This document summarizes the key points that came out of that discussion and what leaders in the field identified as significant next steps in advancing the administration of pretrial justice, ensuring efficient and effective release and detention decisions for pretrial defendants, managing defendant risk through appropriate and specific conditions of release, and balancing the rights of defendants with community safety.

This publication is designed for a wide-ranging audience of criminal justice stakeholders who have questions about pretrial risk assessment and its value to the pretrial justice process. The first section of this publication provides a brief review of the history and current state of pretrial justice. The second section looks at critical issues related to pretrial release, detention, and risk assessment. The third section discusses challenges to implementing evidence-based<sup>1</sup> risk assessment and threats to reliable administration, including time constraints and practicality of the risk assessment instrument, money bail schedules, local capacity, subjective risk assessment, and court culture and judicial behavior. The fourth section of the document outlines methodological challenges associated with the prediction of risk. The final section provides recommendations for research and practice. We discuss high priority research activities, the potential for a universal risk assessment instrument, and the need for training and technical assistance.

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<sup>1</sup> There are many types of "evidence." In this document, the use of the term "evidence-based" as it relates to pretrial release decision-making, risk assessment, and development of effective pretrial supervision and conditions of release refers to efforts that are guided by empirical knowledge, are tested empirically, and are adjusted as necessary using rigorous social science methods.

## SETTING THE STAGE

The growth and development of pretrial justice in the United States is a story of philosophical debates, practical challenges, a developing portfolio of research, and evolving national standards. There are several publications that go into great detail about the historical and legal foundations of pretrial justice and the current practices being implemented across the country.<sup>2</sup> This section will set the stage for the rest of the document, providing a brief review of the history and current state of pretrial justice.

### Pretrial Justice Defined

When a person is arrested, the decision to release or detain him or her pending trial is a critical step in the justice process. The judicial officer (e.g., judge, magistrate, commissioner, or hearing officer) must decide whether to release the defendant on personal recognizance or unsecured appearance bond, release the defendant on a condition or combination of conditions, or detain the defendant for a temporary or extended period of time. Pretrial justice policies and practices exist to provide due process to the accused, eliminate inappropriate detention, and maintain community safety.

Effectively balancing the presumption of innocence, the assignment of the least restrictive intervention for defendants, and the need to ensure community safety while minimizing defendant pretrial misconduct is the challenge afforded pretrial justice. Whether this balance is reached and how pretrial justice is administered has significant ramifications for both the defendant and the community. For the community at-large, the pretrial decision affects how limited jail space is allocated and how the risks of non-appearance and pretrial crime by released defendants are managed. The pretrial decision also affects defendants' abilities to assert their innocence, negotiate a disposition, and mitigate the severity of a sentence.<sup>3</sup>

Pretrial services programs, the first of which was established in 1961,<sup>4</sup> provide initial assessments of the defendant to the judicial officer; consider and, where appropriate, recommend alternative placements of the defendant; and supervise the defendant upon release. Pretrial services programs operate within a context that includes a variety of participants including law enforcement personnel, prosecutors, defense attorneys, and judicial officers. The roles, responsibilities, and activities of these programs may vary depending on their legal authority, jurisdictional resources, geographic location, case volume, and local legal culture.<sup>5</sup>

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<sup>2</sup> See *Federal Probation Journal* (September 2007) Volume 71, Number 2, Special Issue on the 25th Anniversary of Pretrial Services in the Federal System. See also the Pretrial Justice Institute's webpage on the history of bail (<http://www.pretrial.org/Pages/History-of-Bail.aspx>) and the Pretrial Justice Institute's *Survey of Pretrial Programs* (2009).

<sup>3</sup> Mahoney, B., B.D. Beaudin, J.A. Carver III, D.B. Ryan, and R.B. Hoffman (March, 2001) *Pretrial Services Programs: Responsibilities and Potential*. National Institute of Justice: Issues and Practices. Washington, DC: US Department of Justice, US Government Printing Office.

<sup>4</sup> The Vera Institute of Justice's Manhattan Bail Project, established in 1961, was designed to provide an alternative to the money bail system and marked the beginning of pretrial services programs.

<sup>5</sup> Mahoney, B., B.D. Beaudin, J.A. Carver III, D.B. Ryan, and R.B. Hoffman (March, 2001) *Pretrial Services Programs: Responsibilities and Potential*. National Institute of Justice: Issues and Practices.

Pretrial Justice- The honoring of the presumption of innocence, the right to bail that is not excessive, and all other legal and constitutional rights afforded to accused persons awaiting trial while balancing these individual rights with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance.<sup>6</sup>

### **The Purpose of Bail**

The purpose of bail, according to the American Bar Association (ABA), is to provide due process to the accused; ensure the defendant’s appearance at all hearings before the court; and protect victims, witnesses, and the community from threats, danger, and interference.

Bail refers to the money or bond put up to secure the release of a person who has been charged with a crime. Bail is part of a larger process in which a defendant is taken into custody by law enforcement, is issued a summons or transported to the local detention facility, is assessed for his risk of failure to appear in court and committing additional crimes, appears before a judicial officer, is given or denied a bail bond with or without specific conditions, and is detained in jail or released into the community until the disposition of his case.<sup>7</sup> Judges have a set of bail conditions available to them, including release on recognizance, release via financial conditions, release to community supervision, or detention without bail.

The Eighth Amendment of the United States Constitution provides that “excessive bail shall not be required.” It does not, however, explicitly state the purposes of bail or the rights of defendants at bail. The early advocates of bail reform purported that the constitutional prohibition of excessive bail could stem only from a presumption favoring the release of defendants before trial, derived from the presumption of innocence.<sup>8</sup> The U.S. Supreme Court has since defined the purpose of bail as assuring the appearance of the accused at trial and sentencing (*Stack v. Boyle, 1952*). In 1984, Congress added another purpose—to reasonably assure the safety of any other person and the community.<sup>9</sup>

The definition of bond or bail bond, on the other hand, is the agreement between the defendant and the court, or between the defendant, the surety (or bondsman), and the court, originally designed primarily to assure the defendant’s appearance in court and more appropriately expanded to include public safety protections.<sup>10</sup> The terms bail and bond are used interchangeably in public discourse, but they are not legal synonyms. With bond, a person arrested for a criminal offense is released from police or court custody pending trial. As a condition of release, the defendant promises to appear in court for all scheduled criminal proceedings. If the defendant fails to appear in court as scheduled, he or she will be subject to

6 VanNostrand , M. and G. Keebler (September, 2007) Our Journey Toward Pretrial Justice, *Federal Probation*, Vol .71 (2): 20-25.

7 Jefferson County, Colorado, Criminal Justice Planning Unit. *Bail History and Reform: An Introduction*. An Excerpt From: A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado’s First Judicial District.

8 <http://law.jrank.org/pages/557/bail-eighth-amendment-constitution-defendant-rights.html>.

9 Bail Reform Act of 1984, United States Code, Title 18, Sections 3141-3150 (1984).

10 Jefferson County, Colorado, Criminal Justice Planning Unit. *Bail History and Reform: An Introduction*. (Need publication year)

immediate arrest, and any bond amount paid may be forfeited. If the defendant is unable to get access to the money needed to pay the bond, he or she remains in jail until the case is adjudicated.

In most jurisdictions, commercial surety agents (bail bondsmen), are available to defendants should the court set a surety bond. In this scenario, defendants may pay a non-refundable fee to the bondsmen (usually 10 to 15 percent of the bond amount set by the court) and the bondsmen make a promise to the court that the defendant will make all court appearances. The bondsmen do not actually provide any money up front to the court; a bond will be ordered forfeit only if the defendant fails to appear and is not returned to the court within a statutory grace period (typically 90 days or more).

Criticisms of the American bail system abound and have fueled reform efforts over the past five decades. In response to the criticism that money bail is ineffective at distinguishing between dangerous and non-dangerous defendants, laws were changed providing judges with a list of alternatives that take into account the circumstances and characteristics of each arrestee, rather than simply their ability to pay.<sup>11</sup> “Preventing danger to the community” became a “legitimate regulatory goal.”<sup>12</sup>

Research has suggested that bail decisions have often been made arbitrarily and that little information other than previous criminal history and current charges has been provided to judicial officers to help in their determining appropriate bond amounts and bail conditions.<sup>13</sup> Objective research-based tools have been and continue to be developed that assess the defendant’s flight risk, as well as their likelihood of danger to the community, in an effort to present impartial information to judges. With the availability of such tools, judges are better equipped to assign more rational conditions of release or detention.

### **Standards of Practice and the Reality of Practice**

The ABA Standards on Pretrial Release present policies favoring release of defendants under the least restrictive conditions pending adjudication, recommend the abolishment of compensated sureties for release (i.e., bail bondsmen), and advocate for the establishment of a comprehensive pretrial release services agency with adequate resources. The National Association of Pretrial Services Agencies also has Standards for Pretrial Release that provide implementation guidance for the ABA standards.<sup>14</sup> For the purposes of this document, we will focus on the ABA standards. Both sets provide specific information on effective and high functioning pretrial justice systems, and provide guidance on how to maintain policies, practices, and quality control measures that ensure adherence to these standards.

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<sup>11</sup> Bail Reform Acts of 1966 and 1984.

<sup>12</sup> U.S. v. Salerno (481 U.S. 739).

<sup>13</sup> Maxwell, S.R. (1999) Examining the Congruence between the predictors of ROR and failure to appear. *Journal of Criminal Justice*, 27: 127-141.

<sup>14</sup> *National Association of Pretrial Services Agencies, Standards on Pretrial Release, 3rd Edition* (October 2004) Approved by the Board of Directors of the National Association of Pretrial Services Agencies.

While the most recent versions of the ABA standards were introduced in 2002, findings from a 2009 survey of officials in the 150 most populous counties in the country suggest that the standards of the ABA have not yet led to standardized practices.<sup>15</sup> Qualitative reports from practitioners within the field suggest that the standards, while excellent, are generally unknown to the judiciary, defense attorneys and prosecutors, and that little has been done to effectively promulgate these important and useful guidelines.

### Research Highlights in the Area of Pretrial Justice

Improving bail administration and pretrial decision-making are topics that have, beginning in the early 1950s, been consistently represented in the academic literature.<sup>16</sup> Research on pretrial risk assessment, and also the effects of supervised pretrial intervention and other conditions of pretrial release is a body of literature that is still developing. Of this developing literature, what do we know?

Research that relates to pretrial risk assessment focuses on identifying factors that are predictive of pretrial misconduct including failure to appear in court (FTA), re-arrest, and/or danger to the community. Pretrial risk assessment instruments that have been developed and tested in different jurisdictions across the country<sup>17</sup> at various times since the early 1960s have considered a variety of predictive factors of FTA and re-arrest. These have included items related to community and family ties, employment, prior criminal record, education level, specific crimes for which a person is charged, and substance abuse.<sup>18</sup> All of these studies looked at risk assessment instruments whose structure was based upon the model developed by the Vera Institute in 1961—a point scale that assigns certain points (positive or negative) to factors believed (either

<sup>15</sup> Pretrial Justice Institute (2009) *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes*.

<sup>16</sup> See Foote, C. (1954) Compelling Appearance in Court: Administration of Bail in Philadelphia. *University of Pennsylvania Law Review*, Vol. 102: 1031-1079. Roberts, J.W. and J.S. Palermo (1958) The Administration of Bail in New York City. *University of Pennsylvania Law Review*, Vol. 106: 693-730. Goldkamp, J.S. (1979) Two Classes of Accused: A Study of Bail and Detention in American Justice. Cambridge, MA: Ballinger Publishing Company. Goldkamp, J.S. and M.R. Gottfredson (1985) *Policy Guidelines for Bail: An Experiment in Court Reform*. Philadelphia, PA: Temple University Press. Goldkamp, J.S., M.R. Gottfredson, P.R. Jones, and D. Wiland (1995) *Personal Liberty and Community Safety: Pretrial Release in the Criminal Court*. New York, NY: Plenum Press.

<sup>17</sup> Throughout this document, research that examines risk factors for defendants at federal, state and local levels is cited. While there are many similarities among defendants at these different jurisdictional levels, there are also differences that may limit the transferability of findings between federal and state/local defendants. Research suggests, for example, that federal pretrial defendants are almost entirely felony defendants (see VanNostrand, M. and G. Keebler [2009] Pretrial Risk Assessment in the Federal Court. *Federal Probation*. Volume 72, Number 2. “Defendants’ primary charge was a felony 92 percent of the time, a misdemeanor 7 percent, and an infraction 1 percent. There were few fluctuations in the percent of charge offense level across the years.”), while local pretrial defendants are more commonly misdemeanants [e.g., 65 percent misdemeanants in Allegheny, PA (2008); 47 percent misdemeanants or infractions in New York City, NY (2003); 66 percent misdemeanants in Hennepin, MN (2006); 42 percent misdemeanants in Multnomah, OR (2010); and 66 percent misdemeanants in VA (2003)]. These types of population differences influence our expectations with respect to defendant risk and pretrial programming effectiveness (e.g., sending a court reminder to savvy federal defendants may not be as effective as sending a court reminder to a first-time state or local defendant). It is important for readers to be aware of the differences in these defendant populations and the associated limits in generalizing from one group to the other.

<sup>18</sup> Consider for example, Austin and Murray, 2009; Cuvelier and Potts, 1993; Dickinson, 1994; Eskridge, 1981; Goodman, 1992; Henry, Clark, Austin and Naro, 1999; Latessa, Smith, Lemke, Makarios and Lowencamp, 2009; Podkopacz, 2006; VanNostrand, 2003; Siddiqi, 2006; VanNostrand and Keebler, 2009; VanNostrand and Rose, 2009. For complete review of these studies, see Pretrial Justice Institute (2010) *Overview of Pretrial Risk Assessment Validation Study Findings*.

intuitively or based on research findings) to be related to risks of pretrial misconduct. The factors included and the weights assigned have varied, but the basic structure has remained the same.

There are commonalities among these study findings. For example, defendants with prior histories of FTA and prior convictions are more likely to fail to appear for their current case and be rearrested. The studies, however, vary on the specifics of these variables. For example, some studies show that any prior FTA raises the risk of failure to appear in the current case, while others show that risk is not raised until a defendant reaches at least two prior FTAs. Likewise, some studies show that having any prior convictions raises risk, but in others only a certain number of convictions or convictions for certain types of offenses are relevant.

The following table<sup>19</sup> summarizes the six most common validated pretrial risk factors identified in studies published during the last decade:

| Validated Risk Factors  | Study  |
|-------------------------|--|
| Prior FTA               | Virginia, 2 or more (VanNostrand, 2003)<br>New York City (Siddiqi, 2006)<br>Harris County, TX (Austin and Murray, 2008)<br>Hennepin County, MN (Podkopacz, 2006)<br>Allegheny County, PA, 2 or more (Pretrial Justice Institute, 2007)<br>Ohio (Lowenkamp, Lemke and Latesasa, 2008)<br>Federal System (VanNostrand and Keebler, 2009)   |
| Prior convictions       | Virginia, 1 or more (VanNostrand, 2003)<br>New York City, Prior misdemeanor convictions (Siddiqi, 2006)<br>Harris County, TX (Austin and Murray, 2008)<br>Hennepin County, MN, Having a higher number (Podkopacz, 2006)<br>Allegheny County, PA, 2 or more (Pretrial Justice Institute, 2007)<br>Ohio, 3 or more prior jail incarcerations (Lowenkamp, Lemke and Latesasa, 2008)<br>Federal System (VanNostrand and Keebler, 2009) |
| Present charge a felony | Virginia (VanNostrand, 2003)<br>Federal System (VanNostrand and Keebler, 2009)   |
| Being unemployed        | Virginia (VanNostrand, 2003)<br>New York City (Siddiqi, 2006)<br>Harris County, TX (Austin and Murray, 2008)<br>Hennepin County, MN (Podkopacz, 2006)<br>Ohio (Lowenkamp, Lemke and Latesasa, 2008)<br>Federal System (VanNostrand and Keebler, 2009)  |
| History of drug abuse   | Virginia (VanNostrand, 2003)<br>Federal System (VanNostrand and Keebler, 2009)<br>Ohio (Lowenkamp, Lemke and Latesasa, 2008)   |
| Having a pending case   | Virginia (VanNostrand, 2003)<br>New York City (Siddiqi, 2006)<br>Federal System (VanNostrand and Keebler, 2009)  |

<sup>19</sup> Austin, J. and T. Murray (2009) *Re-Validation of the Actuarial Risk Assessment Instrument for Harris County Pretrial Services*. Washington, D.C.: The JFA Institute. Clark, J. and D. Levin (2007) *The Transformation of Pretrial Services in Allegheny County, Pennsylvania: Development of Best Practices and Validation of Risk Assessment*. Washington, D.C.: Pretrial Justice Institute. Lowenkamp, C., R. Lemke and E. Latesasa (2008) The Development and Validation of a Pretrial Screening Tool. *Federal Probation*. Vol. 72 (3). Podkopacz, M. (2006) *Fourth Judicial District of Minnesota Pretrial Evaluation: Scale Validation Study*. Power Point Presentation. Siddiqi, Q. (2006) *Predicting the likelihood of pretrial re-arrest for violent felony offenses and examining the risk of pretrial failure among New York City defendants: An analysis of the 2001 dataset*. New York, NY: New York City Criminal Justice Agency, Inc. VanNostrand, M. (2003) *Assessing risk among pretrial defendants in Virginia: The Virginia pretrial risk assessment*. Richmond, VA: Virginia Department of Criminal Justice Services. VanNostrand, M., and G. Keebler (2009) *Pretrial Risk Assessment in Federal Court*. *Federal Probation*. Vol. 72 (2).

A study by VanNostrand and Keebler (2009) demonstrates some of the nuances associated with pretrial risk factors and prediction of pretrial failure. VanNostrand and Keebler (2009) studied all persons charged with criminal offenses in the federal courts between October 1, 2001 and September 30, 2007, and who were processed by the federal pretrial services system.<sup>20</sup> These researchers developed a risk classification scheme based on nine statistically predictive factors, six of which are included in the above table,<sup>21</sup> to scale the risk persons arrested for federal criminal offenses pose if released pending trial. The classification scheme included five levels of risk of pretrial failure (e.g., failure to appear and danger to the community), with one being lowest risk and five being highest risk. After having applied the risk classification scheme to the study population of defendants, results indicated that as defendant risk increased, the likelihood of pretrial detention increased, and when defendants were released, the likelihood of pretrial failure increased as the level of pretrial risk increased. What this study also found was that three quarters of the defendants were ordered to alternatives to detention programming, and of these defendants released to this type of programming, the moderate to high risk defendants (i.e., risk levels 3 through 5) were less likely to experience pretrial failure when compared to defendants released without a condition that included an alternative to detention. What is most interesting, however, is that when lower risk defendants (i.e., risk levels 1 and 2) were released to conditions that included alternatives to detention, they were *more* likely to result in pretrial failure. These defendants were, in effect, over-supervised given their risk level.

This study of the federal system underscores the importance of doing risk assessment *correctly*, so that defendants can be accurately classified and appropriate alternatives to detention are assigned to defendants based on their predicted level of risk of pretrial failure. This distinction becomes abundantly important in the context of limited resources and wanting to optimize the success of those defendants who are released pretrial.

The research literature related to the effects of supervised pretrial intervention and other conditions of pretrial release is, as stated before, still developing. Most recently, Levin (2007) analyzed the impact of variation in availability and type of pretrial release conditions, pretrial release sanctions and pretrial screening in 27 of the cumulative 65 counties in the 1990-2004 State Court Processing Statistics (SCPS) data, using also the 1999 BJA-Pretrial Services Resources Center's Pretrial Release Programming at the Start of the 21st Century Survey. The findings from this study suggest that: 1) a pretrial program's use of quantitative or mixed quantitative-qualitative risk assessments lowers a defendant's likelihood of pretrial misconduct; 2) a pretrial program's ability to impose sanctions and reports to courts is associated with less pretrial misconduct; 3) the more ways a pretrial program has to follow-up an FTA, the lower the likelihood of a defendant's pretrial misconduct; 4) a pretrial program's use of targeted mental health screening lowers a defendant's likelihood of pretrial misconduct; and 5) a pretrial program's ability to supervise mentally ill defendants lowers the likelihood of a defendant's re-arrest.<sup>22</sup> While a

<sup>20</sup> N=565,178. VanNostrand, M., and G. Keebler (2009) Pretrial Risk Assessment in Federal Court. *Federal Probation*. Vol. 72 (2).

<sup>21</sup> Three other factors—number of prior misdemeanor arrests, number of prior felony arrests, and defendant's residency status—were also included.

<sup>22</sup> Levin, D. (2007) *Examining the Efficacy of Pretrial Release Conditions, Sanctions and Screening with the State Court Process-*

handful of notable studies have been conducted on pretrial risk assessment and conditions of pretrial release,<sup>23</sup> this area of research is still generally in its infancy. What the research has provided, however, is a reasonable profile of pretrial defendants and pretrial practice.

### **A Profile of Defendants and Scan of Current Pretrial Practice**

What does the defendant pretrial population look like? We know from national data sources that the local jail population continues to increase, and that in 2009, 62 percent of all jail inmates were awaiting court action or had not been convicted of their current charge, up from 56 percent in 2000.<sup>24</sup> The data suggest that jails have increasingly become pretrial detention facilities. The overwhelming majority of jail inmates are adult males; more than 6 in 10 persons in local jails are racial or ethnic minorities; and the majority of inmates are being held for property, drug and public order offenses.<sup>25</sup> Only 25 percent of inmates are being held for violent offenses.

Analysis of State Court Processing Statistics data between 1990 and 2004 provide a general description of characteristics of defendants who are being released and detained pretrial.<sup>26</sup> Results indicate that 62 percent of felony defendants in state courts in the 75 largest counties were released prior to the disposition of their case. Beginning in 1998, financial pretrial releases, requiring the posting of money bond, were more prevalent than non-financial releases (36 percent compared to 28 percent).<sup>27</sup> The analysis found that defendants were less likely to be released if they had a prior arrest or conviction, an active criminal justice status at the time of arrest (such as those on probation or parole), or a history of missed court appearances.

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*ing Statistics Dataseries*. Paper Prepared for the Presentation at the Annual Meeting of the American Society of Criminology, Atlanta, GA, November 14-16.

23 See also (1) Goldkamp, J.S. and M.D. White (2006) Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments. *Journal of Experimental Criminology*, Vol. 2: 143-181. This research used linked randomized experiments to study supervision within the context of pretrial release decision-making reform in Philadelphia, PA. Separate experiments examined the impact of levels of supervision on different types of defendants, the impact of notification alone, and the impact of delayed enforcement and defendant retrieval. Findings suggested that facilitative notification strategies have little influence on defendant behavior and that deterrent aims are undermined by the system's failure to deliver consequences for defendant noncompliance during pretrial release. (2) Austin, J., B. Krisberg, and P. Litsky (1985) The Effectiveness of Supervised Pretrial Release. *Crime and Delinquency*, 31 (4): 519-537. In this study, an experimental design with random assignment was used in three cities (Miami, Milwaukee, and Portland) to test whether defendants denied initial pretrial release could later be screened and released under close supervision without adversely affecting arrest and failure to appear rates. The results were generally positive with approximately 90 percent of the defendants not being arrested or becoming fugitive.

24 The national jail population increased from 621,149 inmates in 2000 (mid year) to 767,620 in 2009 (mid year), representing a 24 percent increase. Minton, T. (2010) *Jail Inmates at Midyear 2009*. Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2195>).

25 James, D. (2004) *Profile of Jail Inmates, 2002*. Bureau of Justice Statistics Special Report. Washington, DC: US Department of Justice, Office of Justice Programs.

26 Cohen, T.H. and B.A. Reaves (November 2007) *Pretrial Release of Felony Defendants in State Courts*. Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

27 This increase in the use of financial releases was mostly the result of a decrease in the use of release on recognizance (ROR), coupled with an increase in the use of commercial surety bonds.

It is estimated that about 200 to 300 pretrial programs provide services to defendants across fewer than 1,000 of the 3,000 U.S. counties. Though there may be some core pretrial services beyond these programs, there is no information at the national level about the availability or lack of core pretrial services (i.e., interviewing and investigating defendants, assessing risks of pretrial misconduct, providing supervision of pretrial release conditions set by the court) in more than 2,000 counties in this country.<sup>28</sup>

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<sup>28</sup> Pretrial Justice Institute (August 11, 2009) *2009 Survey of Pretrial Services Programs*.

## CRITICAL ISSUES RELATED TO PRETRIAL RELEASE, DETENTION, AND RISK ASSESSMENT

There are a number of critical issues related to pretrial release and detention that inform our discussion of pretrial risk assessment. Each of these issues must be taken into account as the field continues to grapple with how best to advance pretrial practice and policy.

First, the presumption of innocence provides the rationale for pretrial release with the least restrictive conditions. The challenge is balancing the presumption of innocence and individual liberty of defendants with community safety, the protection of witnesses and victims, and ensuring the defendant's return to court.

Second, danger concerns at the bail stage are considered legally acceptable, and the laws in many, but not all U.S. jurisdictions, refer to both the appearance and community-protection aims of pretrial release decisions, as well as the aim of judicial process integrity.<sup>29</sup> The continued challenge for pretrial justice, therefore, is the development of valid assessments of defendant risk and potential dangerousness so as to more confidently guarantee the values of community safety and protection of witnesses and victims.

Third, differentiating the two standard pretrial justice outcome measures—appearance rate and pretrial good conduct (no re-arrest while on pretrial)—is theoretically important; understanding the differentiated risks a specific defendant poses empowers the court to have differentiated pretrial responses and conditions. This suggests, however, that researchers and practitioners must agree on their definitions of risk and how specific they want to be in their predictions.<sup>30</sup> Are they concerned with risk of failure to appear generally or risk of failure to appear in more serious cases? Should the assessment focus on the risk of the defendant committing another crime pretrial or the risk of the defendant committing specific crimes pretrial (e.g., violent offenses)? Given the constitutional aims of the pretrial release decision, is the field also interested in predicting whether witnesses and victims will be protected?

Results from analysis of State Court Processing Statistics data from 1990 to 2004<sup>31</sup> indicate that one-third (33 percent) of released defendants were charged with committing one or more types of misconduct<sup>32</sup> within one year of being released but prior to the disposition of their case. Overall misconduct rates varied only slightly from 1990 through 2004, ranging from a high of 35 percent to a low of 31 percent. Bench warrants for failure to appear in court were issued for 23 percent of released defen-

<sup>29</sup> <http://law.jrank.org/pages/556/Bail-purposes-bail-or-pretrial-release-decision.html>.

<sup>30</sup> The concept of risk in pretrial research could be better defined. Risk assessment research traditionally focuses on pretrial misconduct including FTA, rearrest, and/or danger to the community. Researchers are encouraged to refine these concepts beyond dichotomous measures (e.g., appeared/did not appear; rearrested/not rearrested), and continue to gauge the likely specific types of misconduct and specific types of threats pretrial defendants may pose.

<sup>31</sup> Cohen, T.H. and B.A. Reaves (November, 2007) *Pretrial Release of Felony Defendants in State Courts*.

<sup>32</sup> Types of pretrial misconduct include failure to appear, rearrest, felony rearrest, and fugitive after 1 year.

dants, and 8 percent remained fugitives after one year. An estimated 17 percent were arrested for a new offense, including 11 percent for a felony.

Rates of pretrial misconduct among pretrial defendants are generally low and reasonably consistent through the years (see following table). Thus, what is being predicted is considered a “statistically rare event” and can be difficult to measure given the low occurrences that exist.<sup>33</sup> Risk assessment and prediction are important, however, to minimize the number of low-risk defendants who are unfairly detained and maximize the number of high-risk defendants who are not released prematurely.

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<sup>33</sup> Gottfredson and Gottfredson (1980) in reviewing the literature concluded: “The results of these studies cast serious doubt on current abilities to predict with great accuracy the statistically rare events of failure to appear at trial and pretrial crime.” (Gottfredson, M.R., and D.M. Gottfredson (1980). *Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion*. Cambridge, MA: Ballinger Publishing Co.). Statistically, prediction of pretrial misconduct is more challenging. “On statistical grounds, with such a small number of failures, it is extremely difficult to find predictors that can discriminate adequately between successes and failures. As has been discussed repeatedly in the literature, the unfortunate consequence of predictions resulting from low failure rates is the extremely high number of false positives - cases in which the prediction is made that the individual will fail when in fact he will succeed (Gottfredson, M.R. and D.M. Gottfredson (1988) *Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion*, 2nd Edition. New York, NY: Plenum Press).”

| Research Study                               | Total Sample Size         | Number and Percent of Pretrial Defendants Classified “High Risk”     | Number and Percent of High Risk Defendants with FTA                       | Number and Percent of High Risk Defendants with Re-arrest                    |
|--|---------------------------|--|---|--|
| VanNostrand and Keebler (2009) <sup>34</sup> | 172,515<br>Federal sample | 16,070<br><b>(9.3%)</b><br>(Risk Level 5 on a scale of 1 to 5)       | 901<br><b>(5.7%)</b>  | 1,576<br><b>(9.8%)</b>   |
| Siddiqi (2006) <sup>35</sup>                 | 25,402<br>New York sample | 8,416<br><b>(33%)</b><br>(3 Risk Categories: low, moderate and high) | 2,056 or 2,339<br><b>(24%)</b><br>depending on risk classification scheme | 2,218 or 2,426<br><b>(24-26%)</b><br>depending on risk classification scheme |
| VanNostrand (2003) <sup>36</sup>             | 1,971<br>Virginia sample  | 295<br><b>(15%)</b><br>(Risk Level 5 on a scale of 1 to 5)           | 47<br><b>(16%)</b>  | 109<br><b>(37%)</b>  |

### HOW RISKY IS HIGH-RISK?

The field of criminal justice is unarguably concerned about how best to manage defendants who are released pre-trial—especially defendants who are classified as “high risk.” There are the issues of minimizing failure to appear and re-arrest and maximizing victim and community safety. Government officials struggle with balancing actual risks and perceived risks that affect voters since so much of politics is perception. But are these concerns justified to the extent that the field should be investing significant resources and effecting substantial changes to pretrial policy and practice as it relates to high-risk defendants? Just how risky are defendants who are identified as “high risk”? How great or small are the probabilities of failure for high-risk defendants?

34 VanNostrand, M. and G. Keebler (2009) Pretrial Risk Assessment in the Federal Court. *Federal Probation*. Vol. 72 (2).

35 Siddiqi, Q. (2006) *Final Report: Predicting the Likelihood of Pretrial Re-arrest for Violent Felony Offenses and Examining the Risk of Pretrial Failure Among New York City Defendants: An Analysis of the 2001 Dataset*. New York City Criminal Justice Agency.

36 VanNostrand, M. (2003) *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument*. Virginia Department of Criminal Justice Services.

Current data are limited, but two recently published studies at the federal level suggest that the defendants we are calling “high risk” are not high risk. In a study of federal criminal case processing between 2003 and 2004 (N=30,952), 80 percent of defendants released prior to trial completed their periods of release without violating the conditions of their release. *Only 20 percent* of defendants released violated the conditions of their release, and only 8 percent of defendants had their release revoked. Results indicated that it was defendants charged with weapon or drug offenses who were more likely to commit at least one violation of their conditions of release (34 percent and 29 percent, respectively).<sup>37</sup>

More recently, VanNostrand and Keebler (2009), in a study of all criminal defendants who were processed by federal Pretrial Services between October 1, 2001 and September 30, 2007 (N=565,178), found that the average pretrial failure rate for all released defendants was *only 7 percent*. Nine statistically significant and policy relevant predictors of pretrial failure and related output were used to create a pretrial risk classification scheme to scale the risk persons arrested for federal criminal offenses pose if released pending trial. Results indicated that the average pretrial failure rate for defendants released pending trial ranged by risk level from 2.3 percent (lowest risk level) to 15.5 percent (highest risk level).<sup>38</sup>

These results encourage the field to refine its thinking about what level of risk it is willing to tolerate and what constitutes a “high risk” defendant.<sup>39</sup> Unfortunately, “when failure occurs and elected officials see a series of ugly headlines describing tragic fatalities of whatever sort, the spectacle of disaster can convolute the normal assessment of risk. Extreme measures are embraced. The upshot is that government— especially these days, when disasters are drilled into our conscience by a relentless news cycle—often stumbles in risk management situations. And the automatic response to stumbling—as even the most coordinated people know—is always the same: The body reacts without the brain, trying to keep itself from falling. In these instances we’re beyond all possibility of subtlety, compromise or rational assessment. It’s all gut reaction, and almost always all or nothing. Governments thrown into such circumstances end up acting like an old light switch: It’s either on or off.”<sup>40</sup> The criminal justice system could reduce pretrial

37 Defendants charged with weapon, violent, or drug offenses were more likely to have their release revoked (16 percent for weapon offenses and 11 percent each for violent or drug offenses) than were other defendants. *Compendium of Federal Justice Statistics, 2004* (December, 2006) Bureau of Justice Statistics. Office of Justice Programs, U.S. Department of Justice.

38 Results by risk level: level 1 (2.3 percent), level 2 (6 percent), level 3 (9.2 percent), level 4 (11.8 percent), and level 5 (15.5 percent). VanNostrand, M. and G. Keebler (2009) Pretrial Risk Assessment in the Federal Court. *Federal Probation*. Vol. 72 (2).

39 It is important for the field to also acknowledge that while defendants who have substantially different failure rates may be classified as “high risk”, this classification may be as much a result of the way outcomes are defined (e.g., new arrest) as it is true variation in the outcomes. See *Lack of Standardized Definitions and Consequent Variations on the Dependent Variable* section later in this document.

40 Goldsmith, S. (August 18, 2010) The High Cost of No Risk. *Governing* (www.governing.com).

defendants' risk of FTA or re-arrest by detaining *all* pretrial defendants, but measures this drastic compromise the integrity of the judicial process and would be economically devastating. Rather, it is imperative that the field continue to experiment with risk management processes for a population of defendants whose pretrial failure is more of a "rare" event than it currently concedes.

### **The Pretrial Release Decision: How is it Really Made and Why Does it Matter?**

What really goes into the pretrial release decision that is being made? The *2009 Survey of Pretrial Services Programs*<sup>41</sup> found that the majority of pretrial programs (64 percent) use a combination of objective and subjective criteria in risk assessment, and 12 percent of pretrial programs rely exclusively on subjective criteria (e.g., gut feeling, professional experience, etc.). Only 24 percent of programs rely only on objective criteria in making their risk assessments. Recent research also indicates that judges are still dependent on the use of bond schedules in making pretrial release decisions.<sup>42</sup> Anecdotally, it appears that a fear of letting out the "wrong" defendant is a reality that also influences decision-making.

Research also shows that pretrial release decisions made by judicial officers are based on the direct influence of other professionals who are involved in this stage of defendant processing. For example, research that explored the *Release and Bail Decisions in New York City* found that the prosecutor's bail request was found to have the *strongest* influence on both the ROR (release on own recognizance) decision and the amount of bail set at arraignment. The findings of this study did not contradict previous findings that charge severity strongly affects release and bail decisions, but rather, the findings contributed to a more nuanced understanding of this relationship by showing that a large part of the effect is indirect, coming through the prosecutor's bail request.<sup>43</sup>

Why does it matter that the criminal justice field understand how pretrial release decisions are really made? In addition to wanting to philosophically ensure integrity in the pretrial release decision process, research suggests that there are also practical consequences for the jail population (e.g., jail crowding) based on whether decisions are made subjectively or objectively.<sup>44</sup>

41 Pretrial Justice Institute (August 11, 2009) *2009 Survey of Pretrial Services Programs*.

42 In its 2009 survey of 112 of the nation's 150 most populous counties across the United States, Pretrial Justice Institute found that 64 percent stated that a bail schedule is used in their jurisdiction, and of those counties that use a bail schedule, 51 percent report using the schedule before and at the initial appearance. (Pretrial Justice Institute (2010) *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes*.)

43 Phillips, M. (August, 2004) *Release and Bail Decisions in New York City*. Research Brief, No. 6. NY: New York City Criminal Justice Agency, Inc.

44 A study by Clark and Henry (2003) suggests that programs that assess risks of pretrial misconduct in an exclusively subjective manner are more than twice as likely to have a jail population that exceeds its capacity than those programs that assess risk exclusively through an objective risk assessment instrument (56 percent compared with 27 percent). In addition, 47 percent of programs that add subjective input to an objective instrument are in jurisdictions with overcrowded jails. [Clark, J. and D.A. Henry (July, 2003) *Pretrial Services Programming at the Start of the 21st Century. A Survey of Pretrial Services Programs*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance.]

## Pretrial Risk Assessment: At Present

In response to concerns that pretrial release and detention decisions are predominantly subjective in nature, and in light of the strong recommendations made by the ABA standards, many agencies have adopted or developed a structured objective classification process that helps determine an individual defendant's level of risk to the community and the likelihood of failing to appear for court appearances. These risk assessments can ultimately be used to inform the "in or out" decision, and help the judge or prosecutor decide the extent to which they are willing to take a risk with a given defendant.

The field has made significant progress in the 50 years since Vera's Manhattan Bail Project, but results would also suggest that there is room for improvement.

### THE VERA POINT SCALE

The first pretrial risk assessment instrument can be traced back to 1961, when an experiment was launched in New York City to test the hypothesis that defendants could be categorized by the degree of risk they posed to fail to appear in court, and that such categorizations could be used in recommending pretrial release. Under a program run by the Vera Institute of Justice, a "point scale" was developed that used strength of family and community ties as the criteria for identifying defendants who were good risks of appearing in court. Evaluations of that point scale showed that the use of such objective criteria could be effective in classifying risks of FTA.

*"The Vera Institute model of bail reform, well described elsewhere (Ares et al., 1963; Freed and Wald, 1964; Thomas, 1976; Goldkamp, 1979), basically sought to influence judges to make greater use of nonfinancial alternatives (personal recognizance release) by providing better and different information than previously made available to judges at the first appearance stage. The underlying theory of the Vera-type reform, borrowing from Beeley's work of the late 1920s, was to rate defendants based on their "community ties" (employment, residence in the community) through a "point-scale" and to recommend nonfinancial release to the presiding judge based on defendants ratings. (Defendants with sufficient community ties were deemed releasable without cash bail being set—the modern version of Beeley's "dependable" defendants.) The Vera point-scale, which was widely adopted as the reform was emulated across the nation, packaged as the new and better information scheme relating to defendants' likely appearance in court, and was promoted as "objective"; it had the aura of being empirically based (though in fact it was not) and seemed to be based on some implicit theory about establishing a defendant's standing in the "community" as major determinant of risk (emphasis added)."<sup>45</sup>*

<sup>45</sup> Goldkamp, J.S. and E.R. Vilcica (2009) Judicial Discretion and the Unfinished Agenda of American Bail Reform: Lessons from Philadelphia's Evidence-Based Judicial Strategy. In Sarat, Austin, Ed. Special Issue: New Perspectives on Crime and Criminal Justice. *Studies in Law, Politics, and Society*, Vol. 47 (115-157).

Now, almost 50 years since the creation of the Vera Point Scale, it is important for the criminal justice field to question the utility of continuing to validate a scale for specific jurisdictions that is not empirically based. It is now time for the field to recognize the enormous contributions of the Vera Point Scale, while also dispelling the myth that this scale is the state of the art with respect to risk assessment instrument development.

Survey results indicate that objective pretrial risk assessment instruments are increasingly being used by jurisdictions across the country. The field, however, must understand how these instruments are being developed and whether they are being validated<sup>46</sup> for the specific jurisdiction that is using it. The Pretrial Justice Institute survey found that of those pretrial programs that do risk assessment, 42 percent report having developed their risk assessment procedures based on research done in their own jurisdictions on the factors that are related to pretrial misconduct, and about one third adapted their risk assessments from other jurisdictions.<sup>47</sup> With respect to validation, survey results indicate that 48 percent of pretrial programs have never validated their instruments, a statistic that has remained unchanged from 2001 to 2009. One concern, however, is that there is no standard method being used for the “validation of a risk assessment instrument.”

Anecdotally, we know that many jurisdictions are using *post-adjudication* risk assessment tools in pretrial settings, which are inappropriate at this stage of the legal process.<sup>48</sup> Factors that are often considered relevant for post-conviction offenders, such as those related solely to recidivism or criminogenic needs, which do not demonstrate a relationship to predicting pretrial risk (e.g., court appearance or danger to the community) should not be included in pretrial risk assessment instruments.<sup>49</sup>

While a handful of communities across the United States have validated pretrial risk assessment instruments for their *specific* jurisdiction, Virginia, Ohio and Kentucky created and validated a risk assessment instrument for use by pretrial services agencies across *the entire state*.<sup>50</sup> The Virginia Pretrial Risk Assessment Instrument (VPRAI) was developed, implemented, and re-validated in 2009 for use by all Virginia pretrial services agencies. The Commonwealth of Kentucky is the nation’s only state-wide pretrial, paid for by the state and made available to counties, and thus the full commonwealth uses the instrument validated in 2010. The Ohio instrument was developed in 2009 and is optional for counties, some of who

46 Risk assessments can be validated — normed or proven reliable— for different types of populations.

47 Pretrial Justice Institute (2009) *2009 Survey of Pretrial Services Programs*.

48 The Pretrial Justice Institute has received many inquiries from jurisdictions that ask about the applicability of using the LSI-R (Level of Service Inventory-Revised) in their pretrial setting. The LSI-R™ assessment is a quantitative survey of offender attributes and offender situations relevant for making decisions about levels of supervision and treatment. LSI-R scores are proven to help predict parole outcome, success in correctional halfway houses, institutional misconduct, and recidivism.

49 VanNostrand, M. (2007) *Legal and Evidence-based Practices: Application of Legal Principles, Laws and Research to the Field of Pretrial Services*. National Institute of Corrections and Crime and Justice Institute.

50 VanNostrand, M. and K. Rose (2009) *Pretrial Risk Assessment in Virginia: The Virginia Pretrial Risk Assessment Instrument*. VA Department of Criminal Justice, Virginia Community Criminal Justice Association, and Luminosity, Inc. Visit <http://www.pre-trial.org/Pages/bail-decision.aspx> for the most up-to-date information on validated pretrial risk assessment instruments.

already have their own validated instruments. In early 2011, Florida began an effort with six potentially representative counties to create a validated risk assessment instrument to be made available to all Florida counties. These efforts open up the discussion about whether validation of pretrial risk assessment instruments can be effective for different population levels—local, state, and nationwide.

#### RISK ASSESSMENT VERSUS RISK MANAGEMENT

Possibly the greatest emerging issue in the field of criminal justice is how to safely manage probationers, parolees, and pretrial defendants in the community, and manage them in ways that they have not been managed before. Pretrial risk assessment is the determination of a quantitative or qualitative value of risk related to a pretrial defendant and his or her specific circumstances, and the first step in the risk management process. Risk management means balancing the constitutional rights of the defendant with the risk the defendant poses using effective supervision and strategic interventions. What is lacking is strong empirical evidence related to the risk management piece of the process—matching different categories of risk with appropriate varied conditions of release. Simply stated, the one-size fits all strategy of risk management does not work. The field must also be open to the possibility that defendants do not need as much supervision and as many conditions of release as we seem to think they need. Not everyone needs all resources, and a reallocation of existing resources may be all that is needed. The field also needs to consider the extent to which over-supervising defendants could have negative consequences for them and the community. Moving forward, researchers are encouraged to engage in controlled experimental studies and demonstration projects where incremental knowledge is gained about types of supervision or what strategic interventions are most effective based on defendant risk level, and incremental adjustments and improvements in risk management are made.<sup>51</sup> This type of knowledge building will enable the criminal justice system to release more defendants into the community, while managing them safely.

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<sup>51</sup> As criminal justice researchers embark on new research, they are encouraged to borrow knowledge and strategies from other fields of study. For example, they might build into future pretrial demonstration projects what sociologists have learned about diffusion of an innovation, in this case new pretrial practices, and what must happen in order for people to shift from doing things one way to doing things a different way. Diffusion of an innovation occurs through a five-step process: knowledge, persuasion, decision, implementation, and confirmation. See Rogers, E.M (1962) *Diffusion of Innovation*. Glencoe: Free Press.

## CHALLENGES TO IMPLEMENTING EVIDENCE-BASED RISK ASSESSMENT AND THREATS TO RELIABLE ADMINISTRATION

There are a number of system-based challenges to effectively implementing evidence-based risk assessment procedures during the pretrial phase of the justice process, specifically time constraints related to defendant processing and the practicality of the risk assessment instrument, bail schedules, and the local capacity of jurisdictions. Concurrently, there are a number of threats to reliable administration of these instruments, including most notably subjective discretion, court culture, and judicial behavior.

### Time Constraints and the Practicality of the Risk Assessment Instrument

Pretrial risk assessment instruments are developed to synthesize relevant data collected during the interview and background checks, to provide a prediction of defendant pretrial misconduct. It is not a prediction for the specific defendant; it is a statistical probability of failure for defendants with that specific score.

While theoretically straightforward, the context in which this must happen makes implementation challenging. The pretrial phase of the system involves a high volume of cases, few staff dedicated to pretrial processing, and a limited time frame in which to collect and analyze information. The pretrial release decision stage has the highest volume of cases in the judicial process.<sup>52</sup> In order for the pretrial services program to be able to provide information and options to the judicial officers making the pretrial release decision, it is important that the risk assessment be conducted before the initial court appearance; in many jurisdictions, they are not.<sup>53</sup> Couple this with the few minutes judges have for each bail hearing, and one can appreciate the difficulty in trying to scientifically predict human behavior in such a short period of time.

### Money Bail Schedules

Money bail schedules are instruments that fix a specific bail amount to a specific charge. For example, in Los Angeles County, first-degree robbery carries a bail of \$100,000.<sup>54</sup> Usually, these jurisdiction-specific schedules have been created and authorized by judicial officers. They are designed to afford persons arrested without a warrant their constitutional right to have bail set during the period between a person's arrest and his or her initial appearance before a judicial officer for the pretrial release hearing. If the defendant is able to post the scheduled amount of money, he or she can be released from the police lock up or jail before seeing a judicial officer.

<sup>52</sup> Goldkamp, J., and M. White (2006) Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments. *Journal of Experimental Criminology* 2: 143-181.

<sup>53</sup> Findings from the Pretrial Justice Institute's *2009 Survey of Pretrial Services Programs* suggest that for the years 1989, 2001 and 2009, between 25 and 31 percent of pretrial programs conducted their investigations *after* the defendant's first appearance in court.

<sup>54</sup> Superior Court of California, County of Los Angeles (2010) *Felony Bail Schedule*.

When used for this purpose, there is no discretion by the arresting agency or the jail to set or accept a bail of a different amount other than that which is set forth in the bail schedule. The charge itself is the only information known about the defendant that is used at this point. Other information that pretrial release statutes specify must be considered in the pretrial process, such as residence status, ties to the community, length of time in the area, employment, prior criminal history, and prior record of appearance in court, is often not available at this point in the process. What is controversial, however, is that many jurisdictions also use bail schedules to guide the judiciary in setting bail even after more information is known about the defendant. Ignoring relevant and critical information about the defendant when it is available and relying solely on the bail schedule is using it for that which it was not intended.<sup>55</sup>

Bail schedules, in design and in execution, are incompatible with individualized pretrial release decisions as directed in the ABA standards and many states' statutes. According to the standards, "[f]inancial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge."<sup>56</sup> In explaining this position, the ABA "flatly rejects the practice of setting bail amounts according to a fixed schedule based on charge. Bail schedules are arbitrary and inflexible: they exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates. The practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount of bail required by the bail schedule. They also enable the unsupervised release of more affluent defendants who may present real risks of flight or dangerousness, who may be able to post the required amount easily and for whom the posting of bail may be simply a cost of doing "business as usual."<sup>57</sup> In its 2009 survey of 112 counties across the United States, the Pretrial Justice Institute found that 64 percent of the counties stated that a bail schedule is used in their jurisdiction, and of those counties that use a bail schedule, 51 percent report using the schedule both before and at the initial appearance.<sup>58</sup>

Given the common use of bail schedules in U.S. jurisdictions for pretrial release and detention decision making, advocates of evidence-based pretrial risk assessment question how these two divergent practices—bail schedules and evidence-based risk assessment—can coexist in the pretrial justice sys-

<sup>55</sup> See, for example, Thomas, W.H. (1976) *Bail Reform in America*. Berkley, CA: University of California Press. As Thomas wrote: "The use of a bail schedule prior to court appearance must be distinguished sharply from the use of a bail schedule after the defendant is already in court and before the judge. As long as the defendant has not yet appeared, the schedule helps by making it possible to know immediately what bail is required and to secure release if he can afford the cost. Once the defendant appears in court, there is much less justification for determining the bail amount solely by the offense charged. The defendant is present, and the court can make an individual determination. Hence, the in-court application of pre-set schedules has been criticized as highly inconsistent with the best judicial practice" (p. 212).

<sup>56</sup> ABA Pretrial Release Standard 10-5.3 (e).

<sup>57</sup> Commentary to ABA Standard 10-5.3(e).

<sup>58</sup> Pretrial Justice Institute (2010) *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes*.

tem. It is easy to appreciate the simplicity and consistency of a bail schedule and how it makes doing business quicker for those making pretrial release and detention decisions. Dockets can be managed expeditiously; same rules are applied consistently across defendants, limiting the liability of the court should a released defendant reoffend; and for the many defendants who cannot post bail, incarceration guarantees their appearance in court, no negative headlines, and time served. This rationale is what evidence-based risk assessment must overcome in order to become a normative process in the pretrial justice system.

“If we know the defendant is going to get out ultimately, or we have a high probability that the defendant is going to end up with time served, why don’t we start thinking about having punishment after the fact rather than before—get out of Alice in Wonderland and start thinking in terms of a real and fair criminal justice process.” —Barry Mahoney (June 7, 2010) Meeting on Pretrial Risk Assessment: State of the Science and Practice. Washington, DC: Pretrial Justice Institute and Bureau of Justice Assistance.

### Local Capacity

Survey data show that currently only 41 percent of jurisdictions are using risk assessment instruments that have been validated within the past five years, and that one-third of pretrial programs are using risk assessment tools that were not developed specifically for their jurisdiction.<sup>59</sup> Research also suggests that subjective discretion on the part of those involved in the release decisions of defendants is still a normative process and a large percentage of pretrial programs report overriding the risk assessment results.<sup>60</sup> Why is there resistance and reluctance to use these tools and to use them appropriately? Why is there not greater demand for the application of science to this part of the judicial process?

Researchers and practitioners alike must acknowledge and understand the capacities of local jurisdictions in order to make substantial operational changes to the pretrial process. What are appropriate expectations of jurisdictions with respect to institutionalizing risk assessment instruments, especially those without formal pretrial services programs? There needs to be honest discussion about how realistic it is to expect every community in the United States to validate its own jurisdiction-specific risk assessment instrument. When we talk of local capacity, how do issues related to pretrial justice processes translate to rural courts, especially since most risk assessment instruments have been developed and validated in urban areas?

To build local capacity, expect local preparedness, and whet the local appetite for evidence-based pretrial risk assessment, the local community and everyone who is part of the pretrial process needs to be engaged in its reformation. Building local capacity for pretrial justice including risk assessment and

<sup>59</sup> Pretrial Justice Institute (August 11, 2009) *2009 Survey of Pretrial Services Programs*.

<sup>60</sup> A more detailed discussion of this occurs in the next section of this document.

pretrial services would involve human resource development,<sup>61</sup> organizational development,<sup>62</sup> and institutional and legal framework development.<sup>63</sup> Resources at all levels need to be mobilized.

### **Subjective Risk Assessment**

Research shows that subjective risk assessment aided by objective actuarial instruments produces better outcomes than subjective judgment alone.<sup>64</sup> And yet, subjective assessment is still the normative procedure in the majority of jurisdictions. The percentage of pretrial programs that rely exclusively on subjective criteria has decreased from 34 percent in 2001 to 12 percent in 2009. The percentage of pretrial programs that use a combination of objective *and* subjective criteria in risk assessment has increased from 42 percent in 2001 to 64 percent in 2009.<sup>65</sup>

### **Court Culture and Judicial Behavior**

In the 1970s, researchers coined the term “local legal culture” in their efforts to understand court management, court reform in general, and expedition and timeliness in particular.<sup>66</sup> This concept of local legal culture was raised as an explanation for why some courts perform differently than others. Court culture, specifically, is defined as the expectations and beliefs judges and court administrators have about the way work gets done, and this too varies considerably both within and between judicial institutions.<sup>67</sup>

Anecdotally, we know that court culture, or the expectations and beliefs of judges and court administrators, affects the pretrial justice process and how defendant release and detention decisions are made. There are many agendas under which officers of the court operate and these agendas can influence their release and detention decisions. For example, are judges most concerned with whether a defendant will reappear for their next scheduled day in court, or is the judge basing his decision on what he believes will ultimately be the outcome or disposition of the case? Some scholars argue that the pretrial process itself is essentially implemented in a purposeful way that inconveniences the defendant enough such that the defendant has paid something for this judicial process, and can poten-

61 The process of equipping individuals with the understanding, skills and access to information, knowledge and training that enables them to perform effectively.

62 The elaboration of management structures, processes and procedures, not only within organizations but also the management of relationships between the different organizations and sectors (public, private and community).

63 Making legal and regulatory changes to enable organizations, institutions and agencies at all levels and in all sectors to enhance their capacities. (Urban Capacity Building Network, Global Development Research Center. <http://www.gdrc.org/uem/capacity-define.html>).

64 See Grove, W.M. and P.E. Meehl (1996) Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical–Statistical Controversy. *Psychology, Public Policy, and Law*, 2: 293–323.

65 Pretrial Justice Institute (2009) *2009 Survey of Pretrial Services Programs*.

66 See Nimmer, 1971 and Church, 1978; as cited in Ostrom, B., R. Hanson, C. Ostrom, and M. Kleiman (Spring, 2005) Court Cultures and Their Consequences. *The Court Manager*, Vol. 20, Issue 1.

67 Ibid.

tially learn his lesson.<sup>68</sup> It would be no small feat for validated pretrial risk assessment instruments to break through and become court culture.

“Improvement in pretrial release and detention practices is in large part the responsibility of the judiciary. Chronic problems with pretrial release and detention in the United States will never effectively be addressed without judicial leadership and accountability in the pretrial release function.”<sup>69</sup>

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68 “In the lower courts, it is the cost of being caught up in the criminal justice system itself that is often most bothersome to defendants accused of petty offenses, and it is this cost which shapes their subsequent course of action once they are entrapped by the system....In essence, the process is the punishment. The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence. Furthermore, pretrial costs do not distinguish between innocent and guilty; they are borne by all, by those whose cases are nulled or dismissed as well as by those who are pronounced guilty (pp.30-31).” Feeley, M.M. (1979) *The Process is the Punishment: Handling Cases in a Lower Criminal Court*. NY: Russell Sage Foundation.

69 Goldkamp, J. (March, 1993) Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services. *Federal Probation*, Vol. 57 (1):28-35.

## METHODOLOGICAL CHALLENGES ASSOCIATED WITH PREDICTION OF RISK

### Data Quality Limitations

As must be managed in any type of research, there are a number of limitations with data that define the pretrial justice phase of the criminal justice system. In many jurisdictions, the data are poor at best—unreliably collected and internally inconsistent. **Pretrial programs tend to have underdeveloped information systems and limited financial resources.**<sup>70</sup> For many jurisdictions, the data exist and are accessible, but cleaning the data and preparing them for any useful analysis is time and cost consuming. There are also challenges inherent in merging disparate databases within a single jurisdiction to have all the appropriate data elements needed for analyses.

At the national level, the Bureau of Justice Statistics (BJS) has supported the State Court Processing Statistics (SCPS) project for 22 years—a statistical series describing the characteristics of felony defendants and the processing of their cases by state courts. These data have routinely been used in pretrial justice research over the years.<sup>71</sup> In March 2010, however, BJS issued a data advisory outlining the limitations in the use and capabilities of these data—that the data are insufficient to explain causal associations between patterns reported, such as the efficacy of one form of pretrial release over another; that evaluative statements about the effectiveness of a particular program in preventing pretrial misconduct may be misleading; and that SCPS data, as currently collected, cannot be used to evaluate which factors state and local officials consider when developing and implementing pretrial release policies.<sup>72</sup>

When one considers the challenges with local data collection, coupled with the absence of credible national level data, it becomes abundantly clear that researchers must think creatively about how best to answer the questions that will advance the science used to effectuate pretrial justice, and pretrial risk assessment specifically, using existing data sources and at the same time, generating new ones.

### Lack of Standardized Definitions and Consequent Variations on the Dependent Variable

Traditionally in pretrial justice research, the outcomes on which researchers have focused are failure to appear in court and re-arrest during their period of pretrial release.<sup>73</sup> These outcome measures are

70 Clark, J. and Henry, D.A. (2003) *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs*. Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Assistance.

71 Visit [www.pretrial.org](http://www.pretrial.org) to access any number of reports that use the SCPS data.

72 Bureau of Justice Statistics (March 2010) *Data Advisory: State Court Processing Statistics Data Limitations*.

73 Failure to appear and re-arrest outcomes are often dichotomous measures (the outcome occurred or it did not). Variations of these dependent variables however, might include time to failure measures that explore how long it takes for a defendant on pretrial release to reoffend, or more parsed out measures of re-arrest that are crime-specific, for example. The field may also need to look beyond court appearance and re-arrest. For example, we may find that over-supervising defendants has negative consequences and relying on these two outcome measures alone may not capture the full picture.

logical when one considers the primary aims of pretrial justice that include assuring court appearance of the defendant and protecting the community. Consistent as these dependent variables may seem, however, there are variations across jurisdictions in how these variables are defined and which data are gathered. Consequently, we are *not* all predicting the same things.

For example, recent survey data<sup>74</sup> suggest that pretrial programs vary in the *populations* for which they calculate FTA rates. Most (79 percent) programs only calculate FTA rates for those defendants under the supervision of the program. The percentage of pretrial programs that calculate FTA rates for all defendants, regardless of release type, was 10 percent. Anecdotally, we also know that programs vary in *how lenient they are* in managing a defendant's failure to appear, which affects the data collected. In some jurisdictions, if the defendant fails to appear for court, he is immediately assigned a FTA status. In other jurisdictions, if the defendant fails to appear, the family is called, the defendant is given another chance, and the defendant's case is only considered a FTA if a warrant is ultimately issued.<sup>75</sup>

Outcome measures also vary as a result of *how FTA is calculated*. There are two main measures used to calculate FTA rates. One is appearance, or event-based; for this measure, the number of court appearances scheduled is compared with the number of appearances made. The other measure is defendant-based, based simply on whether or not a defendant had one or more FTAs in the life of the case.<sup>76</sup> Survey results indicate that there has been a shift in the way pretrial programs measure defendants' FTA. In 2001, about 62 percent of programs used a defendant-based measure and 32 percent used an event-based measure. In 2009, the percent using a defendant-based measure fell to 45 percent, while the percent using an event-based methodology increased to 56 percent.<sup>77</sup> These variations obviously affect comparisons between and among jurisdictions, but also complicate any comparisons of pretrial statistics from one year to another.

Pretrial arrest can look very different in different jurisdictions as well. In its 2009 Survey of Pretrial Programs, the Pretrial Justice Institute found that only 37 percent of pretrial programs calculate re-arrest rates. Of those programs that *do* calculate re-arrest rates of released defendants, about 87 percent only calculate re-arrest rates for those defendants under the supervision of the program. Other jurisdictions calculate re-arrest rates for defendants interviewed by the program and placed on non-financial release, or all those interviewed by the program regardless of release type. Across jurisdictions, there is any number of variations in how re-arrest is defined (e.g., whether traffic or misdemeanor offenses are included; whether the accused crime allegedly occurred while the person was on pretrial release; whether any re-arrest is included or only those that resulted in bail revocation.)

74 Pretrial Justice Institute (August 11, 2009) *2009 Survey of Pretrial Services Programs*.

75 When defendants fail to appear in court, 69 percent of counties report that staff of a pretrial services program or similar entity make an effort to contact the defendant and urge them to return to court voluntarily (Pretrial Justice Institute (2010) *Pretrial Justice in America*).

76 The event-based calculation is a more accurate measure of the impact of FTA on the court, and thus may be a more useful measure from the court's perspective. Pretrial Justice Institute (August 11, 2009) *2009 Survey of Pretrial Services Programs*.

77 Pretrial Justice Institute (August 11, 2009) *2009 Survey of Pretrial Services Programs*.

When researchers begin to compare one jurisdiction's pretrial practices and outcomes with another, it does not take long to realize that they are not always comparing apples with apples and oranges with oranges—definitions and the data that are collected are not standardized.

### **Sampling: Low Base Rates and Points of Comparison**

With any statistical analysis, researchers must make decisions about their population of interest, and the population against which they will make a comparison. They must further consider at what jurisdictional level their samples will be pulled (e.g., federal, state, local). Each of these decisions is made based upon the research questions being asked and these decisions affect the samples that are used in the research design.

In pretrial research, the population of interest is defendants who have been arrested and are awaiting trial. This population, however, is parsed out in any number of ways when processing of defendants occurs and as a result, researchers struggle methodologically with managing low base rates. Samples can include those defendants who have never been detained, those who have never been released, those who have been detained at arraignment and subsequently released prior to disposition, or those released at arraignment and subsequently detained prior to disposition. Further specifications could be made with each of those categories, depending on the research questions being asked. While these categories of pretrial defendants accurately reflect reality, in the context of adequate sample sizes for research, it is here the challenge emerges. How many people are needed in the above population samples to make the research statistically relevant? With low base rates of released pretrial defendants in many jurisdictions,<sup>78</sup> researchers struggle to obtain adequate sample sizes. In addition, differing base rates of pretrial defendant categories (e.g. those detained vs. those released)<sup>79</sup> between and among jurisdictions makes jurisdiction-level comparisons more challenging. Similar low base rate issues arise depending on which dependent variable(s) are being studied. When trying to predict, for example, re-arrest of released pretrial defendants for serious offenses, the samples will reflect the fact that there are relatively very few and that more defendants are being rearrested for misdemeanor and lesser severity charges.<sup>80</sup>

<sup>78</sup> In 2004, there was a large range of pretrial release rates within individual counties, from 90 percent in Fairfax County, Virginia to 31 percent in Los Angeles County, California. Non-financial release rates ranged from 57 percent in King County, New York to less than one percent in Harris County, Texas. The percent released on money bail spanned a range from 64 percent in Broward County, Florida to 12 percent in Maricopa County, Arizona. Pretrial Justice Institute (2010) *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices, and Outcomes*.

<sup>79</sup> The reality is that low-risk defendants are typically released, high-risk defendants are typically detained without bail, and there is a large group of defendants—low risk, low offense, low release—who remain incarcerated. When we look at failure rates of released defendants and they are low, this is primarily a function of the types of defendants that were released (i.e., low risk). In testing risk assessment instruments, we are usually studying whatever sample of defendants has been released. Our population of study is typically the lowest risk group.

<sup>80</sup> Between 1990 and 2004, overall re-arrest rates for State court felony defendants in the 75 largest counties ranged from 13 percent to 21 percent, and felony re-arrest rates ranged from 10 percent to 13 percent. Cohen, T. and B. Reaves (November, 2007) *Pretrial Release of Felony Defendants in State Courts*. Bureau of Justice Statistics Special Report. Washington, DC: US

Researchers must also consider what the relevant and appropriate points of comparison are to their pretrial defendant population of interest. As noted above the pretrial population is parsed out in any number of ways when processing of defendants occurs. The point in the process at which the research sample is selected affects the sample against which comparisons are made and the generalizability of the study findings. Researchers are encouraged to consider whether given the presumption of innocence for the pretrial population, there should be a different definition for the base rate. Should the field compare the risk of pretrial defendants committing new crimes while on release with the risk of arrest within the general population?<sup>81</sup> Also, it seems that researchers may want, for example, to compare all defendants in the system, not just the ones who are released with the ones who are not released, not just the ones who are released and re-offend, and those who are released and do not offend.

### **The Short Time Frame That is Pretrial**

There are serious data limitations in studying the pretrial phase of the justice process in that pretrial provides such a short period of time during which one is trying to predict behavior. The pretrial time span offers far less opportunity for intervention both in dosage and duration than post-conviction,<sup>82</sup> and far less opportunity to observe changes in behavior. Average length of stay data, while varied, all reflect limited periods of time. For example, a study in 2007 by the North Carolina Governor's Crime Commission and Justice Analysis Center collected data on 10 pretrial services programs operating in the state (either county or privately-run by a nonprofit agency). The average length of stay on pretrial release was found to be 118 days.<sup>83</sup> Northwest Piedmont in Winston Salem, NC reports a typical range of the length of stay to be 3 to 6 months for defendants charged with misdemeanor offenses and 6 to 9 months for defendants charged with felony offenses.<sup>84</sup> And the Corrections Center of Northwest Ohio reports a pretrial average length of stay of only 10 days.<sup>85</sup> This relatively short period of time translates to a low base rate of observed behavior, which makes research all the more challenging. Researchers need to continue to develop and implement innovative research designs that can realistically accommodate this very limited pretrial period of time.

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Department of Justice, Office of Justice Programs.

81 See Blumstein, A. and K. Nakamura (June, 2009) *Redemption in an Era of Widespread Criminal Background Checks*. US Department of Justice, Office of Justice Programs, National Institute of Justice, for an example of a study that compared the population of interest, in this case 88,000 individuals who were arrested in New York City, with two general populations: people in the general population who were the same age, and people of the same age who had never been arrested.

82 Bhati, A. (2010) *Working Paper: Reassessing Risk Assessment: Measuring Latent Risk in Pretrial Populations to Predict Crime*. Maxarth LLC.

83 *Pretrial Service Programs in North Carolina: A Process and Impact Assessment* (October, 2007) Department of Crime Control and Public Safety, North Carolina Governor's Crime Commission.

84 <http://www.nwpcog.org/criminaljustice/web.cfm?CID=15>

85 <http://www.ccnoregionaljail.org/Statistics.htm>

## WHERE DO WE GO NEXT? RECOMMENDATIONS FOR RESEARCH AND PRACTICE

### Overcoming Data and Methodological Limitations

As researchers continue to advance the science of pretrial risk assessment and what constitutes an effective pretrial justice system, they must be creative in how they will overcome data and methodological limitations associated with research at this stage of the justice process. Unfortunately, good pretrial justice research is limited by the available jurisdictional and national level data, which are often poor at best. Researchers are encouraged to work with jurisdictions to collect necessary data for research and practice, and refine ongoing data management systems.

Researchers are also encouraged to apply varied modeling strategies that have not been commonly used in this field of study. For example, given the low rates of re-offending of released pretrial defendants, rare event models may prove to be useful. So that we might overcome selection bias and compare all people in the system, including those released and those not released, researchers might consider selection bias correction modeling. Certainly, expounding on the independent variables and considering risk suppression in risk prediction models may help refine our understanding of risk and make our risk assessment instruments all the more accurate. Knowing that risk assessment looks at individuals and individuals act in a context, researchers need to account for context measures, and these measures also require sophisticated modeling techniques.

*Despite time constraints and selection bias.....we have some science that says we can predict.” —Ed Latessa*

### High Priority Research Activities

In addition to creative methodologies, researchers are encouraged to consider any number of high priority research activities that have been identified by leaders in the field as next steps to advancing the science and practice of pretrial justice.

Where does the field of criminal justice go in knowledge building? There is no question that high priority research activities are needed. Overwhelmingly, there seems to be a want for more qualitative studies in the area of pretrial justice and pretrial risk assessment, specifically. Using focus groups, narratives, and other qualitative study techniques, what can the field learn from failure? For example, if researchers were to talk with the last 50 defendants who “failed” by either not showing up to court, or by being rearrested, what would they learn? Why did defendants miss their court date? Was the information provided to them about when they were supposed to appear clear? Did the services provided to them as part of pretrial supervision (i.e., drug treatment) have any effect on reducing their drug use? What do they think the system could have done to give them a better chance of succeeding on pretrial release? What data were available when the judge made the decision about their release? Qualitative data that reflect the defendants’ perspectives on pretrial interventions generally would be very valuable,

especially as it relates to improving case outcomes. These types of studies are low cost and can yield big results.

A significant wave of research on pretrial intervention strategies must also be initiated. The criminal justice field knows very little about pretrial interventions and their effects for different categories of defendants, and it has yet to develop an empirically tested repertoire of conditions that are aligned with the types of risks posed by different defendants. For example, a field demonstration that evaluates supervised release is needed. The field has also seen risk assessment processes established but later ignored, which suggests that jurisdictions lack confidence in the existing processes and tools, and that research and development are necessary in order to establish credibility in the field. A substantial investment is necessary. The processes (not just the instrument), where discretion can play in appropriately, must be documented.

In addition to research that looks specifically at existing pretrial processes, researchers are encouraged to explore *variations* in the processing of pretrial defendants. For example, to what extent would a quick triage process that includes early differentiation of cases work? After rapidly identifying those defendants who should be released quickly without bail, the court could then spend some additional time with the moderate risk group of defendants, possibly using a different type of instrument, and proposing different types of supervision. Further triage of this moderate risk group would allow a more in-depth assessment of those with whom the court is most concerned. Process related questions should be explored such as whether it would be beneficial to have increased defense counsel involvement at this stage of the pretrial process so that additional data might be gathered that would be useful in making risk assessments.

With ethical advisory committees in place to guarantee the integrity of the research process, researchers are encouraged to use experimentation and random assignment to develop category by category incremental knowledge about risk assessment and risk management. Research might identify sites that are motivated but that are not using any risk assessment at all. Through experimentation and random assignment, the study design might consider how implementation of pretrial processes affects the system—what difference does using a risk assessment instrument really make?

Prior research suggests there are wide variations in pretrial processes across jurisdictions. A basic multi-jurisdictional study will provide some sense of the overall dimensions of the problem and will generate interest among practitioners and policy makers. For example, using a purposive sample of 12 jurisdictions—some with high and some with low release rates, some with high and some with low pretrial crime rates with risk assessment instruments in place—what percent of low risk defendants remain in jail for different periods of time? Who are they, why are they there, how long did they stay? For those who are released, what do we see with respect to FTA and pretrial arrest? What explains the differences between jurisdictions with high and low release rates? We can look at what actually happened to those who had time served and probation to see what happened at the front end of the system. The research could consider supervision practices; judicial attitudes; and degrees of training for people making the assessments and decisions, including prosecutors, judicial officers, and defense lawyers.

Some researchers caution that there is danger in seeking absolute truths and being too esoteric. The pretrial release period is a relatively short period of time (90-120 days) and there needs to be reasonable expectations about what changes, if any, are expected of defendants during such a short period of time. While almost all offenders have a declining rate of offending (e.g., maturation, regression to the mean, intervention effects, natural fall off), this is not expected during the short pretrial period. Pretrial is not in the business of getting people to change significantly. It is better to use existing resources that are designated for research, for studies that help refine processes that are designed to keep the right people in, the right people out, get defendants to court, and keep the public safe during this short time frame. Researchers must simultaneously acknowledge that empirically grounded risk assessment processes, which are designed to help keep the right people in and the right people out, will always generate large margins of error (in the direction of over-detaining). The field must continue to grapple with the real problems of misclassification and over-classification in risk assessment.

“We must document the effectiveness of [pretrial] processes—not only an instrument—and where discretion can play in appropriately.” — Jim Burch, Acting Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. (June 7, 2010) Meeting on Pretrial Risk Assessment: State of the Science and Practice. Washington, DC: Pretrial Justice Institute and Bureau of Justice Assistance.

#### SUPPRESSION EFFECTS

The field of pretrial supervision has moved in the direction of using evidence-based practices, as seen primarily in its efforts to construct, validate and use risk assessment instruments. The suggestion has been made, however, that the credibility of these instruments is severely undermined by the failure to adequately account for risk suppression in the failure to appear and pretrial misconduct data.<sup>86</sup> In light of this empirical position, the risk we observe in pretrial defendants is despite the best efforts of the criminal justice system to suppress or mitigate it. Therefore, it is not the individual risk a person brings, but rather an unknown mixture of the risk a person brings and what the criminal justice system has done to suppress or minimize that risk, or in some cases, enhance it. Suppression is anything that is done to mitigate the innate risk that is posed (e.g., finding a job, intense supervision, incarceration). What we observe in a pretrial defendant is suppressed risk and what we hope to measure with our current risk assessment instruments is latent, or unsuppressed risk.

In pretrial populations, risk prediction is confounded by the fact that the sample may be contaminated with some combination of complete or partial suppression.<sup>87</sup> Without accounting for complete suppression, characterized as

<sup>86</sup> Bhati, A. (2010) *Working Paper: Reassessing Risk Assessment: Measuring Latent Risk in Pretrial Populations to Predict Crime*.

<sup>87</sup> See Bhati (2010) for a more detailed discussion of risk suppression in the context of pretrial risk assessment.

those defendants who are never released while waiting for their case disposition, the population on which we would be validating our risk assessment instruments would be biased. Without accounting for partial suppression, characterized as those defendants for whom different mechanisms (formal or informal) designed to manage risk are assigned (i.e. conditions of release), validated risk assessment instruments would be missing significant variations on an independent variable. Suppression effects are possibly changing the probability of the outcome in risk assessment models.

Why is the field doing risk assessment in the first place? Risk assessment is being done so that defendants will be placed correctly. If defendants are placed correctly, the idea is that risk is mitigated. It is possible, however, that the relationship between observed risk and the factors used for prediction is contaminated. If conceived of in this way, one can appreciate how risk suppression is one possible factor that may help explain jurisdictional differences. In the context of suppression effects, one can also appreciate how knowledge building as it relates to risk factors needs to be an iterative process. For example, a study of a high-risk group of pretrial defendants, where each is randomly assigned to a specific pretrial intervention for 6 months, allows us to measure whether there was an effect as a result of the intervention and what that effect was. If there was an effect, this then is incorporated in the next model that is tested. As the field continues to advance the science of pretrial justice, carefully executed experimental designs that incorporate suppression effects should be used in further developing and testing conditions of pretrial release.

### **Open Dialogue: Eliciting Data and Experiential Knowledge from All Participants in the Pretrial Process**

There are a number of conversations with participants in the pretrial process that are needed in order to garner more qualitative data and enhance pretrial policies and practice. Judges, defendants, researchers, prosecutors, legislators, and county commissioners for example, all have experiential knowledge and data that will help inform pretrial reform efforts. Answers to many questions raised below are needed to accelerate refinements to the pretrial process.

It is imperative that researchers speak with *judges* about how and why they make the pretrial release and detention decisions that they do. What are they most interested in predicting?<sup>88</sup> The psychology of pretrial decision-making is an area of study that needs to be explored to advance bail reform and establish a more enlightened pretrial process.

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<sup>88</sup> Is it possible, for example, that judges are less concerned with failure to appear and re-arrest, and more concerned with the defendant's degree of dangerousness? Current risk assessment instruments, however, cannot tell specifically which defendants are going to go out and hurt another person.

It would be helpful to speak with *defendants* who failed to appear for court hearings or were rearrested following pretrial release to understand what factors they believe affected their choices. When defendants fail to attend court or commit new crimes, why do they say they failed? It would also be helpful to understand whether money bond and other bail conditions matter to defendants and whether they feel they influence the choices they make during the pretrial period. To what extent do defendants value the social services aspect that some pretrial agencies have adopted as they have expanded their role beyond monitoring conditions purely to assure return to court and avoiding rearrest? These qualitative data would be very useful in refining conditions of release.

Guidance is needed by *professionally trained researchers*, both from within the field of criminal justice and from other disciplines, about the research that is needed to advance the science of pretrial risk assessment, and how the complexities of research designs should be optimally managed.

*Prosecutors* have a significant role to play with respect to diversion recommendations, and pretrial release and bail recommendations. Prosecutors need to be at the table to explain what factors influence their recommendations and talk through guidelines such as the American Bar Association Standards on Pretrial Release, pretrial risk assessment research, and risk management best practices.

Strategies should be developed to bring judges, and *legislators and county commissioners* together to discuss the values and structures of an effective pretrial system. The people who are responsible for the practice and influence the policies that define the process and structure of the system must be mobilized to establish new and enhance existing pretrial services programs. Conversations about tax dollars, cost incentives, budget implications, and the bottom line would provide an important and varied perspective as to why pretrial programs are beneficial to jurisdictions nationwide. Finally, lobbying of legislators to introduce bills that prohibit money-based release or detention decisions, abolish commercial surety like Kentucky, Wisconsin, Illinois, and Oregon have already done, call for objective pretrial risk assessment, and allow for preventive detention after due process, is critical to the long-term welfare of pretrial defendants.

### **A Universal Risk Assessment Instrument: Fact or Fiction?**

While some jurisdictions report using pretrial risk assessment instruments, very few are using risk assessment instruments that have been validated for their specific jurisdiction.<sup>89</sup> This reality is due in part to the high costs associated with the development and implementation of a standardized tool, which few criminal justice agencies can afford.<sup>90</sup> Also cost prohibitive is the idea of going into every jurisdiction

<sup>89</sup> Survey results suggest that only 10 percent of pretrial programs refrain from making any risk assessment. Of those agencies that report assessing risk, 24 percent use only objective criteria in risk assessment and 64 percent use a combination of objective and subjective criteria. With respect to validation, survey results indicate that 48 percent of pretrial programs have never validated their instruments, a statistic that has remained unchanged from 2001 to 2009. Pretrial Justice Institute (2009) *2009 Survey of Pretrial Services Programs*.

<sup>90</sup> Jones, P. (1996) Risk Prediction in Criminal Justice. In A.T. Harland (Ed), *Choosing Correctional Interventions that Work: Defining the Demand and Evaluating the Supply* (pp. 33-68). Thousand Oaks, CA: Sage.

to do validated risk assessment.<sup>91</sup> The current state of practice with respect to pretrial risk assessment instruments begs the question: can a universal risk assessment instrument be developed that can be used by jurisdictions nationwide? There are arguments on both sides.

The most significant criticism of a universal risk assessment instrument is that it is not locally validated or normed for specific jurisdictions. Most predictions of crime are different in different places for different reasons, whether they be variations in local culture, local crime, or information systems, for example. A good instrument must be both reliable and valid, and validity comes when the instrument is normed to a specific population. “Specifically, it should be shown that the instrument can successfully predict the outcomes of interest for the population being served.”<sup>92</sup> How generalizable would a universal instrument be across jurisdictions? There is the legitimate concern that judicial officers would not be receptive to a universal tool, quick to provide reasons why it would not work in their jurisdiction or with their population. Should researchers do a content analysis of all research that has been done before in the area of pretrial risk assessment and offer the field a set of universal risk criteria based on those results?

Alternately, a universal risk assessment instrument would provide jurisdictions with the much-needed tool that most do not have the capacity themselves to develop. There are not enough researchers in the field and it is far too expensive to have each county develop its own jurisdiction-specific evidence-based validated risk assessment instrument. The risk taken in not developing a universal instrument is that pretrial services programs will continue to assess risks without one. Is it better to use nothing, or a universal tool that has not been locally validated? Is it detrimental to use a non-validated risk assessment for specific pretrial populations?

So can one size fit all? The potential validity of a universal risk assessment instrument is an idea that cannot be ignored. The success of the Virginia Pretrial Risk Assessment instrument, the more recent Ohio instrument, and the instrument being used in all 92 federal districts raises the stakes for this examination. There are different paths to getting there,<sup>93</sup> but in the end, providing the field with a national standard for pretrial risk assessment could help advance the science and practice of pretrial release and detention. Needed potentially is an uncomplicated template that includes six to nine universal elements that are predictive of FTA, re-arrest, and other outcome measures of interest, with prescribed decision or cut points for the decision maker. This template

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91 The approximate costs for a site to validate its risk assessment instrument can range from \$20,000 to \$75,000. The low-end estimate of \$20,000 reflects the cost of analyzing existing data and writing a report only. These costs increase if the site works with the researcher/consultant to do collaboration building, make policy changes, train staff, put in place quality control mechanisms to ensure the risk assessment outcomes are being used to drive the bail decision, and re-validate the instrument after it has been in place for about one year. These costs are prohibitive for TA providers who rely on government funding for such efforts, and for counties themselves, many of which do not have resources of this magnitude for this type of reform work.

92 Lowenkamp, C., R. Lemke, and E. Latessa (December, 2008) *The Development and Validation of a Pretrial Screening Tool*. *Federal Probation*, Vol. 72 (3): 2-9.

93 Researchers might consider doing a content statistical analysis of past studies to identify universal predictive elements. A consensus-based model used to develop a risk assessment instrument may be a possible alternative (See Steinhart, D. (2006) *Juvenile Detention Risk Assessment: A Practice Guide to Juvenile Detention Reform*. Juvenile Detention Alternatives Initiative- A Project of the Annie E. Casey Foundation).

could be pilot tested in each jurisdiction, and be accompanied by a training and technical assistance package in an effort to improve its reliability and potentially norm it to the local jurisdiction. Development of a template that includes standard items that are easily adaptable by individual communities would be beneficial.

As the field continues to develop pretrial risk assessment instruments, it should be guided by interventions and practices that are consistent with the legal and constitutional rights afforded accused persons awaiting trial, and empirically-based methods found to be effective in reducing unnecessary detention while assuring court appearance and the safety of the community during the pretrial stage. According to VanNostrand (2007)<sup>94</sup>, there are guiding practices for pretrial risk assessment development that include:

1. The pretrial risk assessment instrument should be proven through research to predict risk of failure to appear and danger to the community pending trial.
2. The instrument should equitably classify defendants regardless of their race, ethnicity, gender, or financial status.
3. Factors utilized in the instrument should be consistent with applicable state statutes.
4. Factors utilized in the instrument should be limited to those that are related either to risk of failure to appear or danger to the community pending trial.

At a minimum, universal efforts need to break down the complexities of the process into manageable steps for jurisdictions. Focusing on a universal pretrial process, with the risk assessment instrument being one part of the larger process that needs to be better defined, may allow for variability around the country. The ABA standards are an excellent starting point from which to launch any universal pretrial process. As the field continues to explore how best to roll out a universal pretrial process informed by the ABA standards, it is useful to think about how the federal government might contribute to this process. For example, in an effort to help jurisdictions with proper data collection and systems, and risk assessment, the federal government could create standardized pretrial software for localities to use. It could also conduct a data collection effort that standardizes the definition of failure to appear and rearrest. The ideal application then would have the risk assessment instrument tied to the data collection tool package,<sup>95</sup> so that every jurisdiction is collecting the necessary data and producing the needed reports. Jurisdictions could also better accommodate definitional problems in doing it this way, and comparisons across like jurisdictions could begin to be made.

In the end, and at whatever jurisdictional level is most appropriate (local, state, universal), the field needs to provide judicial officers with tools, processes, and resources that answer two questions: (1) Which pretrial defendants should stay in the facility and which should be released to the community? (2) And if released into the community, what strategies, techniques and conditions should be put in place to mitigate individual risk?

94 VanNostrand, M. (2007). *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services*. Washington, DC: National Institute of Corrections and Crime and Justice Institute.

95 This is the case in Washington, DC, where Pretrial Services staff, enter diagnostic interview data and the computer generates the risk assessment score automatically.

“We need to get people thinking about risk assessment and get away from arbitrary and capricious decision-making.”  
 — Jim Austin (June 7, 2010) Meeting on Pretrial Risk Assessment: State of the Science and Practice. Washington, DC: Pretrial Justice Institute and Bureau of Justice Assistance.

### **Training and Technical Assistance Are Mandatory**

Sustained pretrial-specific training and technical assistance will help communities understand the process of pretrial and help build their local capacity to support effective pretrial systems. Comprehensive training and technical assistance must occur both at the site and remotely. It must occur at multiple levels including the judiciary, law enforcement, and larger community.

Judges and all those involved in this phase of the pretrial process must be educated on the standards put forth by the ABA on what a rational pretrial justice system looks like. These standards are the blueprint for jurisdictions to build enlightened pretrial justice processes.

Training related to risk assessment instruments specifically must happen both for those officers of the court who administer the instrument as well as for stakeholders of the process including the judges, prosecutors, and public defenders. A comprehensive training process will increase the confidence judges and prosecutors have in their reliance on evidence-based risk assessments in making pretrial release decisions. Training must be provided so that persons using the risk assessment instruments are consistent in their application. To improve the reliability of risk assessment instruments, following their training, officers of the court should go through a certification process in using the instrument. Follow-up training and quality assurance are critical.

Effective pretrial programs require access to reliable data that can inform appropriate release and detention decisions, which is no small feat for jurisdictions across the country. Technical assistance provisions must include skilled computer programmers who can mine and extract the data that already exist within jurisdictions, build needed databases, and generate reports using data from a variety of different platforms. Technical assistance providers must work with judges, commissioners, prosecutors, and public defenders, among others, to see who within the pretrial system has the data and the analytic capability on which to build a more refined system.

### **The Need for Accountability and Transparency**

As the field moves toward a more evolved pretrial justice system, one that reflects the standards put forth by the ABA, there needs to be increased accountability for and transparency of the pretrial release or detention decision. The preventive detention law in Washington, DC, for example, calls for a due process hearing to effectuate pretrial detention. This allows all the facts supporting detention to be entered into the official records, and provides the defendant an opportunity to be represented by counsel.<sup>96</sup>

<sup>96</sup> In the early 1970s, the District of Columbia became the first jurisdiction to experiment with preventive detention for defendants other than murder defendants. Under D.C. Code 1973, 23-1322, a defendant charged with a dangerous or violent crime could be held before trial without bail for up to 60 days. The defendant was entitled to a hearing at which the pros-

Establishing a transparent system that reports on bail decisions and their outcomes can ensure that bail laws are being upheld. Pretrial risk assessment, an objective risk-based score, can be an integral part of a transparent system.

### **The Perfect Storm**

When many variables come together to create a larger effect of great magnitude, when it is statistically unlikely that it would ever happen, we have a perfect storm. After 50 years of slow and steady development of the pretrial system, it has indeed started to storm. Practitioners are increasingly calling for evidence-based practices in an effort to facilitate greater efficiency and effectiveness with the defendants they process and serve. Researchers are also thinking more imaginatively about how to study the sophisticated issue of pretrial justice that brings with it complex methodological challenges. Increasingly more state and local decision-makers and stakeholders are asking for less costly and more effective practices and programs than have been tolerated in the past. The time has come to demystify the process of pretrial risk assessment and move the field away from arbitrary and capricious decision-making, without overpromising that any tool can predict a single person's behavior with 100 percent accuracy. Massive efforts are needed to help judicial officers and other pretrial practitioners understand what risk assessment is, how it can be appropriately validated, how it can be tailored to specific communities, and how it can benefit those managing the court docket and defendants it assesses.

The federal government has also recognized more recently the importance of the pretrial stage of criminal justice processing and has already appropriated federal dollars to two major initiatives of which pretrial is one small part (see Textbox). To accelerate this momentum, the federal government is encouraged to also mount a significant pretrial justice grant program or initiative that would stimulate national discussion and infuse the topic of pretrial justice with legitimacy. This is so important to localities, and their ability to develop new and enhance existing pretrial processes. The federal government is a change agent, as we have seen in the past. For example, beginning in the 1970s in the United States, prison classification systems began to experiment with using objective criteria. The California Department of Corrections and the Federal Bureau of Prisons developed the first objective classification systems.<sup>97</sup> In less than 10 years, prisons all around the country adopted objective prison classification systems and adapted them to their specific prison. This is a good example of how a federal agency fixed a problem in a relatively short period of time.

Similarly, in the 1980s, the federal government got behind piloting supervised release and significantly informed policy and practice. At the federal level, the Comprehensive Crime Control Act of 1984 created

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ecutor was required to present evidence of a substantial probability that the defendant committed the alleged offense. The defendant was allowed to present evidence, cross-examine witnesses, and appeal an adverse ruling. This detention scheme was upheld by the District of Columbia Court of Appeals in *United States v. Edwards*, 430 A.2d 1321, (1981), *cert. denied*, 455 U.S. 1022 (1982). (<http://law.jrank.org/pages/9370/Preventive-Detention.html#ixzz0wAhmByqL>)

97 Austin, J. and P. Hardyman (July 2004) *Objective Prison Classification: A Guide for Correctional Agencies*. U.S. Department of Justice.

the U.S. Sentencing Commission.<sup>98</sup> Offenders sentenced to federal prison were no longer eligible for parole release and instead were now required to serve a defined term of “supervised release” following release from prison.<sup>99</sup> The evolution of drug courts happened in much the same way.<sup>100</sup> The federal government can enact changes in criminal justice policy and practice with great efficiency and effectiveness.

## FEDERAL INITIATIVES

### Justice Reinvestment at the Local Level

In the fall of 2008, the Bureau of Justice Assistance funded the Urban Institute Justice Policy Center to begin work on moving the concept of justice reinvestment from the state level down to the county level. Justice reinvestment employs data and collaborative decision-making to help jurisdictions lower crime, reduce local criminal justice spending, and control correctional populations. The goal is to reduce county costs for corrections and reinvest the resources in high-stakes communities to yield a more cost-beneficial impact on public safety and community well being. The three counties selected to pilot-test this work (Alachua County, FL; Travis County, TX; and Allegheny County, PA) all have a dedicated pretrial services agency and the Pretrial Justice Institute is a member of the Advisory Committee for the project. In the fall of 2010, the Bureau of Justice Assistance funded a follow-on project, working to take this concept to scale.

PJI will continue to serve as an advisor. More information can be found at [http://www.ojp.usdoj.gov/BJA/topics/justice\\_reinvestment.html](http://www.ojp.usdoj.gov/BJA/topics/justice_reinvestment.html).

### Evidence-Based Decision Making

In the summer of 2008, the National Institute of Corrections funded the Center for Effective Public Policy, the Pretrial Justice Institute, the Justice Management Institute, and The Carey Group for the first phase of a three-phase initia-

<sup>98</sup> That legislation abolished the Parole Commission and parole was eliminated for offenders sentenced under sentencing guidelines that took effect in 1987 and were kept only for prisoners sentenced under prior laws.

<sup>99</sup> Petersilia, J. (1999) Parole and Prisoner Reentry in the United States. *Crime and Justice*, Vol. 26: 479-529. Adams, W., J. Roth, and J. Scalia (August 1998) *Federal Offenders Under Community Supervision, 1987-96*. Bureau of Justice Statistics Special Report. US Department of Justice, Office of Justice Programs.

<sup>100</sup> After the Miami drug court experience showed promise, several other jurisdictions around the country started their own drug courts. This was followed by a massive infusion of federal funding to help local jurisdictions plan and implement drug courts, the creation of a national drug court association, the release of numerous studies on the impact of these courts, the enactment of state statutes authorizing local jurisdictions to set up drug courts, and the expansion of the specialty treatment court concept to other populations, including persons with mental illness, drunk drivers, domestic violence offenders, juveniles, and inmates re-entering society after a period of incarceration. Clark, J. (October 2007) *The Role of Traditional Pretrial Diversion in the Age of Specialty Treatment Courts: Expanding the Range of Problem-Solving Options at the Pretrial Stage*. Pretrial Justice Institute.

tive to address “Evidence-Based Decision Making in Local Criminal Justice Systems.” This initiative is grounded in the accumulated knowledge of two decades of research on the factors that contribute to criminal re-offending, and the processes and methods the justice system can employ to interrupt the cycle of re-offense. The initiative seeks to equip criminal justice policymakers and practitioners in local communities with the information, processes, and tools that will result in measurable reduction of pretrial misconduct and post-conviction re-offending. Phase I resulted in “The Framework,” a document that outlines core principles of this work, the decision points within the criminal justice system that are the focus of this initiative, and a summary of the “evidence”—research supporting best practices at each of the decision points. Phase II, which began in the summer of 2010 and is co-funded by the Office of Justice Programs’ Bureau of Justice Assistance, embarks on an experiment of “The Framework.” Phase II will test the capacity of seven competitively selected sites from across the country to develop, with the support of technical assistance, collaboratively developed action plans to implement evidence-based policy and practice at the system, agency and case levels. Phase III, due to begin in the summer of 2011, will allow two competitively selected of the seven sites for assisted implementation of the action plans. In the pre-adjudication portion of this work, pretrial risk assessment and management plays a major role in the potential to improve system outcomes overall. For more information, please visit <http://www.cepp.com/EBDM.OneLess/>.

## CONCLUSION

The pretrial justice stage of criminal processing has many challenges as it continues to mature and be relevant. It has, however, significant strengths on which to grow. It has a blueprint for development in the guidelines set forth by the ABA. It has a foundation of knowledge, informed by research, from which the science can continue to develop. It has a number of jurisdictions around the country that have efficient and effective pretrial systems in place, after which other jurisdictions can model their systems. In the end, the goals of the pretrial period are simple and important:

- To improve adherence to constitutional, statutory, and case law.
- To increase the number of individuals objectively and thoroughly assessed, and then:
  - For low-risk defendants to be released on their own recognizance.
  - For moderate-risk defendants to be released with non-financial conditions of release appropriately managed in the community by trained and resourced supervision staff.
  - For defendants objectively assessed such that no condition or combination of conditions will protect public safety and assure appearance in court to be detained after a due process hearing.
- To reduce unnecessary pretrial detention while maintaining public safety and the integrity of the judicial process.
- To save jurisdictions money through more effective utilization of jail beds.

To achieve these goals, the pretrial field requires and deserves policy decisions that are informed by research, tools that will assist judicial officers in making release and detention decisions that benefit defendants and the community at large, and support by the federal government to promulgate the standards and evidence-based practice of pretrial justice.

### (Footnotes)

1 VanNostrand, M. and G. Keebler (2009) Pretrial Risk Assessment in the Federal Court. *Federal Probation. Vol. 72 (2).*

2 Siddiqi, Q. (2006) Final Report: Predicting the Likelihood of *Pretrial Re-arrest for Violent Felony Offenses and Examining the Risk of Pretrial Failure Among New York City Defendants: An Analysis of the 2001 Dataset.* New York City Criminal Justice Agency.

3 VanNostrand, M. (2003) Assessing Risk Among Pretrial Defendants in Virginia: *The Virginia Pretrial Risk Assessment Instrument.* Virginia Department of Criminal Justice Services.