



# Money as a Criminal Justice Stakeholder:

*The Judge's Decision to Release or  
Detain a Defendant Pretrial*



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September 2014

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## Preface

The future of pretrial justice in America will come partly from our deliberative focus on our judges' decisions to release or detain a criminal defendant pretrial and from our questioning of whether our current constitutional and statutory bail schemes are either helping or hindering those decisions. When I started researching bail, I wrote reams of paper on this particular decision point, only to be told by an extremely bright judge that the current Colorado statute seemed to guide him toward a primarily charge and money-based decision-making process. He was right, and even though people said we could never do it, we changed the entire statute to create a legal scheme designed to help judges realize the actual release ofailable defendants by reducing the use of money and bail schedules.

Now, however, we recognize that we also need a fair and transparent scheme allowing the preventive detention of higher risk defendants without "bail," or judges will continue to be forced to use money to accomplish the same thing, albeit unfairly, non-transparently, and, some would say, unlawfully. A new group of people are now telling us that we can never change our constitution to allow the creation of this scheme, but the fact is that change is inevitable. Indeed, moving from a mostly charge and money-based bail system to one based primarily on empirically-derived risk necessarily means that virtually all American bail laws are antiquated and must be changed.

This paper is designed to show a somewhat ideal process for making a release or detain decision, but with the realization that a particular state's bail laws may hinder that ideal process to a point where best practices are difficult or even impossible to implement. Nevertheless, until we know how the pretrial decision-making process should work (i.e., an in-or-out decision, immediately effectuated), we will never know exactly which changes we must make to further the goals underlying the "bail/no bail" process.

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# Acknowledgements

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

I am thankful to Cherise Fanno Burdeen and the National Association of Pretrial Services Agencies, and especially to Judges Gregg Donat (Tippecanoe County, Indiana) and Matt Osman (Mecklenburg County, North Carolina), who provided me with invaluable input on the draft. I am also extremely grateful to Spurgeon Kennedy, who has both inspired me and helped me down the stretch, and to Dan Cordova and the staff of the Colorado Supreme Court Law Library, who can seemingly answer any question, no matter how challenging.

In writing about judicial decision making, I am also indebted to the many judges with whom I have worked over the years. They include Judge Truman Morrison of the Superior Court of the District of Columbia, Judge Deanell Tacha and the other judges on the Tenth Circuit Court of Appeals during my employment as both law clerk and staff counsel, the judges of the Colorado Court of Appeals during my employment with that court, and the inspired and enlightened judges on the bench in Jefferson County, Colorado. I am especially thankful to Judges Margie Enquist, Thomas Vance, and Brooke Jackson, who understood the need for pretrial improvement before most, who worked to implement improvements against great opposition, and who continue to strive toward an ideal pretrial justice system where I live.

As with everything I have written in bail, I give my deepest thanks and appreciation to Claire Brooker (Jefferson County, Colorado) and Mike Jones (Pretrial Justice Institute), who helped with every aspect of this paper. Their contribution to the administration of bail transcends any particular paper, though, and continues to inspire me daily to think and write about important issues of pretrial justice.

## Executive Summary

Our best understanding of how to make meaningful improvements to criminal justice systems points to justice stakeholders cultivating a shared vision, using a collaborative policy process, and enhancing individual decision making with evidence-based practices. Unfortunately, however, using secured money to determine release at bail threatens to erode each of these ingredients. Money cares not for systemwide improvement, and those who buy their stakeholder status from money have little interest in coming together to work on evidence-based solutions to systemwide issues.

Like virtually no other area of the law, when judges set secured financial conditions at bail, they are essentially abdicating their decision-making authority to the money itself, which in many ways then becomes a criminal justice stakeholder, with influence and control over such pressing issues as jail populations, court dockets, county budgets, and community safety. Money takes this decision-making authority and sells it to whoever will pay for the transfer, ultimately resulting in “decisions” that run counter to justice system goals as well as the intentions of bail-setting judges. The solution to this dilemma – a dilemma created and blossoming in only the last century in America – is for judges to fully understand the essence of their decision-making duty at bail, and in their adhering to a process in which they reclaim their roles as decision makers fully responsible for the pretrial release or detention of any particular defendant.

Judges can achieve this understanding through a thorough knowledge of history, which illustrates that bail has always been a process in which bail-setting officials were expected to make “bail/no bail,” or in-or-out decisions, immediately effectuated so that bailable defendants were released and unbailable defendants were detained. The history of bail shows that when bailable defendants (or those whom we feel should be bailable defendants) are detained or unbailable defendants (or those whom we feel should be unbailable defendants) are released, some correction is necessary to right the balance. Moreover, the history shows that America’s switch from a personal surety system using primarily unsecured bonds to a commercial surety system using primarily secured bonds (along with other factors) has led to abuses to both the “bail” and “no bail” sides of our current dichotomies, thus leading to three generations of bail reform in America in the last 100 years.

Judges can also achieve this understanding through a thorough knowledge of the pretrial legal foundations. These foundations follow the history in equating “bail” with release, and “no bail” with detention, suggesting, if not demanding an in-or-out decision by judicial officials who are tasked with embracing the risk associated with

release and then mitigating that risk only to reasonable levels. Indeed, the history of bail, the legal foundations underlying bail, the pretrial research, the national standards on pretrial release, and the model federal and District of Columbia statutes are all premised on a “release/detain” decision-making process that is unobstructed by secured money at bail. Understanding the nuances of each of these bail fundamentals can help judges also to avoid that obstruction.

Nevertheless, it is knowledge of the current pretrial research that perhaps provides judges with the necessary tools to avoid the obstruction of money and to make effective pretrial decisions. First, current pretrial research illustrates that not making an immediately effectuated release decision for low and moderate risk defendants can have both short- and long-term harmful effects for both defendants and society. It is important for judges to make effective bail decisions, but it is especially important that those decisions not frustrate the very purposes underlying the bail process, such as to avoid threats to public safety. Therefore, judges should be guided by recent research demonstrating that a decision to release that is immediately effectuated (and not delayed through the use of secured financial conditions) can increase release rates while not increasing the risk of failure to appear or the danger to the community to intolerable levels. Second, the use of pretrial risk assessment instruments can help judges determine which defendants should be kept in or let out of jail. Those instruments, coupled with research illustrating that using unsecured rather than secured bonds can facilitate the release of bailable defendants without increasing either the risk of failure to appear or the danger to the public, can be crucial in giving judges who still insist on using money at bail the comfort of knowing that their in-or-out decisions will cause the least possible harm.

These in-or-out decisions can be hindered by inadequate state bail laws, most of which are outdated due to their charge-based structure. In particular, states that do not allow detention based on risk are putting judges at a disadvantage because the existing laws will often force judges to choose between releasing a high risk yet bailable defendant (thus endangering the public) or detaining that otherwise bailable defendant to protect the public by using money. Judges are thus encouraged to follow the recommendation of the Conference of Chief Justices that they work within the criminal justice system to analyze state laws and to propose revisions supporting risk-based or risk-informed decisions.

# Introduction

In nearly 50 years, we have greatly strengthened our ability to make meaningful improvements to the criminal justice system. In 1967, the President’s Commission on Law Enforcement and Administration of Justice issued its report titled, “The Challenge of Crime in a Free Society.” In that report, the Commission introduced America to a criminal justice “systems” perspective, emphasized the role of data-guided or research-based decision making, and stressed the need for the various criminal justice stakeholders to come together in “planning and advisory boards” to manage and improve justice systems – all novel concepts to a country accustomed to the fragmented and decentralized justice system of the first half of the twentieth century.<sup>1</sup> Since then, we have re-defined our notions of criminal justice systems, coming to a better understanding of various discretionary justice system decision points and their relationship to one another. Moreover, we have begun keeping data and evaluating programs and processes, activities slowly leading to a base of criminal justice literature and research designed to illuminate “what works” to achieve our justice system goals. And finally, we have experimented with, and refined our ideas about, systemwide collaboration by watching both the successes and failures of various policy planning teams created to put that research to use.

This evolutionary understanding of the principles articulated in 1967 culminated in 2008, when the National Institute of Corrections (NIC) partnered with the Center for Effective Public Policy, the Pretrial Justice Institute, the Justice Management Institute, and the Carey Group to create a criminal justice systemwide “framework.” This framework is designed to maximize collaboration and research by allowing policy teams made up of criminal justice stakeholders to apply evidence-based practices to system issues found at the various decision points.<sup>2</sup>

The framework rests on several premises. One premise is that all criminal justice stakeholders share a similar vision that focuses on harm reduction and community wellness while embracing certain core values of the justice system, such as public safety, fairness, individual liberty, and respect for people’s rights and the rule of law. A second premise is that these stakeholders work best when they work together, agreeing to apply the research shown best to accomplish the overall vision at each decision point. A

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<sup>1</sup> See *The Challenge of Crime in a Free Society: A Report by the President’s Commission on Law Enforcement and Administration of Justice* (Washington, D.C. 1967).

<sup>2</sup> See *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems* (NIC 3<sup>rd</sup> ed. 2010) [hereinafter *NIC Framework*].



third premise is the need for collaborative policies to filter down to each person making each decision, creating a “value chain” comprised of multiple individual decision makers who follow, and ultimately benefit from, professional judgment enhanced with evidence-based knowledge.<sup>3</sup> When these premises are followed, 50 years of experience shows that criminal justice decision makers can not only manage the overall operations of a complicated justice system, they can also identify and agree to implement evidence-based solutions to seemingly insoluble problems such as jail crowding, inefficient resource allocation, and recidivism. When the premises are not followed, however, justice system effectiveness and the shared vision itself can suffer. In the field of bail and pretrial justice, the latter happens most frequently when judges use their professional judgment during the pretrial release or detention decision point to set secured financial conditions of bail without fully contemplating their usefulness or effects.

Financial conditions of bail (i.e., money or its equivalent in property) have been a part of the release process for 1,500 years, but for virtually all of that time whatever financial condition that existed on any particular bond was typically unsecured, or, like a debenture, secured only by the general credit of the personal sureties. It was a debt that would be owed only if the accused did not appear for court; accordingly, no amount of money stood in the way of the defendant being released immediately from jail. On the other hand, secured financial conditions – which effectively require money to be paid up-front by a defendant (or his or her family) or specific collateral to be pledged or obligated in the form of what we now call “cash bonds,” “surety bonds,” “deposit bonds,” and “property bonds” before that defendant can be released from jail – have only been used extensively in America since about 1900. Since then, our emphasis on secured bonds at bail has led to issues that are conceivable only when wealth and profit become foundational to a process of release. For the most part, these issues all stem from the puzzling custom of judges routinely abdicating their roles as decision makers by setting monetary conditions that are largely dependent upon others to effectuate.

Recognition of this abdication of decision-making authority is not new. Indeed, in the 1960s numerous critiques of the commercial surety industry included the notion that those sureties were improperly usurping a role best left to judges. For example, in 1963 author Ronald Goldfarb wrote the following:

A cardinal flaw even with the legitimate aspects of the bondsmen’s present role, and it could be argued that this is in and of itself a fatal flaw, is his power to singlehandedly inject himself into the administration of

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<sup>3</sup> See *id.* at 17-29.

justice and impede or corrupt it. Once a judge sets bail in a given case, one would hope that the issue of the bailability of a defendant was settled. But because of the absolute power of the bondsmen to withhold his services arbitrarily, the matter is not settled by the judge. In fact the judge's ruling can be defeated by the caprice of the bondsman, who can refuse to provide bail for good reasons, bad reasons, or no reasons.<sup>4</sup>

Goldfarb went on to quote a now well-known court opinion, in which D.C. Circuit Court Judge J. Skelly Wright wrote:

Certainly the professional bondsman system as used in this District is odious at best. The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety – who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.<sup>5</sup>

Observations such as these undoubtedly influenced the rationale behind at least one of the American Bar Association's (ABA) criminal justice recommendations surrounding pretrial release. In commentary, the ABA lists "four strong reasons" for its recommendation to abolish bail bonding for profit. Its second and third reasons are as follows:

Second, in a system relying on compensated sureties, decisions regarding which defendants will actually be released move from the court to the bondsmen. It is the bondsmen who decide which defendants will be acceptable risks – based to a large extent on the defendant's ability to pay the required fee and post the necessary collateral. Third, decisions of bondsmen – including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond – are made in secret, without any record of the reasons for these decisions.<sup>6</sup>

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<sup>4</sup> Ronald Goldfarb, *Ransom: A Critique of the American Bail System* at 115 (NY Harper & Row 1965).

<sup>5</sup> *Id.* at 115-16 (quoting *Pannell v. U.S.*, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion)).

<sup>6</sup> American Bar Association *Standards for Criminal Justice: Pretrial Release* (3<sup>rd</sup> ed. 2007), Std. 10-1.4(f) (commentary) at 45 [hereinafter *ABA Standards*].

In 1996, authors John Clark and D. Alan Henry provided a compelling rationale for why judicial delegation to bondsmen of a decision to release or detain can undermine the criminal justice system: “The goal of the commercial bonding agent – to maximize profits – provides no reconciliation of the two conflicting goals of the pretrial release decision-making process [i.e., to allow pretrial release to the maximum extent possible while trying to assure that the accused appears in court and will not pose a threat to public safety].”<sup>7</sup>

By focusing criticism on the for-profit bail industry, however, we are likely now missing a much broader and more important point. For even in states where bondsmen have been made unlawful or where they are actively avoided through non-commercial sureties, cash-only financial conditions, or deposit bond options, judges are still effectively abdicating their decision-making role by setting secured money bonds. In those states, as in states with commercial bail bondsmen, judges are often simply setting amounts of money and then assuming that the money will either facilitate release or detention. In fact, those amounts of money can lead to opposite, and sometimes tragic or absurd results.

For example, during a 14-week study of over 1,250 cases conducted in 2011, researchers in Jefferson County, Colorado, documented twenty cases in which defendants were ordered released but were unable to leave jail on bonds with cash-only financial conditions of \$100 or less. In addition, 120 other defendants were ordered released but remained detained for failure to post the cash-only financial conditions of \$1,000 or less.<sup>8</sup> In 2011, National Public Radio reported on Leslie Chew, who was arrested for stealing blankets and was ordered released with a \$3,500 secured financial condition. At the time of the report, he had been detained for six months at a cost of over \$7,000 to taxpayers for the lack of \$350 to pay a for-profit bail bondsman.<sup>9</sup> Finally, in 2013, a Missouri judge set a \$2 million secured financial condition on the bail bond of a college student arrested in connection with the murder of a local bar owner. When the Saudi Arabian government posted the \$2 million, however, the judge refused to release the

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<sup>7</sup> John Clark & D. Alan Henry, *The Pretrial Release Decision Making Process: Goals, Current Practices, and Challenges*, at 21 (Pretrial Res. Servs. Ctr. 1996).

<sup>8</sup> See Claire M.B. Brooker, Michael R. Jones, & Timothy R. Schnacke, *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds*, 9-10 (PJI/BJA 2014).

<sup>9</sup> Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates*, found at <http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates>.

student, explaining that the amount of money was meant to detain him, even if that detention potentially violated the Missouri Constitution.<sup>10</sup>

In each of these cases, judges have made decisions to release or detain defendants, but by setting often arbitrary amounts of money as secured financial conditions of bail bonds, they have handed over the actual decision to release or detain to others – or to no one – thus giving the money a life of its own. Essentially, judges have elevated money to the status of criminal justice stakeholder, having influence and control over such pressing issues as jail populations, court dockets, county budgets, and, most importantly, community safety.

However, money should never be allowed stakeholder status. The NIC’s framework document defines “stakeholders” as “those who influence and have an investment in the criminal justice system’s outcomes.”<sup>11</sup> Money, albeit influential, has no investment whatsoever in the justice system’s outcomes. Money simply exists, and is capable of aiding and abetting outcomes (such as mere profit) running counter to justice system philosophies that more appropriately envision community wellness and harm reduction.

Moreover, money is content to hand over its stakeholder status to anyone willing and able to pay for the transfer. The framework document lists the typical key decision makers and stakeholder groups for any given justice system, and nowhere on the list is a defendant’s cousin, grandmother, bail bondsman, or foreign government. These persons and entities certainly have a stake in the particular case, but they rarely have either the interest or commonality of purpose to be considered stakeholders for criminal justice system issues. Money as a criminal justice stakeholder erodes the very premises underlying what we know works to achieve systemwide improvements, including a shared vision, a collaborative policy process, and evidence-based enhancement of individual decisions. If fifty years of research, experimentation, and implementation have taught us how to best achieve legal and evidence-based criminal pretrial practices, the continued casual use of money at bail threatens to erode if not erase those lessons from our memory.

The solution to this dilemma is not as simple as eliminating money from the bail process, but the solution is potentially simple nonetheless. The solution comes from

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<sup>10</sup> Sarah Rae Fruchtnicht, *Missouri Judge Refuses to Release Saudi Student After He Posted \$2M Bond*, found at <http://www.freerepublic.com/focus/f-news/3027702/posts>; Bill Draper, *Saudi Remains Behind Bars After \$2M Bond Posted*, found at <http://bigstory.ap.org/article/saudi-remains-behind-bars-after-2m-bond-posted>.

<sup>11</sup> *NIC Framework*, *supra* note 2, at 36.

judges fully understanding the essence of their decision-making duty at bail, and in their adhering to a process in which they reclaim their roles as decision makers responsible for the pretrial release or detention of any particular defendant. Following the history of bail, the foundational legal principles of bail, the national best practice standards on release and detention, and the pretrial research, the judge's decision to release should be an "in-or-out," "release/detain" decision, immediately effectuated, with conditions (including, albeit rarely, financial conditions) set in lawful ways that do not impede or otherwise defeat the intent of the decision. To move forward in pretrial justice, we must examine this most important part of the bail process – the judge's decision to release or detain – and come to agreement on how that decision must be made using legal and evidence-based knowledge of the administration of bail.

This is not a paper that seeks to blame judges for "doing it wrong;" instead, it applauds judges for doing so well for so long, given a bail system with so many limitations. Indeed, throughout the history of bail, from the Middle Ages until the 1960s in America, bail-setting officials were only able to use one condition of release – money – to provide reasonable assurance of only one valid purpose for limiting pretrial freedom – court appearance. Our culture today is still one in which many persons equate the process of bail with money, and it is the rare judge who can see beyond the blurring of these two very different concepts. Moreover, judges are in no way assisted by prosecutors who continually request secured bonds in arbitrarily high amounts, defense attorneys who acquiesce and merely argue for lesser amounts, and public pressure, which can force judges to focus on the monetary condition of bail at the expense of all other conditions. Judges are often also hindered by bad bail statutes, some of which mandate secured financial conditions or even the use of monetary bail bond schedules. And finally, judges are given little training in bail and pretrial issues, leaving them with no alternative but to study the perhaps antiquated but customary practices of their colleagues when learning how to make effective bail decisions.

But since the 1960s America has embarked on a journey of infrastructure improvements in bail, including the creation and implementation of non-financial conditions and other alternatives to money-based releases, the development and refinement of transparent detention processes, and even a second constitutionally valid purpose for limiting pretrial freedom – public safety. These improvements, coupled with recent and significant research showing what works to best attain the goals of bail, give judges the foundation for making effective pretrial release and detention decisions despite whatever hurdles might stand in the way.

The remainder of this paper describes this new infrastructure by exploring how the history, law, model statutes, national pretrial standards, and pretrial research all

support and encourage an in-or-out, or “bail/no bail,” decision as well as how and when to incorporate money into that decision. In the last section, I will explore how judges should view risk at bail and use the kind of tools specifically created for them to follow a more effective decision-making process leading to decisive and immediately effectuated orders to release or detain defendants pretrial.

# Chapter 1. The History and the Law to the Twentieth Century

The history of bail and the law evolving through that history are intertwined. Historical events are often the catalyst for new laws, and the new laws often generate new practices, which, in turn, necessitate changes to the laws. In 1676 England, for example, officials arrested an individual known as Jenkes for making a speech upsetting to the King, charged him with sedition (a charge that technically required release on bail), and held him for two years using various procedural loopholes. His case, and other cases in which defendants were given a similar procedural “runaround” so that they remained detained, led parliament to pass the Habeas Corpus Act of 1679, which provided a procedure that “plugged the loopholes and made even the king’s bench judges subject to penalties for noncompliance.”<sup>12</sup> Unfortunately, recalcitrant judges quickly learned that they could obtain the same result by setting bonds in unattainable financial amounts, a practice ultimately leading to the English Bill of Rights, which prohibited excessive bail.<sup>13</sup> In these cases, historical events led to laws, which, in turn, affected historical events. Accordingly, it is logical and practical to discuss history and the laws together in terms of their authority for, and effect on, judicial decision making.

When discussing the history and law surrounding bail, they may be recounted either as a series of singular events or as phenomena or trends shaping the way we administer the bail process today. For purposes of this paper, it is most helpful to do the latter. Accordingly, viewed as historical phenomena, we see two main threads running through history that have the largest impact on current practices and judicial decision making.

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<sup>12</sup> Caleb Foote, *The Coming Constitutional Crisis in Bail I*, 113 U. Pa. L. Rev 959, 967 (1965) [hereinafter Foote].

<sup>13</sup> *Id.* at 967-68.

## The First Historical Thread: The Move from Unsecured Bonds Administered by Personal Sureties to Secured Bonds Administered by Commercial Sureties

The first historical thread is the gradual transformation, starting from the beginning of bail itself and moving through the Middle Ages to the present, from using mostly unsecured bonds administered through a personal surety system to using mostly secured bonds administered through a commercial surety system.<sup>14</sup> Fully understanding this thread is crucial because the trend toward using secured bonds has led to significant hindrances to the judges' decisions to release or detain once those decisions have been made. For purposes of this paper, however, it should suffice to say that the historical practice of using unsecured bonds administered through a personal surety system (i.e., a system in which the surety was a person or persons who were willing to take responsibility over the accused for no money and for no promise of reimbursement upon default) was the predominant practice from the beginning of our modern notions of bail in the Middle Ages until the 1800s in America. When thinking about the personal surety system, we focus on the significant differences in the ways in which money was used. In addition to the prohibition of profit and indemnification for the bail transaction in the personal surety system, any financial condition set at bail was always what we might call today an unsecured financial condition, meaning that it was not tied to any particular collateral; instead, it was secured only by the promise of the personal surety, and it was payable only upon default of the accused to come back to court.

In the mid-to-late 1800s, however, that practice gave way to using mostly secured bonds administered primarily through a commercial surety system when America began running out of willing personal sureties. Unlike unsecured financial conditions, secured financial conditions, such as in "cash bonds" or "surety bonds," mean that someone (typically a defendant or his family) must pay some amount of money up-front for the privilege of leaving the jail. Even when a bond is technically secured through bail insurance company assets, the defendant or the defendant's family must typically pay a fee and sometimes collateralize the bond to obtain a bondsman's assistance. Because secured bonds tend to cause pretrial detention for those unable to pay the up-front money, we have continually seen pretrial detention due to money throughout the twentieth century to the present time.<sup>15</sup> As we will see later, the collision of this

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<sup>14</sup> See Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (NIC 2014) [hereinafter *Fundamentals*].

<sup>15</sup> Though some who oppose bail reform doubt the premise, the history of American bail in the twentieth century is replete with literature describing pretrial detention due to the inability to pay the up-front costs of secured bonds. Most recently, the Bureau of Justice Statistics reported that, "About 9 in 10



historical thread with the second historical thread, discussed next, explains why America has had to endure two generations of bail reform in the twentieth century and is currently in the middle of a third.

## The Second Historical Thread: The “Bail/No Bail” Dichotomy Leading to an In-or-Out Decision

The second historical thread is more relevant to the decision to release or detain and thus requires more explanation, for it involves the creation and nurturing through the centuries of a division of defendants into two mutually exclusive groups – what I have termed the “bail/no bail,” or “release/detain” dichotomy. This historical and legal thread, once understood, is the thread that instructs judges that their pretrial decisions must not depend on the caprice of outside factors, and that their release and detention decisions should be in-or-out decisions that are immediately effectuated. The genesis of this thread takes us back to England in the Middle Ages.

After the Normans invaded Britain in 1066, they gradually established a criminal justice system beginning to resemble the one we see today. Once completely a private process, justice slowly became public. This was due to several important movements, but most relevant to the judge’s decision to release or detain was the crown’s initiation of crimes against the state by designating certain felonies “crimes of royal concern” (or “pleas of the crown”) and by placing persons accused of those particular felonies under the control and jurisdiction of itinerant royal justices.<sup>16</sup> According to bail historian William Duker, “The writ *de homine replegiando*, which commanded the sheriff to release the individual detained unless he were held for particular reasons, probably dates from this point [and] although the writ is famous for being the first ‘writ of liberty,’ it actually established the first written list of nonbailable offenses.”<sup>17</sup> This began a “code of

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detained defendants had a bail amount set but were unable to meet the financial conditions required to secure release. Those with a bail amount set under \$5,000 (71%) were nearly 3 times as likely to secure release as defendants with a bail amount of \$50,000 or more (27%).” Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009-Statistical Tables*, at 15 (BJS 2013).

<sup>16</sup> See Elsa De Haas, *Antiquities of Bail*, at 24-25, 60-63 (AMS Press, NY 1966) [hereinafter De Haas]; June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 *Syr. L. Rev.* 517, 521 (1983) [hereinafter Carbone].

<sup>17</sup> William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 *Alb. L. Rev.* 33, 44 (1977-78) (internal footnotes omitted) [hereinafter Duker].

custom” (akin to our notions of common law) surrounding bail that established bailable and nonbailable offenses.<sup>18</sup>

By the 1270s, however, the crown began to scrutinize this customary “bail/no bail” dichotomy and quickly found areas of abuse. As a result of the Hundred Inquests of 1274, the crown became aware that sheriffs (who at that time were responsible for release and detention of bailable and unbailable defendants) were committing two primary abuses: (1) they were extracting money from bailable defendants before releasing them (and sometimes even arresting innocent people for no reason to demand payment); and (2) they were releasing otherwise unbailable defendants, also for “considerable sums of money.”<sup>19</sup> At the time, these abuses were likely considered equally egregious to the crown. However, while the history of bail is occasionally punctuated with abuses leading to unlawful releases, it is abundant with instances of unlawful detention, leading to the following more typical scenario, as recounted by author Hermine Herta Meyer:

The poor remained in prison. Thus, it is reported that Ranulfo de Rouceby remained in prison for eight years, until he paid forty shillings to be pledged, although he could have been released on bail from the beginning. The answer to these abuses was the Statute of Westminster I, which was the first statutory regulation of bail. It was a reform statute, addressed to the sheriffs, undersheriffs, constables, and bailiffs and intended to give them definite guidelines in handling release on bail.<sup>20</sup>

The Statute of Westminster, enacted in 1275, sought to correct these abuses primarily by establishing criteria governing bailability, largely based on a prediction of the outcome of the trial by examining the nature of the charge, the weight of the evidence, and the character of the accused. While doing so, the Statute expressly categorized bailable and unbailable offenses, creating the first express legislative articulation of a “bail/no bail” scheme.

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<sup>18</sup> *Id.* at 45; *see also* Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 *Geo. L. J.* 1139, 1154 (1971-72) [hereinafter Meyer].

<sup>19</sup> De Haas, *supra* note 16, at 91-97. A pure “release/no release” system structured around bailability through the local sheriffs was made more complex, however, through numerous exceptions based on who could later impact the bail decision (especially the Court of King’s Bench) and the various writs that governed release, which also often required payment. *See* Meyer, *supra* note 18, at 1155-56; De Haas, *supra* note 16, at 51-127.

<sup>20</sup> Meyer, *supra* note 18, at 1155 (internal footnotes omitted).

More importantly, however, the Statute also made it clear that bailable defendants were to be released and unbailable defendants were to be detained. Thus, the “bail/no bail” dichotomy was mutually exclusive – if an accused were deemed bailable, he could not also be unbailable or treated as unbailable by being detained. Likewise, an accused who was deemed unbailable could not also be bailable or treated as bailable by being released. Sheriffs who disobeyed or abused this aspect of the dichotomy, especially by collecting money, did so at their peril. The following language was specifically written into the Statute:

And if the Sheriff, or any other, let any go at large by Surety, that is not replevisable [i.e., unbailable], if he be Sheriff or Constable or any other Bailiff of Fee, which hath keeping of Prisons, and thereof be attainted, he shall lose his Fee and Office for ever: And if the Under-Sheriff, Constable, or Bailiff of such as have Fee for keeping of Prisons, [do it] contrary to the Will of his Lord, or any other Bailiff . . . , they shall have Three Years Imprisonment, and make Fine at the King’s Pleasure. And if any withhold prisoners replevisable [i.e., bailable], after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King; and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall [be in the great mercy of] the King.<sup>21</sup>

In sum, the Statute “eliminated the discretionary power of the sheriffs and local ministers by carefully enumerating those crimes which were not replevisable and those crimes which were replevisable by sufficient sureties without further payment.”<sup>22</sup> Thus, if bailable, the person “had to be released upon sufficient surety [i.e., persons],<sup>23</sup> without any additional payment to the sheriff.”<sup>24</sup> At least so far as the sheriffs were concerned, nonbailable persons were to remain detained.<sup>25</sup>

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<sup>21</sup> De Haas, *supra* note 16, at 95-96 (quoting Statute of Westminster I, 3 Edward I, c. 15 (1275)).

<sup>22</sup> Duker, *supra* note 17, at 46 (internal footnotes omitted).

<sup>23</sup> The term “sufficient surety” had a particular meaning in thirteenth century England that we tend to forget today. As briefly mentioned previously, and as more fully described *infra*, it did not mean paying money up-front, what we might today call a secured bond or through any kind of commercial surety. Indeed, collecting money from an accused to pay for his or her release up-front was considered one of the abuses – essentially a bribe – that hindered release and that thus necessitated statutory remedy. Instead, “sufficient surety” referred specifically to the personal surety system then in place, which included the use of one or more reputable persons willing to take responsibility for the defendant’s appearance in court without remuneration or indemnification.

<sup>24</sup> Meyer, *supra* note 18, at 1156.

<sup>25</sup> The crown and the crown’s royal justices were still given wide latitude to continue granting bail to those deemed unbailable, typically through various technical writs governing release. *See* De Haas, *supra*

For the next 400 years, major bail reforms grew in response to other abuses, many of which also hindered the release ofailable defendants.<sup>26</sup> For example, when the sheriffs again began charging for release, author William Duker reports that Parliament enacted a law in 1444 declaring that,

[S]heriffs and their subordinates were not to accept anything ‘by Occasion or under Colour of their office’ for their ‘Use, Profit or Avail’ offered by anyone subject to arrest or from anyone seeking mainprise or bail, under pain of fine . . . [and that] said officials were required to set at large those held forailable offenses offering sufficient surety.<sup>27</sup>

In 1483, another statute gave justices complete discretion to release prisoners detained by the sheriffs “to remedy the great abuse of incarceration without opportunity for bail or mainprise.”<sup>28</sup> In 1554, Parliament extended the reform provisions of the Statute of Westminster to those justices as well, apparently due to their own susceptibility to “the same corrupting influences which operated on the sheriffs in earlier periods.”<sup>29</sup> But the most notable reforms came in the seventeenth century, primarily to “address[] circumvention of the bail process to detain individuals in disfavor with the Crown.”<sup>30</sup>

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note 16, at 96. Later, as the power to initially grant or deny bail was transferred from sheriffs to justices of the peace, Parliament enacted laws similar to the Statute of Westminster for judges. *See Meyer, supra* note 18, at 1155-56. These complicating factors, along with other complex exceptions to all rules regarding the administration of bail in early England (albeit, importantly, all exceptions allowing discretion to release the unailable, not to detain theailable, *see Carbone, supra* note 16, at 522 n. 29), make the concept of a “bail”/“no bail” dichotomy in England an accurate yet admittedly simplified notion that was more fully realized in America.

<sup>26</sup> The period was also occasionally marked by laws designed to eliminate any right to bail. *See Duker, supra* note 17, at 56-57 (“Beginning in the latter part of the fourteenth century, statutes, ordinances, and proclamations, that made new offenses punishable by imprisonment, forbade bail or mainprise in such cases. . . . Thus, although the right to bail was on a progressive course, it existed in a rather precarious state.”).

<sup>27</sup> *Id.* at 54 (quoting 23 Hen. 6, c. 9 (1444)).

<sup>28</sup> *Id.* at 55. This statute also attempted to curb the abuse of sheriffs allowing prisoners to escape upon payment of a fee. The statute apparently proved unsuccessful, however, and thus was repealed in 1486. *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Carbone, *supra* note 16, at 528.

## “Bail” and “No Bail” in England in the Seventeenth Century

One of the first reforms came in the 1620s, when Charles I ordered five knights to be jailed without a charge, essentially circumventing the Statute of Westminster (and the Magna Carta, upon which the Statute was based) that triggered a bail determination based on the alleged charge. Responding to this particular abuse, Parliament passed the Petition of Right, which prohibited detention “without being charged with anything to which they might make answer according to law.”<sup>31</sup> Likewise, as previously noted, when the crown’s sheriffs and justices used procedural delays to avoid setting bail, Parliament responded by passing the Habeas Corpus Act of 1679, which provided procedures designed to prevent delays prior to bail hearings.<sup>32</sup> Specifically, the Act set strict time limits for acting on writs governing release, and stated that officials,

‘shall discharge the said Prisoner from his Imprisonment, taking his or their Recognizance, with one or more Surety or Sureties, in any Sum according to their Discretion, having regard to the Quality of the Prisoner and Nature of the Offense, for his or their Appearance in the Court of the King’s Bench . . . unless it shall appear . . . that the Party [is] . . . committed . . . for such Matter or Offenses for which by law the Prisoner is not bailable.’<sup>33</sup>

Unfortunately, by specifically acknowledging discretion, the Habeas Corpus Act effectively allowed financial conditions of bail to be set in unattainable amounts.<sup>34</sup> According to author William Holdsworth, the justices began setting high bail amounts only after James II failed in his attempts to repeal Habeas Corpus, which he considered to be a “destruction . . . of royal authority,”<sup>35</sup> and it appears to be the first time that a condition of bail, rather than the fact of bail itself, became a concern.<sup>36</sup> In response,

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<sup>31</sup> Duker, *supra* note 17, at 64 (quoting Petition of Right of 1650, 3 St. Tr. 221-24). For in-depth discussions of the Five-Knights Case, also known as Darnell’s case, *see id* at 58-65; Meyer, *supra* note 18, at 1181-85.

<sup>32</sup> *See* Duker, *supra* note 17, at 66.

<sup>33</sup> *Id.* at 65-66 (quoting 31 Car. 2, c. 2. (1679)); *See* Carbone, *supra* note 16, at 528. A discussion of the illustrative case of Francis Jenkes is found in various sources. *See* Duker, *supra* note 17, at 65-66 (citing Jenkes Case, 6 St. Tr. 1190 (1676)); Carbone, *supra* note 16, at 528 (citing same); William Searle Holdsworth, *A History of English Law*, at 116-18 (Methuen, London, 1938) [hereinafter Holdsworth].

<sup>34</sup> *See* Duker, *supra* note 17, at 66.

<sup>35</sup> Holdsworth, *supra* note 33, at 118-19.

<sup>36</sup> This was a monumental shift, given that money was the only means of securing release at that time, and remained so until the advent of “pure” (i.e., no money) personal recognizance bonds and non-

William and Mary consented to the English Bill of Rights, which declared, among other things, that “excessive bail ought not to be required,”<sup>37</sup> a clause that appears in similar form in the Eighth Amendment to the United States Constitution.

In terms of practicality, it must be remembered that this prohibition on excessive bail in England existed within the context of the personal surety system. In England (and America until the late 1800s) the personal surety system operated by decision makers assigning a surety (i.e., a person or several people) to act as a “private jailer”<sup>38</sup> for the accused and to make sure the accused faced justice. The personal surety system had three essential elements: (1) a reputable person (the surety, sometimes called the “pledge” or the “bail”); (2) this person’s willingness to take responsibility for the accused under a private jailer theory and with a promise to pay the required financial condition on the back-end – that is, only if the defendant forfeited his obligation; and (3) this person’s willingness to take the responsibility without any initial remuneration or even the promise of any future payment after forfeiture. Thus, the accused was not required (or even permitted) to pay a surety or jailor prior to release. Excessiveness under a personal surety system meant that the financial condition was in a prohibitively high amount such that no person, or even group of persons, would willingly take responsibility for the accused.

Even before the prohibition on excessive amounts, however, financial conditions of bail were often beyond the means of any particular defendant or a single surety, thus requiring sometimes several sureties to provide “sufficiency” for the bail determination. Accordingly, it is likely that some indicator of excessiveness at a time of relatively plentiful sureties for any particular defendant was merely continued detention despite the amount of the condition being set. Nevertheless, before the abuses leading to the English Bill of Rights and Habeas Corpus Act, there was no real historical indication that high amounts required of the surety led to detention in England, and this trend followed into America: “although courts had broad authority to deny bail for

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financial conditions in America in the twentieth century. Nevertheless, money, when ordered in secured form, is typically the only limitation that acts as a condition precedent to release. Most bail bond conditions are conditions subsequent – that is, release is obtained, but if the condition occurs (or fails to occur, depending on its wording), it will trigger some consequence, and sometimes bring pretrial freedom to an end. Secured money at bail is the quintessential, and typically the only condition precedent. Unlike other conditions, some or all of a secured financial condition often must be paid first in order to initially obtain release.

<sup>37</sup> English Bill of Rights, 1 W. & M., 2d Sess., ch. 2 (1689).

<sup>38</sup> *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869).

defendants charged with capital offenses, they would generally release in a form of pretrial custody defendants who were able to find willing custodians.”<sup>39</sup>

## “Bail” and “No Bail” in America

Indeed, this notion thatailable defendants should necessarily obtain release naturally followed from England to America, a country founded on principles of liberty and freedom. Author F.E. Devine wrote as follows:

Blackstone, writing in the last decade of America’s colonial period, explains the workings of the bail system known to the founders of the United States. A suspected offender who was arrested was brought before a justice of the peace. After examining the circumstances, unless the suspicion was completely unfounded, the justice could either commit the accused to prison or grant bail. A justice of the peace who refused or delayed bail in the case of a suspect who was legally eligible for it committed an offense. Requiring excessive bail was also prohibited by the common law. However, Blackstone explained, what constituted excessive bail was left to the court upon considering the circumstances. Granting bail consisted of a delivery of the suspect to sureties upon their giving sufficient security for appearance. The individual bailed merely substituted, Blackstone remarked, their friendly custody for jail.<sup>40</sup>

Moreover, in colonial America excessiveness rarely played a factor in hindering that release to “friendly custody.” In a review of the administration of bail in colonial Pennsylvania (1682-1787), author Paul Lermack concluded that “bail . . . continued to be granted routinely . . . to persons charged with a wide variety of offenses . . . [and ] [a]lthough the amount of bail required was very large in cash terms and a default could ruin a guarantor, few defendants had trouble finding sureties.”<sup>41</sup> This is likely because “[t]he form of bail in criminal cases, all of the common law commentators agree, was by

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<sup>39</sup> Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 Yale L. J. 320, 323-24 (1987-88); Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 Hous. L. Rev. 731, 748 (1996-97) (same).

<sup>40</sup> F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives*, at 4 [hereinafter Devine] (citing William Blackstone, *Commentaries on the Laws of England*, at pp. 291, 295-97, Chitty ed. (Philadelphia: J.P. Lippincott, 1857) (Praeger Publishers, 1991)).

<sup>41</sup> Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 Temp. L.Q. 475, 497, 505 (1977) [hereinafter Lermack].

recognizance,”<sup>42</sup> that is, with no requirement for anyone to pay money up-front. Sufficiency was often determined by requiring sureties (i.e., persons) to “perfect” or “justify” themselves as to their ability to pay the amount set, but they were not required to post an amount prior to release. Instead, the sureties were held to a debt that would become due and payable only upon their inability to produce the accused.<sup>43</sup> Because the sureties were not allowed to profit, or even be indemnified against potential loss, bonding fees and collateral also did not stand in the way of release.

For the most part, the American colonies applied English law verbatim, but differences in beliefs about criminal justice, differences in colonial customs, and even differences in crime rates between England and the colonies led to more liberal criminal penalties and, ultimately, changes in the laws surrounding the administration of bail.<sup>44</sup> Indeed, the differences between America and England at the time of Independence included fundamental dissimilarities in how to effectuate the “bail/no bail” or “release/detain” dichotomy. While England gradually enacted a complicated set of rules, exceptions, and grants of discretion that governed bailability, America leaned toward more simplified and liberal application by granting a nondiscretionary right to bail to all but those charged with the gravest offenses and by settling on bright line demarcations to effectuate release and detention.

According to Meyer, early American statutes “indicate that [the] colonies wished to limit the discretionary bailing power of their judges in order to assure criminal defendants a right to bail in noncapital cases.”<sup>45</sup> This is a fundamental point worth explaining. In England, the Statute of Westminster listed bailable and unbailable offenses, but bailability was to be finally determined by officials also looking at things like the probability of conviction and the character of the accused, which were, themselves, carefully prescribed in the Statute. Accordingly, there was, even then, discretion left in the “bail/no bail” determination, which was ultimately retained throughout English history. America, on the other hand, chose bright line demarcations of bailable and unbailable offenses, gradually moving the consideration of things like evidence or character of the accused to determinations concerning conditions of bail or release, presumably so they would not interfere with bailability (or release) itself.

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<sup>42</sup> Devine, *supra* note 40, at 5. See also Lermack, *supra* note 41, at 504 (“Provision was sometimes made for posting bail in cash, but this was not the usual practice. More typically, a bonded person was required to obtain sureties to guarantee payment of the bail on default.”).

<sup>43</sup> See Devine, *supra* note 40, at 5.

<sup>44</sup> See Carbone, *supra* note 16, at 529-30.

<sup>45</sup> Meyer, *supra* note 18, at 1162.



Thus, even before some of England's later reforms, in 1641 Massachusetts passed its Body of Liberties, creating an unequivocal right to bail for non-capital cases, and re-writing the list of capital cases. In 1682, "Pennsylvania adopted an even more liberal provision in its new constitution, providing that 'all prisoners shall beailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.'"<sup>46</sup> While this language introduced consideration of the evidence for capital cases, "[a]t the same time, Pennsylvania limited imposition of the death penalty to 'willful murder.' The effect was to extend the right to bail far beyond the provisions of the Massachusetts Body of Liberties and far beyond English law."<sup>47</sup> The Pennsylvania law was quickly copied, and as America grew "the Pennsylvania provision became the model for almost every state constitution adopted after 1776."<sup>48</sup> The Continental Congress, too, apparently copied the Pennsylvania language when it adopted the Northwest Territory Ordinance of 1787.<sup>49</sup>

In addition to their liberality, the commonality of these provisions is that they rested upon the Statute of Westminster's original template of a "bail/no bail" dichotomy.<sup>50</sup> In fact, the language that "all persons areailable . . . unless or except," which is used in various forms in most state constitutions or statutes today, is the classic articulation of that dichotomy. Moreover, even in state bail schemes without constitutional right to bail provisions and with statutes that have tended to erode the notion that bail equal release, the "bail/no bail" dichotomy still exists because at the end of the enacted process, one can typically say that any particular defendant is considered eitherailable or unailable under the scheme. Today, it is more appropriately expressed as "release" or "detention," whether that language is constitutional or statutory, because the notion thatailable should lead to release was foundational in early American law.

Indeed, language from the United States Supreme Court supports the notion thatailable should equal release. In 1891, the Supreme Court described bail as a mechanism of release, even as the Court likely struggled with the potential for detention due to the declining number of personal sureties during the nineteenth

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<sup>46</sup> Carbone, *supra* note 16, at 531 (quoting 5 American Charters 3061, F. Thorpe ed. 1909) (internal footnotes omitted).

<sup>47</sup> *Id.* at 531-32 (internal footnotes omitted).

<sup>48</sup> *Id.* at 532.

<sup>49</sup> Meyer, *supra* note 18, at 1163-64 (citing 1 Stat. 13).

<sup>50</sup> See *Iowa v. Briggs*, 666 N.W. 2d 573, 579 n. 3 (Iowa 2003) ("The initial recognition of a right to bail of the Statute of Westminster underlies the language of a majority of state constitutions and successive forms of federal legislation guaranteeing bail in certain cases.").

century. In *United States v. Barber*, the Court wrote as follows:

It is true that the taking of recognizance or bail for appearance is primarily for the benefit of the defendant, and in civil cases it is usual to require the costs of entering into such recognizances to be paid by the defendant or other person offering himself as surety. But in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time, and as these persons usually belong to the poorest class of people, to require them to pay the cost of their recognizances would generally result in their being detained in jail at the expense of the government, while their families would be deprived in many instances of their assistance and support. Presumptively they are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail, and, as the whole proceeding is adverse to them, the expense connected with their being admitted to bail is a proper charge against the government.<sup>51</sup>

Four years later, the Court similarly explained in *Hudson v. Parker* that the “power to permit bail to be taken” rests on grounds associated with release:

The statutes of the United States have been framed upon the theory that a person accused of a crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail not only after arrest and before trial, but after conviction and pending a writ of error.<sup>52</sup>

Indeed, it was *Hudson* upon which the Supreme Court relied in *Stack v. Boyle* in 1951,<sup>53</sup> when the Court wrote its memorable quote equating the right to bail with the right to release and freedom:

From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1),<sup>54</sup> federal law has unequivocally

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<sup>51</sup> *United States v. Barber*, 140 U.S. 164, 167 (1891).

<sup>52</sup> *Hudson v. Parker*, 156 U.S. 277, 285 (1895).

<sup>53</sup> *Stack v. Boyle*, 342 U.S. 1 (1951).

<sup>54</sup> In addition to the statutory grant of a right to bail, at that time Rule 46 required the bail bond to be set to “insure the presence of the defendant, having regard to the nature and circumstances of the offense

provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.<sup>55</sup>

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

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial, and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . providing: 'A person arrested for an offense not punishable by death shall be admitted to bail' . . . before conviction.<sup>56</sup>

Among other things, *Stack* has been read to stand for the proposition that bail may not be set to achieve invalid state interests,<sup>57</sup> and has been similarly cited by courts and scholars for the proposition that bail set with a purpose to detain would be invalid.<sup>58</sup>

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charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." *Id.* at 6 n. 3.

<sup>55</sup> *Id.* at 4 (internal citations omitted).

<sup>56</sup> *Id.* at 7-8.

<sup>57</sup> See, e.g., *Galen v. County of Los Angeles*, 477 F.3d 652, 660 (2007) ("The state may not set bail to achieve invalid interests.") (citing *Stack*, 342 U.S. at 5, and *Wagenmann v. Adams*, 829 F.2d. 196, 213 (1<sup>st</sup> Cir. 1987) (finding no legitimate state interest in setting bail with a purpose to detain)).

<sup>58</sup> See, e.g., *Duker*, *supra* note 17, at 69 (citing cases); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, at 8 (Dept. of Just. & Vera Foundation 1964) [hereinafter Freed & Wald] ("In sum, bail in America has developed for a single lawful purpose: to release the accused with assurance he will return at trial. It may not be used to detain, and its continuing validity when the accused is a pauper is now questionable."). *Stack* held that "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [court appearance] is 'excessive' under the Eighth Amendment." 342 U.S. at 5. In his concurrence, Justice Jackson addressed a claim that the trial court had set bail in that case with a purpose to detain as follows: "[T]he amount is said to have been fixed not as a reasonable assurance of [the defendants'] presence at the trial, but also as an assurance they would remain in jail. There seems reason

Support for that proposition also comes from Justice Douglas, who had occasion to also write about bail in cases in which he sat as Circuit Justice.<sup>59</sup> In one such case, he commented on the interplay between the clear unconstitutionality of setting bail with the purpose to detain and de-facto detention:

It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. See Foote, Foreword: Comment on the New York Bail Study, 106 U. of Pa. L. Rev. 685; Note, 106 U. of Pa. L. Rev. 693; Note, 102 U. of Pa. L. Rev. 1031. The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal.

In the light of these considerations, I approach this application with the conviction that the right to release is heavily favored and that the requirement of security for the bond may, in a proper case, be dispensed with. Rule 46 (d) indeed provides that ‘in proper cases no security need be required.’ For there may be other deterrents to jumping bail: long residence in a locality, the ties of friends and family, the efficiency of modern police. All these in a given case may offer a deterrent at least equal to that of the threat of forfeiture.<sup>60</sup>

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to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail.” *Id.* at 10. While the Court in *Salerno* upheld purposeful pretrial detention pursuant to the Bail Reform Act of 1984, it did so only because the statute contained “numerous procedural safeguards” that are rarely, if ever, satisfied merely through the act of setting a high secured financial condition. See *United States v. Salerno*, 481 U.S. at 742-43, 750-51 (1987).

<sup>59</sup> In the most notable of these decisions, Justice Douglas uttered language that indicated his desire to invoke the Equal Protection Clause. See *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (“Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?”); *Bandy v. United States*, 82 S. Ct. 11, 13 (1961) (“[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on ‘personal recognizance’ where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.”).

<sup>60</sup> *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (internal footnote omitted).

If “it would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom,” as Justice Douglas so wrote, then how is a judge to effectuate a decision to detain? The Supreme Court answered that question in *United States v. Salerno*,<sup>61</sup> in which the Court approved the federal detention statute (a new articulation of a “no bail” scheme) against facial due process and 8<sup>th</sup> Amendment challenges. Among other things, the *Salerno* Court purposefully mentioned *Stack* as a valid part of bail jurisprudence, thus retaining the relevance of *Stack*’s language equating bail with release. More importantly, however, the *Salerno* opinion teaches us how exactly to implement the “no bail” side of the “bail/no bail” dichotomy. In particular, *Salerno* instructs that when examining a law with no constitutionally-based right to bail parameters (such as the federal law), the legislature may enact statutory limits on pretrial freedom (including detention) so long as they are not excessive in relation to the government’s legitimate interests, they do not offend due process (either substantive or procedural), and they result in bail practices through which pretrial *liberty* is the norm and detention is the carefully limited exception to release.<sup>62</sup>

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<sup>61</sup> 481 U.S. 739 (1987).

<sup>62</sup> *Id.* (“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”).

## Chapter 2. How American Pretrial Decision Making Got Off Track in the Twentieth Century

If the history of bail and the law that grew up around the history suggest, if not demand, a “release/detain” decision, then the critical questions become: “How did we get to where we are today – a point in time when decisions to release result in detention and decisions to detain result in release? How did we get to a point when judges are allowed to make ‘decisions’ that are not immediately effectuated or that are only effectuated through others with differing goals?” The answers to these questions are found in the collision of the two main historical threads in America in the nineteenth and twentieth centuries, and in a line of cases that was created out of necessity due to that collision.

### The Collision of Historical Threads

As previously noted, until the 1800s America had adopted England’s personal surety system to administer bail, a system with three primary elements: (1) a person, or surety, preferably known to the court; (2) willing to take responsibility for any particular defendant; and (3) for no money or even the promise of reimbursement upon default. Because the law required the release ofailable defendants, this personal surety system posed few barriers to the release decision because of these essential elements. Even though amounts of financial conditions might be chosen arbitrarily, and even though the amounts were often high, they were amounts that only needed to be paid on the back-end – that is, they were what we now call unsecured bonds, with financial conditions due and payable only upon default of the defendant. Because sureties were not allowed to profit from the bail transaction or to be indemnified, there were also no fees or any other front-end financial barriers to release. Finding a person or persons sufficient to cover the amount simply meant stacking sureties to the point that the decision maker had reasonable assurance of court appearance. This system worked so long as there were plentiful personal sureties, but in the 1800s, those sureties began to disappear.<sup>63</sup>

It is widely accepted that the personal surety system flourished for some time in England due to that country’s limited geography and somewhat close-knit populace. But in America in the mid-nineteenth century, various factors were at play causing the

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<sup>63</sup> See generally, *Fundamentals*, supra note 14 and sources cited therein.

demand for personal sureties to quickly outgrow the supply. Those factors included (1) “Americans’ pursuit of the rapidly expanding frontier as well as the growth of impersonal urban areas [that] diluted the strong, small community ties and personal relationships supporting the personal surety system,” and (2) “the unsettled frontier [that] increased the risks of a defendant’s flight and created a further disincentive to the undertaking of a personal surety obligation.”<sup>64</sup> On the other hand, demand for sureties in America was increased by an overall decline in the death penalty, and thus an expansion of the right to bail in noncapital cases after 1789.<sup>65</sup> These factors, coupled with ever-rising arbitrary bail bond amounts (financial conditions), meant that an alternative to the personal surety system was necessary to effectuate bail as a mechanism for release and to reduce the growing jail populations due to the detention ofailable defendants. Accordingly, states began experimenting with new ways to administer bail.

Interestingly, albeit for different reasons, England faced the same dilemma of unnecessary pretrial detention of defendants due to lack of personal sureties in the 1800s, but chose a different path toward correcting it. Author Hermine Herta Meyer recounts as follows:

At about the same time, the English became aware of the fact that a system which inseparably connected freedom with money was harsh and unfair to those who were not able to pay the price. To remedy this injustice, the Bail Act of 1898 was enacted. The preamble recites that accused persons were sometimes kept in prison for a long time because of their inability to find sureties, although there was no risk of their absconding or other reason why they should not be bailed. The Act then provided that ‘[w]here a justice has power . . . to admit to bail for appearance, he may dispense with sureties, if, in his opinion, the so dispensing will not tend to defeat the ends of justice.’<sup>66</sup>

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<sup>64</sup> Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Non-financial Release Conditions*, 19 New Eng. J. on Crim. And Civ. Confinement 267, 274, n 38 (1993) [hereinafter Tobolowsky & Quinn]; see also Wayne H. Thomas, Jr., *Bail Reform in America*, at 11-12 (Univ. CA Press 1976); Freed & Wald, *supra* note 58, at 2-3.

<sup>65</sup> See Carbone, *supra* note 16, at 534-35; Tobolowsky and Quinn, *supra* note 64, at 274 n. 38.

<sup>66</sup> Meyer, *supra* note 18, at 1159 (quoting the Bail Act of 1898, 61 & 62 Vic., c. 7 (1898)) (internal footnote omitted).

In addition, England and other common law countries created laws to solidify their rules designed to keep commercial sureties out of the criminal justice system. According to author F.E. Devine,

[D]uring the same period . . . courts in England, India, Ireland, and New Zealand had variously held agreements to indemnify bail sureties to constitute illegal contracts, and the likelihood of indemnification to be grounds to reject sureties and even to deny bail. They had also established that payment of any amount on behalf of the accused to a surety constituted partial indemnification. Thus any commercial development was effectively precluded. Agreement for any payment constituted an illegal contract, unenforceable in the courts, and suspicion of any payment was reason to reject the surety and sometimes to deny the bail. Eventually these become crimes.<sup>67</sup>

America, on the other hand, chose a different solution to the problem of unnecessary detention of bailable defendants for lack of sureties. For varying reasons throughout the nineteenth century, American courts began eroding historic rules against profiting from bail and indemnifying sureties, slowly ushering in the commercial bail bonding business at the end of the century.<sup>68</sup> By 1898, the first commercial bail bonding company opened for business, and by 1912, the U.S. Supreme Court had announced in *Leary v. United States* that “the distinction between bail and [personal suretyship] is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary.”<sup>69</sup>

The differences in solutions between America and these other countries are significant, and illustrate an even more fundamental departure from the historic personal surety system. In England and nearly everywhere else, allowing judges to dispense with sureties allowed courts to continue releasing defendants without requiring any security paid or promised up-front.<sup>70</sup> In America, however, the introduction of commercial bail

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<sup>67</sup> Devine, *supra* note 40, at 6-7.

<sup>68</sup> See generally James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases*, 6 Fordham L. Rev. 387 (1937) [hereinafter Hayes]. This article describes the slow evolution from America’s use of unsecured bonds administered through a personal surety system to its use of secured bonds administered through a commercial surety system primarily by courts questioning and eventually rejecting the historic policy against indemnifying sureties.

<sup>69</sup> *Leary v. United States*, 224 U.S. 567, 575 (1912).

<sup>70</sup> In their 1964 study, Freed and Wald observed that, “In England today, the bail surety relationship continues to be a personal one. At the same time, the discretionary nature of bail is sufficiently flexible to



bondsmen virtually assured the continued unnecessary detention ofailable defendants because even though bondsmen would provide a promise to pay the full amount of the financial condition upon a defendant's failure to appear, the bondsmen themselves would charge up-front fees and later require collateral for their services. The bondsmen chose defendants for their ability to pay these fees and offer collateral, and those who could not do so typically stayed in jail.<sup>71</sup>

Worldwide, America and the Philippines stand alone in their decision to introduce profit into pretrial release. As author Devine observed, except for those two countries, "the rest of the common law heritage countries not only reject [bail for profit], but many take steps to defend against its emergence. Whether they employ criminal or only civil remedies to obstruct its development, the underlying view is the same. Bail that is compensated in whole or in part is seen as perverting the course of justice."<sup>72</sup>

Accordingly, starting in the twentieth century, the historical thread toward using secured bonds administered through a commercial surety system directly collided with the historical thread creating and nurturing a "bail/no bail" dichotomy in whichailable defendants were expected to be released and nonailable defendants were expected to be detained. Instead of being a solution to the problem of unnecessary detention ofailable defendants due to the lack of sureties, the advent of commercial bail in America virtually guaranteed that the problem would continue. Moreover, the reliance upon secured bonds proved also to interfere with the notion of an optimal "no

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permit denial in cases where the magistrate believes that the defendant is likely to tamper with the evidence or commit new offenses if released." Freed & Wald, *supra* note 58, at 2.

<sup>71</sup> Research documenting the negative effects of the for-profit bail system (including effects on victims, taxpayers, and criminal justice system employees in addition to defendants and their families) date back to the 1920s and are too numerous to list here. An overview of some of those effects is found in the American Bar Association's Standards for Criminal Justice on Pretrial Release (3<sup>rd</sup> Ed. 2007). Recent publications highlighting the negative aspects of the traditional money bail system include a three-part series from the Justice Policy Institute: Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*; Spike Bradford, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice*; Jean Chung, *Bailing on Baltimore: Voices from the Front Lines of the Justice System* (2012) found at <http://www.justicepolicy.org/research/4459>, and in the following document authored by the Pretrial Justice Institute and the MacArthur Foundation: *Rational and Transparent Bail Decision Making; Moving From a Cash-Based to a Risk-Based Process* (2012) at [http://www.pretrial.org/download/featured/Rational%20and%20Transparent%20Bail%20Decision%20Ma king.pdf](http://www.pretrial.org/download/featured/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf).

<sup>72</sup> Devine, *supra* note 40, at 201; See also Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, New York Times (January 29, 2008), found at <http://www.nytimes.com/2008/01/29/us/29bail.html?pagewanted=all& r=0>. Bail bonding for profit is also illegal in several American jurisdictions, including Wisconsin, which in 2013 once again rejected an attempt by commercial sureties to work in that state.

bail” side of the dichotomy; in addition to causing the unnecessary pretrial detention of bailable defendants, the traditional money-based bail system tended to allow for the release of persons who most would agree should be unbailable based on their risk to public safety or for failure to appear for court. In sum, the traditional money-based bail system in America has interfered with the historic notions of a “bail/no bail” system in which bailable defendants are released and unbailable defendants are detained. The traditional money bail system has little to do with actual risk, and expecting money to effectively mitigate risk, especially risk to public safety, is historically unfounded.

As previously discussed, the history of bail reveals that any interference with the “bail/no bail” dichotomy typically leads to reform. Unfortunately, however, the pace of twentieth century reform in America has been slow. One of the reasons for that slow pace is due to our courts, which, when confronted with the continued problem of bailable defendants being detained due to secured money bonds, created an unfortunate line of cases that has enabled judges to avoid making effective and immediately effectuated pretrial release and detention decisions.

## The Unfortunate Line of Cases

That line of cases is well known and rarely questioned, but is actually a historical perversion of the idea that bail should equal release. Although worded differently by different courts, it is essentially the jurisprudential principle that bail is not excessive simply because the defendant is unable to pay it.<sup>73</sup> Bail scholars believe that this line of American decisions found its genesis in a case decided in 1835.

That case, *United States v. Lawrence*,<sup>74</sup> requires at least minimal background. Because it did not require up-front payments, the personal surety system in both England and America functioned so that bail could be set despite an accused’s financial inability to

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<sup>73</sup> See *United States v. McConnell*, 842 F.2d 105 (1988) (“But a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement.”). Interestingly, the *McConnell* court concluded the unattainable financial condition was not excessive despite language in the federal statute articulating that, “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.” Relying on the legislative history of the federal law, however, the court wrote that while unattainable conditions of release may lead to detention, they should also trigger higher scrutiny and procedural processes such as those provided in the detention hearing. Despite its recognition of the need for a due process detention hearing, however, it appears that the *McConnell* court did not remand for that hearing because arguments concerning its absence were not raised on appeal. See *id.* n. 5 and accompanying text.

<sup>74</sup> 26 Fed. Cas. 887 (C.C. D.D. 1835) (No. 15,577).

pay. Indeed, as late as 1820, “[l]ower bonds for the poor were considered to violate, not vindicate, the principle of equal justice.”<sup>75</sup> As the numbers of willing personal sureties declined in the 1800s, however, and as jurisdictions began to consider the notion of expanding allowances for defendants to self-pay, courts quickly realized that a defendant’s inability to pay had direct relevance to the issue of detention. Thus, according to author June Carbone, it was *Lawrence* in which a federal court provided “the first recognition that prohibitive bond for the poor might be ‘excessive,’” when it commented on the dilemma posed by monetary conditions on persons of limited means.<sup>76</sup>

In *Lawrence*, the bail-setting judge set a \$1,000 financial condition for a defendant accused with attempting to kill President Andrew Jackson, and recited the following: “to require larger bail than the prisoner could give would be to require excessive bail and to deny bail in a case clearlyailable by law.”<sup>77</sup> When the government objected, however, the court increased the amount to \$1,500 and stated: “This sum, if the ability of the prisoner only were to be considered, is probably too large; but if the atrocity of the offense were alone considered, might seem too small.”<sup>78</sup>

The judge’s consideration of defendant *Lawrence’s* ability to pay his own financial condition predated any formal federal declaration that the relevant statute did not require the giving of common law bail – i.e., personal surety with no remuneration or indemnification. That recognition came only after the Supreme Court’s decision in *Leary v. United States*, mentioned previously, declaring that the personal surety system had given way to the commercial one. According to author James Hayes, it was because of *Leary* that at least one federal appeals court held eight years later that a federal judge had no right to refuse cash bail offered by a prisoner under the federal statute.<sup>79</sup> Nevertheless, because defendant *Lawrence* remained in jail, the case became known as the first to stand for the proposition that inability to pay does not make a financial

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<sup>75</sup> Carbone, *supra* note 16, at 549.

<sup>76</sup> *Id.* at 549; *see also id.* at 550.

<sup>77</sup> *Id.* at 549 (quoting 26 F. Cas. 887 (C.C. D.C. 1835) (No. 15,557)).

<sup>78</sup> Duker, *supra* note 17, at 90 (quoting 26 F. Cas. 887 (C.C. D.C. 1835) (No. 15,557)).

<sup>79</sup> *See* Hayes, *supra* note 68, at 403 (citing *Rowan v. Randolph*, 268 Fed. 529 (C.C.A. 7<sup>th</sup>, 1920)). In *Lawrence*, the judge mentioned the existence of “reputable friends” of the defendant, “who might be disposed to bail him,” indicating, still, the existence of the personal surety system as the primary means of administering bail at that time. Caleb Foote wrote that “[t]he opinion is ambiguous as to whether the 1,500 dollars was designed to make it possible or impossible for *Lawrence’s* ‘reputable friends’ to bail him; in either event, the bail issue was soon mooted when *Lawrence* was committed on the ground of insanity.” Foote, *supra* note 12, at 992.

condition excessive per se.<sup>80</sup> Later in the nineteenth century, states began to counter this somewhat harsh outcome through legislative or judicial fiats requiring courts to consider the pecuniary circumstances of the accused as a measure of the reasonableness of any particular financial condition. This lessened the impact of the rule that monetary conditions need not be attainable, but the rule remained nonetheless.

Courts frequently cite to the rule with no rationale. When they do, the most frequent rationale is simply that the constitutional test for excessiveness is whether the condition provides reasonable assurance of a lawful purpose (or, in other words, whether the condition is greater than necessary to achieve a lawful purpose), not necessarily whether it is or is not attainable.<sup>81</sup> “Reasonable assurance,” however, implies the requirement of some decently objective way of determining whether the amount is unconstitutional, and, ironically it is likely attainability that best provides that objective standard. Comparison of the amount of the financial condition, which is largely arbitrary to begin with, to other largely arbitrary amounts associated with other charges, or to the subjective notions of reasonableness of any particular judge, should not be deemed to meet any objective test. Too often judges choose an amount of money, declare it to be “reasonable assurance” without rationale, and then move to the next case. In his dissent in *Allen v. United States*, Judge Bazelon complained of this practice when he gave the following reason for why a district court bail decision to set a financial condition at \$400 should not be affirmed when the defendant argued that he could only afford to pay \$200:

Nothing in the record supports the determination that a \$400 deposit will insure appellant's appearance while a \$200 deposit will not. Without such support, it appears that he is being deprived of pretrial release solely

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<sup>80</sup> See Carbone, *supra* note 16, at 549-51; Duker, *supra* note 17, at 90-92.

<sup>81</sup> See, e.g., *Galen v. County of Los Angeles*, 468 F.3d 563, 572 (2006). Other rationales include the fact that the various statutory factors do not include “financial condition of the defendant” or that the other factors outweigh the financial condition factor. Occasionally, a court will explain that permitting defendants to be released simply based on their lack of resources would place the defendants in control of the bail process. In 1965, Caleb Foote reported on the “barren state of the case law” surrounding how to reconcile excessive bail in the case of an indigent defendant. He noted the “circular reasoning” employed by current legal encyclopedias in attempting to reflect the “unfortunate” state of the law in which, simultaneously, it was said that bail may not be set in a prohibitory amount lest it deny one of the right to bail, but that setting an amount in a prohibitory amount was not necessarily excessive. See Foote, *supra* note 12, at 992-94.

because he cannot raise the additional \$200. This deprivation plainly violates both the letter and basic purpose of the Bail Reform Act.<sup>82</sup>

Putting aside the idea that a judge's decision to set an amount with an intention to detain is likely unconstitutional for lack of a proper purpose to limit pretrial freedom, the inability of any particular judge to articulate why one amount is adequate while another amount, either higher or lower, is not, is a hallmark of an arbitrary financial condition, and arbitrariness in the law is rarely, if ever, reasonable. Moreover, as we will later see, pretrial research is beginning to show that secured money amounts are not only arbitrary and unfair, but also that they might not even further the constitutional purposes for which they are set; in those cases, the reasonableness of any particular financial condition must similarly be questioned. Accordingly, even if inability to post a financial condition is not a part of the test of excessiveness, a closer look at "reasonable assurance," which is a part of that test, requires us to radically rethink the use of secured financial conditions at bail when doing so is arbitrary or irrational, and thus likely unreasonable.

This line of cases, which sprung from necessity to address the dilemma of indigent defendants, is unfortunate because it enables judges to set virtually any amount and declare that to be their release "decision." But setting a secured financial condition only creates an illusion of a decision, for the actual posting of that amount is now left to others – indeed, it is often left to chance – and a decision left to chance is no decision. This line of cases does not recognize that a judge's responsibility to decide matters before him or her is the essence of the judicial role in America, and it thus encourages decisions that rely on random forces to attain the desired result. Accordingly, the entire line of cases should be viewed as aberrations to the legal and historic notions that bail should equal release, and that a decision to release should be immediately effectuated.

In sum, the history of bail and the law that grew up around that history generally supports judicial decision making that equates "bail" with release and "no bail" with detention, strongly suggesting, if not necessitating, an in-or-out decision by judges in any particular case. If there were any doubts about the continuation of this trend from

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<sup>82</sup> *Allen v. United States*, 386 F.2d 634 (D.C. Cir. 1967). There appear to be few, if any, good reasons for setting a financial condition just beyond the reach of a defendant's stated limits. When a judge knows the financial limit of any particular defendant, and nonetheless sets a financial condition either much higher or even slightly above that limit without some record adequately explaining the difference, appellate courts should presume that the condition to release was set with an improper purpose to detain, which should lead to analysis for excessiveness and denial of due process. Interestingly, both the federal and D.C. bail statutes have attempted to eliminate the need for this line of cases by making it unlawful for a secured financial condition to result in the pretrial detention of the accused.

England to America, those doubts should have been erased by *Stack*, which emphasized release – i.e., the “bail” side of the dichotomy – and *Salerno*, which emphasized detention – i.e., the “no bail” side. Indeed, it is *Salerno* that provides the blueprint to properly effectuate the *Stack* ideal, in which those who are given a right to bail are in fact released. It does this through its approval of the federal preventive detention scheme, which itself is part of a statutory “bail/no-bail” or “release/detain” system, and which is appropriately titled “Release and Detention Pending Judicial Proceedings.”<sup>83</sup> Understanding the federal statute’s in-or-out scheme, as approved by the Supreme Court, is crucial to a full understanding of effective judicial decision making.

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<sup>83</sup> The current version is codified at 18 U.S.C. §§ 3141-56. The District of Columbia bail statute is significantly similar to the federal statute, and, like the federal statute, is often cited as a model release and detention template.

## Chapter 3. “Bail” (Release) and “No Bail” (Detention) Under the Federal Statute

Section 3141 of Title 18 U.S.C. provides that, “A judicial officer authorized to order the arrest of a person . . . before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings, under this chapter.”<sup>84</sup> This foundational release or detain mandate is effectuated through Section 3142, which requires the judge to order that the defendant be either: (1) released on personal recognizance or upon execution of an unsecured appearance bond; (2) released on a condition or combination of conditions; (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion; or (4) fully detained.<sup>85</sup>

On the “bail” side of the release or detain dichotomy, the statute creates a presumption of release on personal recognizance or with an unsecured appearance bond unless the judge finds that such release “will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”<sup>86</sup> In that case, the statute requires the judge to release the defendant on the conditions of not committing new crimes and participating in DNA testing, and “subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community.”<sup>87</sup>

The statute then lists various conditions available to the judge to mitigate the risk for failure to appear or to public safety. Of the conditions listed, it is notable that the first condition is most like the historic personal surety system based on continued custody

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<sup>84</sup> 18 U.S.C. § 3141 (a). This mandate to either release or detain any given defendant is superior to many state statutes, which do not contain such explicit requirements, and which lead to complacency over the puzzling but all-too-common situations in which defendants are ordered released and yet remain detained.

<sup>85</sup> *Id.* § 3142 (a).

<sup>86</sup> *Id.* § 3142 (b), (c) (1).

<sup>87</sup> *Id.* §3142 (c) (1) (A), (B). The notion of least restrictive conditions is fundamental to an in-or-out decision and an overall presumption of release. *See* ABA Standards, *supra* note 6, Std. 10-1.2 (commentary) at 39-40.

with a known and reputable person. That condition allows judges to order the defendant to:

[R]emain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community.<sup>88</sup>

It is equally notable that two of the last conditions listed in the statute deal with money, the second being a bail bond with solvent sureties. It is widely accepted by all but the for-profit bail industry that secured financial conditions, including so-called “surety bonds,” are typically the most restrictive conditions at bail, and thus the statutory placement and order of the conditions themselves indicates further a federal preference to consider secured financial conditions last, in addition to its explicit preference for release on personal recognizance and unsecured appearance bonds.<sup>89</sup>

Perhaps the most significant provision concerning release in the federal statute, however, is found in Section 3142 (c) (2), which states, “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”<sup>90</sup> This language is critical for assuring that secured money, as typically the only condition precedent to release,<sup>91</sup> does not cause unnecessary pretrial detention, or any detention whatsoever, without the sort of procedural due process safeguards approved by the Supreme Court in *United States v. Salerno*.

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<sup>88</sup> 18 U.S.C § 3142 (c) (1) (B) (i).

<sup>89</sup> The Bail Reform Act of 1966 mandated least restrictive conditions through a more explicit preferential order of conditions by requiring judicial officials to “impose the *first of the following* conditions of release” (emphasis added). That list started with personal supervision and ended with money and a catchall provision. See Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat, 214 (1966). The ABA Standards have retained the “first of the following” language when recommending options for release on financial conditions. See ABA Standards, *supra* note 6, Std. 10-5.3, at 110.

<sup>90</sup> 18 U.S.C. § 3142 (c) (2). The District of Columbia statute’s similar provision, which was implemented in 1992 in the form of a mandate, was “critical to the success of the eradication of money in the District of Columbia.” See *Remarks of Susan Weld Shaffer*, National Symposium on Pretrial Justice: Summary Report of Proceedings, at 35 (BJA/PJI May 23, 2011) [hereinafter National Symposium Report].

<sup>91</sup> As noted previously, secured money at bail is typically the only condition that must be met prior to release, and is the condition that typically causes unnecessary pretrial detention of bailable defendants. Although other conditions sometimes require money to administer, many pretrial services programs across America have created ways for indigent defendants to remain free even when they cannot pay all of the administrative costs for certain “non-financial” conditions, such as pretrial services supervision, drug and alcohol testing, and GPS monitoring.



Those safeguards, as articulated in the *Salerno* opinion, are incorporated into the “no bail” side of the “release/detain” dichotomy of the federal statute.<sup>92</sup> Section 3142 (e) provides that, “If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.”<sup>93</sup> This early articulation of a gateway finding that “no conditions or combination of conditions” suffice for release is significant, as it guides judges toward thinking about the tools enabling those judges to release defendants before considering detention.

The rest of the federal detention provisions create a process that provides a relatively broad gateway based on offenses and risk and uses rebuttable presumptions toward detention for certain preconditions, but incorporates procedural safeguards designed to then limit detention to only those defendants who cannot be adequately supervised in the community. In *Salerno*, the United States Supreme Court summarized those statutory safeguards as follows:

[The statute] operates only on individuals who have been arrested for a specific category of extremely serious offenses. Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.<sup>94</sup>

The Court also commented favorably on the detention hearing itself, in which it found relevant that the defendant could request counsel, could testify and present witnesses or even proffer evidence, and could cross-examine any adverse witnesses. Moreover,

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<sup>92</sup> The federal statute also has temporary detention provisions, which are unnecessary to discuss here.

<sup>93</sup> 18 U.S.C. § 3142 (e) (1).

<sup>94</sup> *United States v. Salerno*, 481 U.S. 739, 750 (1987) (internal citations omitted). Despite these safeguards, there are some who argue, often convincingly, that the detention rates in some federal courts have nonetheless grown to unacceptable levels.

the Court noted, the judges setting bail were required to follow certain statutory criteria in making their decisions and to articulate their reasons for detention in writing. Finally, the decision to detain was, and still is, immediately appealable.<sup>95</sup>

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<sup>95</sup> *See id.* at 742-43; 18 U.S.C. § 3145.

## Chapter 4. The National Standards on Pretrial Release

In 1968, the American Bar Association combined the law, the history of bail, and the existing pretrial research to create its first edition of *Standards Relating to Pretrial Release*,<sup>96</sup> which contained specific recommendations on virtually every criminal pretrial issue and was designed to help decision makers lawfully and effectively administer bail. The second edition standards, approved in 1979, were written, in part, “to assess the first edition in terms of the feedback from such experiments as pretrial release projects . . . and similar developments that had been initiated largely as a result of the influence of the first edition.”<sup>97</sup> The second edition was revised in 1985, “primarily to establish criteria and procedures for preventive detention in limited category of cases.”<sup>98</sup> Among other things, the most recent edition, completed in 2002 and published in 2007, includes discussion of public safety in addition to court appearance as a valid constitutional purpose for limiting pretrial freedom, and addresses pretrial release and detention in the wake of the United States Supreme Court’s opinion in *United States v. Salerno*, which upheld the federal detention scheme against facial due process and Eighth Amendment claims.<sup>99</sup>

Overall, the current Standards make clear that the decision to release or detain is just that – an in-or-out or “bail/no bail” decision – that is expected to be effectuated at the time the decision is made. The Standards do this primarily by recommending a drastic reduction in the use of money at bail.

The Standards consider the judicial decision to release or detain a defendant pretrial to be a “crucial” decision, albeit complicated by the need to “strike an appropriate balance” between competing societal interests of individual liberty, public safety, and court appearance.<sup>100</sup> Indeed, this is the fundamental complexity of bail, which requires judges to simultaneously maximize release, court appearance, and public safety. Nevertheless, this is also why bail is inherently a judicial function. Some entities, such

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<sup>96</sup> American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release - Approved Draft*, 1968 (New York: American Bar Association, 1968).

<sup>97</sup> Martin Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence*, 23 *Crim. Just.* 2-3 (2009). This article also illustrates the ABA Standards as important sources of authority by courts (including the United States Supreme Court and numerous state supreme courts) and legislatures across the country.

<sup>98</sup> ABA Standards, *supra* note 6, at 30 n. 3.

<sup>99</sup> *Id. passim*.

<sup>100</sup> *See id.*, Introduction, at 29-30. The Standards reflect a similar balance in their statement of the purpose of the release decision, which includes providing due process, avoiding flight, and protecting the public. *See id.*, Std. 10-1.1 at 36.

as for-profit bail bondsmen or bail insurance companies, may show concern only for court appearance, even to the point of incorrectly stating that court appearance is the sole function of bail. Other criminal justice actors rightfully focus on public safety as a primary goal in striking the balance, just as defenders might emphasize liberty. Judges, however, are the only criminal justice actors who are required to make decisions (and, indeed, have those decisions reviewed for error) that incorporate all three goals of bail decision making – individual liberty, public safety, and court appearance.

Nevertheless, the Standards recognize that striking this balance is made most difficult when money is involved. Indeed, the Standards stress that “the problems with the traditional surety bail system undermine the integrity of the criminal justice system and are ineffective in achieving key objectives of the release/detention decision.”<sup>101</sup> Even in the most recent edition, the Standards quote with approval the introduction to the 1968 version, which read as follows:

The bail system as it now generally exists is unsatisfactory from either the public’s or the defendant’s point of view. Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise – that risk of financial loss is necessary to prevent defendants from fleeing prosecution – is itself of doubtful validity. The requirement that virtually every defendant must post [financial conditions of] bail causes discrimination against defendants and imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependents on welfare. Moreover, bail is generally set in such a routinely haphazard fashion that what should be an informed, individualized decision is in fact a largely mechanical one in which the name of the charge, rather than the facts about the defendant, dictates the amount of bail.<sup>102</sup>

According to the Standards, the high stakes to the defendant and the community are best reflected in the two kinds of mistakes that can be made at bail: “a defendant who could safely be released may be detained or a defendant who requires confinement may be released.”<sup>103</sup> And thus, the Standards are designed to meet two interrelated needs: “the need to foster safe pretrial release of defendants whenever possible, and the need

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<sup>101</sup> *Id.*, Introduction, at 30.

<sup>102</sup> *Id.* at 31 (quoting American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release – Approved Draft, 1967* (New York: American Bar Association, 1968), at 1.

<sup>103</sup> *Id.* at 35.

to provide for pretrial detention of those who cannot be safely released.”<sup>104</sup> It is a “release/detain” scheme, effectuated rightfully by judges making in-or-out decisions.

The ABA Standards emphasize in commentary the importance of the in-or-out decision by articulating foundational principles upon which the relevant recommendations are made. The Standards summarize these principles as follows:

[T]hese Standards view the decision to release or detain as one that should be made in an open, informed, and accountable fashion, beginning with a presumption (which can be rebutted) that the defendant should be released on personal recognizance pending trial. The decision-making process should have defined goals, clear criteria, adequate and reliable information, and fair procedures. When conditional release is appropriate, the conditions should be tailored to the types of risks that a defendant poses, as ascertained through the best feasible risk assessment methods. A decision to detain should be made only upon a clear showing of evidence that the defendant poses a danger to public safety or a risk of non-appearance that requires secure detention. Pretrial incarceration should not be brought about indirectly through the covert device of monetary bail.

The strong presumption in favor of pretrial release is tied, in a philosophical if not a technical sense, to the presumption of innocence. It also reflects a view that any unnecessary detention is costly to both the individual and the community, and should be minimized. However, the Standards make it clear that under certain circumstances the presumption of release can be overcome by showing that no conditions of release can appropriately and reasonably assure attendance in court or protect the safety of victims, witnesses, or the general public.<sup>105</sup>

In this recommended release and detention model, the Standards emphasize the fundamental legal principle of release on “least restrictive conditions,” which, as illustrated in the above quotation, translates first into an explicit recommendation that judges adopt a presumption of release on recognizance. That presumption may be rebutted by evidence that there is: (1) a substantial risk of nonappearance or the need for additional release conditions; or (2) evidence that the defendant should be detained through an open and transparent detention process or on conditions while awaiting

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<sup>104</sup> *Id.* at 33.

<sup>105</sup> *Id.* at 35-36.

diversion or some other alternative adjudication program.<sup>106</sup> Overall, the Standards create a recommended scheme in which the decision to release is effectuated through the use of least restrictive conditions, and the decision to detain is effectuated through a transparent detention process designed to work when *no condition or combination of conditions* suffice to reasonably assure court appearance or public safety. The Standards' underlying premise is that a defendant's perceived risk of nonappearance or public safety can typically be addressed *after release* through conditions that are designed to reasonably mitigate that risk.

The crux of the presumption of release under least restrictive conditions, however, as well as the notion that judges should make the final in-or-out decision for any particular defendant, is found in the Standards' recommendations dealing specifically with financial conditions. Commentary to the ABA Standards' general recommendation dealing with release on conditions states that, "Financial conditions . . . are to be imposed only to ensure court appearance and under the limits described more fully in Standard 10-5.3. The amount of bond should take into account the assets of the defendant and financial conditions imposed by the court should not exceed the ability of the defendant to pay."<sup>107</sup>

Standard 10-5.3, in turn, is specifically designed to effectuate a foundational premise "that courts . . . should make the actual decision about detention or release from custody."<sup>108</sup> Thus, while the Standards allow the use of secured financial conditions, they "greatly restrict"<sup>109</sup> their use through Standard 10-5.3, which is quoted here in full:

**Standard 10-5.3 Release on financial conditions**

(a) Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.

(b) Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.

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<sup>106</sup> See *id.*, Std. 10-5.1 at 1; see also *id.*, Stds. 10-5.8, 5.9, 5.10 (grounds, eligibility, and procedures for pre-trial detention), at 124-38.

<sup>107</sup> *Id.*, Std. 10-5.2 (commentary) at 109.

<sup>108</sup> *Id.*, Std. 10-5.3 (commentary) at 111.

<sup>109</sup> *Id.*, Std. 10-1.4 (commentary) at 43.

(c) Financial conditions should not be set to punish or frighten the defendant or to placate public opinion.

(d) On finding that a financial condition of release should be set, the judicial officer should require the first of the following alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance: (i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not; (ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to ten percent of the face amount of the bond. The full deposit should be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or (iii) the execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

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

(f) Financial conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schedule.

(g) In appropriate circumstances, when the judicial officer is satisfied that such an arrangement will ensure the appearance of the defendant, third parties should be permitted to fulfill these financial conditions.<sup>110</sup>

In 1965, Professor Caleb Foote called the central problem of a money-based bail system administered to mostly poor defendants an insoluble "riddle."<sup>111</sup> In 2007, however, author John Clark correctly wrote that solving the riddle is now within our grasp

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<sup>110</sup> *Id.* Std. 10-5.3 at 17-18; 110-111.

<sup>111</sup> *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* at 226-27 (Washington, D.C. Apr. 1965).

simply by following the ABA Standards, and especially Standard 10-5.3, quoted above. Indeed, Clark wrote, changing judicial decision making to reduce reliance on money bail is essential to effectuating an in-or-out decision that is the essence of good government:

While such cherished concepts as equal justice and due process should always be stressed, the public also needs to understand the implications for society of a system that relies on money bail. When a judicial officer sets a money bail, the outcome of whether the defendant is released or held is out of the hands of that judicial officer. It is then left to the defendant, his or her family, or any of the bail bondsmen working in the community to determine if the defendant stays in jail or goes home.

From a public policy perspective, this flies in the face of good government, because the result is that public officials have little control over the use of one of the most expensive and limited resources in any community – a jail bed.<sup>112</sup>

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<sup>112</sup> John Clark, *Solving the Riddle of the Indigent Defendant in the Bail System*, Trial Briefs (Oct. 2007) at 34.



## Chapter 5. Effective Pretrial Decision Making

If the history of bail and the law support a “bail/no bail” decision, and if the national best practice standards similarly recommend and justify through the law and research a “release/detain” or in-or-out decision, a decision through which virtually all bailable defendants are immediately released, and unbailable defendants are detained through a fair and transparent process of detention, then why do judges persist in setting secured financial conditions, the only condition known to significantly interfere with this decision-making process? Like dealing with indigent defendants, it is a riddle more complicated than it appears. Indeed, as recently as 2010 a single jurisdiction reported the difficulty in changing judicial decision making to better support legal and evidence-based practices at bail as reflected in the ABA Standards.

That year, judges in Jefferson County, Colorado, decided to spend 14 weeks setting bail by following, in the main, the ABA’s National Standards on Pretrial Release as well as specific local recommendations for making judicial decisions that paralleled those Standards.<sup>113</sup> A report filed after the project showed progress toward adherence to certain best practices, but also showed “much room to improve” because, even despite trying to follow the ABA Standards, judges still insisted on: (1) using commercial sureties; (2) using money to protect the public; (3) avoiding release on unsecured bonds for a myriad of customary, albeit illogical or arbitrary reasons; and (4) setting secured financial conditions without any recorded rationale indicating that the judge considered the defendants’ ability to meet them.<sup>114</sup> The study is significant for many reasons, but the fundamental point for purposes of this paper is that these judges were trying faithfully to follow the Standards during the study period, and yet, in many cases they still could or would not. Later studies of the same jurisdiction showed that despite the ABA’s recommendation to use money only as a last resort due to its inequality and tendency to detain otherwise bailable defendants, the judges in Jefferson County were still considering money first, and still setting unattainable secured financial conditions resulting in defendants who were ordered released but who remained detained.

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<sup>113</sup> Many of the local recommendations were reflected in a Chief Judge Order creating the 14 week study. A general overview of the Jefferson County Bail Project may be found in the document presented at the National Symposium of Pretrial Justice. See Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, and Hon. Margie Enquist, *The Jefferson County Bail Project: Project Summary Presented to the Attorney General’s National Symposium on Pretrial Justice* (May 23, 2011) found at <http://www.pretrial.org/download/research/The%20Jefferson%20County%20CO%20Bail%20Project%20Summary%20May%202011.pdf>.

<sup>114</sup> See *The Jefferson County Bail Impact Study: Initial Report on Process Data for the System Performance Subcommittee* (July 23, 2010), available from Jefferson County public records or through the author.

This is the historical dilemma concerning the Standards; despite their reputation as best-practice recommendations, courts have had difficulty in actually implementing them – especially those parts of the Standards that seek to reduce reliance on money at bail. Until recently, there was perhaps no answer to this dilemma. But that is beginning to change due to the current direction in pretrial research. While pretrial research has proceeded down a variety of substantive paths throughout the twentieth and into the twenty-first centuries, the research being conducted during this third generation of bail reform<sup>115</sup> is most relevant to helping judges make decisions to release or detain that are immediately effectuated and not contingent upon any other person or entity. That relevance comes from the research: (1) showing judges the negative effects of not making a “bail/no bail” or in-or-out decision; and (2) showing judges how to make a more effective “bail/no bail” or in-or-out decision so as to avoid those negative effects.

## The Negative Effects of Not Making an Immediately Effectuated In-or-Out Decision

Research over the last several decades has consistently shown that compared to defendants released pretrial, defendants detained during the entirety of their pretrial phase fare considerably worse. Overall, “the research shows that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period. These relationships hold true when controlling for other factors, such as current charge, prior criminal history, and community ties.”<sup>116</sup>

Most recently and more specifically, the Laura and John Arnold Foundation funded significant research examining a large, multi-state data set and ultimately showing that, controlling for all other relevant factors, defendants detained for their entire pretrial period are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison (and for longer periods in both cases) than defendants

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<sup>115</sup> Professor John Goldkamp first categorized twentieth century efforts at American pretrial reform in terms of “generations.” See John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services*, 57 Fed. Probation 28, 34 n.3 (1993). For a brief description of the third generation, see Timothy R. Schnacke, Claire M.B. Brooker, and Michael R. Jones, *The Third Generation of Bail Reform*, D.U. Law Rev. Online (Mar. 14, 2011), found at <http://www.denverlawreview.org/online-articles/2011/3/14/the-third-generation-of-bail-reform.html>.

<sup>116</sup> *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process*, at 2 (PJI/MacArthur Found. 2012).

released at some point, and the results were even more pronounced for low risk defendants.<sup>117</sup> This is powerful new research, but only confirms what judges and others have presumably known for decades about the outcomes for defendants confined for their entire pretrial period.

More important, then, is additional Arnold Foundation research that is beginning to determine the public safety costs of keeping defendants in jail for even short periods of time. In a separate study, though again with a large data set, researchers found “strong correlations between the length of time low- and moderate-risk defendants were detained before trial, and the likelihood that they would reoffend in both the short- and long-term.”<sup>118</sup> Specifically, the researchers found that when compared to defendants held no more than 24 hours, low risk defendants who were held for two to three days were 40% more likely to commit new crimes before trial and 22% more likely to fail to appear, and if held for 31 days or more were 74% more likely to commit new crimes pretrial and 31% more likely to fail to appear. Moderate risk defendants showed the same correlations, albeit at different rates. Moreover, the researchers found, low risk defendants held two to three days were more likely to commit a new crime within two years, and defendants held for eight to fourteen days were 51% more likely to recidivate long-term than defendants detained less than 24 hours.<sup>119</sup> Interestingly, for high risk defendants there was no relationship between pretrial detention and increased crime, “suggest[ing] that high-risk defendants can be detained before trial without compromising, and in fact enhancing, public safety and the fair administration of justice.”<sup>120</sup>

Pretrial detention has always had costs (including jail bed costs, public welfare costs, such as for lost jobs or for money needed to support defendant families, and other, difficult to quantify social costs, such as denying the defendant the ability to help with his or her defense), but this research illuminates costs going to the very function of bail itself. Since we have known for some time that secured money bonds lead to detention – keeping some defendants in jail for the duration of their pretrial period and keeping some in for shorter periods of time until they can gather the money necessary for

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<sup>117</sup> Christopher Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (LJAF 2013).

<sup>118</sup> *Pretrial Criminal Justice Research* at 2 (LJAF 2013) found at [http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf).

<sup>119</sup> See Christopher Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (LJAF 2013).

<sup>120</sup> *Pretrial Criminal Justice Research*, *supra* note 118 at 4.

release<sup>121</sup> – this new research shows how a judge’s decision to set a secured bond can actually lead to increased danger to public safety both in the short- and long-term. Concomitantly, because detaining high risk defendants does not lead to the same bad outcomes shown for low and moderate risk defendants, the research shows the importance of (1) determining defendants’ risk; and (2) doing everything possible to make clear in-or-out decisions so that low to moderate risk defendants are released as quickly as possible and the highest risk defendants are detained.

## Research Helping Judges to Avoid the Negative Effects

An in-or-out bail decision can be best effectuated using the other strand of pretrial research, which is a two-part strand that seeks to help judges make an effective “release/detain” determination. The first part of this strand is found in research developing empirical pretrial risk assessment instruments. The second part is found in the research dedicated to assessing whether certain conditions of bail or limitations on pretrial freedom are effective in furthering the various purposes underlying the bail process.

### **Part One – Risk Assessment Instruments**

The majority of the most recent risk assessment instrument research is too new to be included in the ABA Standards. The Standards mention various attempts to assess predictors of pretrial performance, even going back to the 1920s, and over the years single jurisdictions, such as counties, have occasionally created risk instruments using generally accepted social science research methods, but their limited geographic influence and sometimes their lack of data from which to test multiple variables meant that research in this area spread slowly. That changed significantly in 2003, when the first multijurisdictional instrument, the Virginia Pretrial Risk Assessment Instrument,<sup>122</sup> was developed, only one year after the last edition of the Standards was approved.<sup>123</sup> Since then, other multi-jurisdictional risk instruments have been developed, including

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<sup>121</sup> See Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts* (BJS 2007) [hereinafter Cohen & Reaves]; see also Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (PJI 2013).

<sup>122</sup> See Marie VanNostrand, *Assessing Risk Among Pretrial Defendants In Virginia: The Virginia Pretrial Risk Assessment Instrument* (Va. Dept. Crim. Just. Servs. 2003).

<sup>123</sup> The Standards nonetheless cite to Dr. VanNostrand’s Virginia study as the latest in a long line of studies designed to empirically identify predictors of defendant pretrial performance. See ABA Standards, *supra* note 6, at 57 n. 22.

in Kentucky, Ohio, Colorado, Florida, and the federal system, and now other American jurisdictions, including single cities and counties, are working on similar instruments or borrowing other instruments while validating them to their own populations. As recently as 2013, the Laura and John Arnold Foundation developed a risk instrument created with enough cases to be generalizable across the United States.<sup>124</sup>

The Pretrial Justice Institute describes a pretrial risk assessment instrument as follows:

A pretrial risk assessment instrument is typically a one-page summary of the characteristics of an individual that presents a score corresponding to his or her likelihood to fail to appear in court or be rearrested prior to the completion of their current case.

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Responses to the questions are weighted, based on data that shows how strongly each item is related to the risk of flight or rearrest during pretrial release. Then the answers are tallied to produce an overall risk score or level, which can inform the judge or other decisionmaker about the best course of action.<sup>125</sup>

The creation and dissemination of these types of instruments across the country are part of the critical infrastructure judges need to set bail in a legal and evidence-based manner, which includes making an in-or-out decision that is immediately effectuated.

Stated simply, we know that out of every one hundred released defendants, some number of them will fail to appear for court or commit some new offense after being released. This has been true throughout history, and will continue to be true for as long as we allow pretrial release because human behavior cannot be completely predicted, and even someone whom we consider the lowest possible risk is still risky nonetheless. Moreover, we cannot avoid pretrial release, for the American system of criminal justice demands it, and, in fact, demands it in such a way that “liberty is the norm.”<sup>126</sup> A judge’s job, then, is to attempt to predict who these pretrial failures likely will be, recognizing that he or she will never predict them all. In the past, judges were given

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<sup>124</sup> See *Developing a National Model for Pretrial Risk Assessment* (LJAF 2013) found at [http://arnoldfoundation.org/sites/default/files/pdf/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](http://arnoldfoundation.org/sites/default/files/pdf/LJAF-research-summary_PSA-Court_4_1.pdf).

<sup>125</sup> *Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants* (PJI/BJA 2012), found at [http://www.pretrial.org/download/advocacy/PJI%20Risk%20Assessment%20101%20\(2012\).pdf](http://www.pretrial.org/download/advocacy/PJI%20Risk%20Assessment%20101%20(2012).pdf).

<sup>126</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

their discretion and a number of somewhat intuitive statutory factors to make this prediction, but these factors may or may not have been actually predictive of pretrial success or failure, and they certainly were not weighted to tell those judges which factors were statistically more predictive than others. In the past, then, judges would often make decisions that may have been no better (and perhaps sometimes worse) than flipping a coin.

With the advent of the newest versions of statistical pretrial risk instruments that test the interrelated predictability of numerous variables, however, research has added an indispensable tool to allow any particular judge to do his or her job of trying to predict the inevitable failures. And while complete predictability will never be attained, a pretrial risk assessment tool nevertheless allows a judge to say, for example, “This defendant is scored as ‘low risk’ or ‘category one,’ and accordingly I know that his performance should look like that of other defendants in the past who have been scored the same, which means that he likely has a 95% chance of showing up for court and a 91% chance of not committing a new crime.” This is not absolute assurance, but absolute assurance is not required by the law. Instead, the law requires us to embrace risk so that release is the norm, and then to mitigate that risk only to the level of *reasonable* assurance. Pretrial risk assessment instruments are tools that allow judges to both embrace and mitigate risk.

## **Part Two – Assessing Which Conditions are Effective for Their Lawful Purposes**

The second part of the strand of research that helps judges make better “release/detain” decisions is the part that looks into which conditions of release, or limitations on pretrial freedom, are the most successful for achieving the various purposes of the bail decision-making process.

Researchers, bail historians, and even the National Judicial College state that the purpose of an effective bail decision is to maximize release while maximizing public safety and court appearance.<sup>127</sup> The ABA Standards state that the purposes of the

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<sup>127</sup> Researchers have previously articulated a purpose of bail to include maximizing release in varying ways. See Stevens H. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvements*, 1 Research In Corrections 3 (NIC 1988) (“Pretrial Release Policy in the American criminal justice system has two goals: (1) to allow pretrial release whenever possible and thus avoid jailing a defendant during the period between his arrest and court disposition, and (2) to control the risk of failure to appear and of new crimes released by defendants.”); John Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services*, 57 Fed. Probation 1 (1993) (“Effective release may be most simply

release decision “include providing due process to those accused of crime [e.g., protecting one’s liberty interest], maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger or interference.”<sup>128</sup> The similarity of these two statements of purpose is not surprising; the history of bail and the law intertwined with that history demonstrate that the primary purpose of bail is to provide a mechanism of release or pretrial freedom, and that the purposes for limitations on that freedom are to further court appearance and public safety. Release, court appearance, and public safety are the three interrelated interests that must be balanced, whether one looks at the “effectiveness” or the “lawfulness” of any particular pretrial decision. Therefore, research that demonstrates how to maintain high release rates while maintaining high court appearance and public safety rates is superior to research that does not address all three.

Accordingly, the test today is whether any particular pretrial research helps judges to make an in-or-out decision so as to avoid the negative effects of pretrial detention (i.e., maximizing release, and, if possible, maximizing immediate release) that also maintains high court appearance and public safety rates. In the 2011 document titled, *State of the Science of Pretrial Release Recommendations and Supervision*,<sup>129</sup> judges can read about the

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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 period.”); John S. Goldkamp, Michael R. Gottfredson, Peter R. Jones, & Doris Weiland, *Personal Liberty and Community Safety: Pretrial Release in the Criminal Court* (New York: Plenum Press 1995) (“An effective pretrial release occurs when a defendant is released from jail, does not commit a new crime, and makes all court appearances.”); John Clark, *A Framework for Implementing Evidence-Based Practices in Pretrial Services*, *Topics in Community Corrections* 4 (2008) (“The goal of pretrial services is to maximize rates of pretrial release while minimizing pretrial misconduct through the use of least restrictive conditions.”). Most recently, researchers have hinted at a legal justification behind these statements favoring release beyond mere “effectiveness.” See Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research* 2 (PJI 2012) (“Judges, prosecutors, defense attorneys, law enforcement, jail officials, victims’ advocates, pretrial services programs, researchers, grantors, foundations, and national professional organizations have been working to determine the most legal, research-based, and cost-effective way to further the purpose of bail: to maximize the release of defendants on the least restrictive conditions that reasonably assure the safety of the public and defendants’ appearance in court.”). The ABA Standards articulate the “purposes of the release/detention decision,” and not the purpose of bail itself, but state that “the law favors the release of defendants pending adjudication of charges,” noting that the statement is “consistent with Supreme Court opinions [i.e., *Stack v. Boyle* and *United States v. Salerno*] emphasizing the limited permissible scope of pretrial detention.” ABA Standards, *supra* note 6, Std. 10-1.1 (commentary) at 37, 38.

<sup>128</sup> ABA Standards, *supra* note 6, Std. 10-1.1, at 1, 36.

<sup>129</sup> Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (PJI/BJA 2011) [hereinafter *State of the Science*].

effectiveness of various release conditions and supervision techniques, such as court date notifications, drug testing, electronic monitoring, and pretrial supervision, which all have varying literatures supporting their ability to achieve one or more of the interrelated purposes. Research in these areas is ongoing. For example, as recently as late 2013 researchers studying pretrial supervision found that “supervised defendants [especially moderate to high risk defendants] were significantly more likely to appear for court” and that “[p]retrial supervision of more than 180 days may also decrease the likelihood of NCA [new criminal activity].”<sup>130</sup> To the extent that pretrial supervision helps judges to maximize release, then this study is an especially good one because it provides useful information that furthers the threefold purpose of the bail process.

Nevertheless, non-financial conditions, like those mentioned above, rarely cause unnecessary pretrial detention. Secured financial conditions, on the other hand, do cause unnecessary pretrial detention because they are typically the only condition precedent to release. As noted previously, the research has consistently shown what logic should suffice to tell us: secured financial conditions cause detention, with higher amounts of money leading to higher detention rates. Accordingly, what has been needed in the pretrial field is research that specifically addresses money, and, more particularly, addresses how judges who still believe that they must set financial conditions of bail can do so in ways that simultaneously maximize quick release, public safety, and court appearance rates.

Generally speaking, the relevant research looking at money releases up to now has focused on “bond types” or “release types” because historically bail bonds have been labeled or “typed” based on their use of money. For example, a “surety bond” is a type of bond that is written through and backed by a for-profit surety company. An “unsecured personal recognizance bond” is a bond that requires no money up-front, but which requires the defendant to pay some amount of money if he or she fails to appear for court. Creating and defining bond “types” based on how they use a single condition of release – i.e., money – represents an antiquated way of describing a process of release or detention, but because it is prevalent in our current administration of bail, the relevant research typically discusses findings based on types.

Moreover, generally speaking, the relevant research up to now has suffered from serious drawbacks. As reported by Marie VanNostrand, et al. in 2011, “Nearly all state court research conducted on a national level in an attempt to identify the most effective term of release (release on own recognizance, unsecured bail, secured bail), has been

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<sup>130</sup> Christopher Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* at 17 (LJAF 2013).



completed using the State Court Processing Statistics (SCPS) data.”<sup>131</sup> Unfortunately, however, and as noted by the Bureau of Justice Statistics itself (which compiles the SCPS information), the SCPS data contains several significant limitations that preclude any ability to meaningfully compare release or bond types.<sup>132</sup> For this and other reasons, researchers Kristen Bechtel, et al., explain that previous research attempting to make these comparisons has suffered from methodological limitations, has not accounted for alternative explanations, or, most importantly for purposes of this paper, has only focused on one purpose underlying the bail process – court appearance – at the expense of public safety and release rates.<sup>133</sup>

To date, only one study specifically focusing on the use of money at bail has accounted for all of the limitations previously unaccounted for and has measured effectiveness of the studied phenomenon on all three purposes of the release decision. Published in 2013, Michael R. Jones, Ph. D., compared release on unsecured bonds (meaning that money was promised by a defendant but did not have to be paid unless and until the defendant failed to appear) versus secured bonds (meaning that money was required to be paid prior to release, either through the defendant, the defendant’s friends and family, or to a bail bondsman for a fee) in approximately 2,000 Colorado cases consisting of defendants in all known risk categories. Controlling for all other factors, including risk, Dr. Jones reported the following:

[T]he type of monetary bond posted [secured versus unsecured] does not affect public safety or defendants’ court appearance, but does have a substantial effect on jail bed use. Specifically, when posted, unsecured bonds (personal recognizance bonds with a financial condition) achieve the same public safety and court appearance results as do secured (cash and surety) bonds. This finding holds for defendants who are lower, moderate, or higher risk for pretrial misconduct. However, unsecured bonds achieve these public safety and court appearance outcomes while using substantially (and statistically significantly) fewer jail resources. That is, more unsecured bond defendants are released than are secured

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<sup>131</sup> *State of the Science*, *supra* note 129, at 33-34.

<sup>132</sup> See Thomas Cohen & Tracey Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitations* (BJS 2010).

<sup>133</sup> See Kristin Bechtel, John Clark, Michael R. Jones, & David J. Levin, *Dispelling the Myths, What Policy Makers Need to Know About Pretrial Research*, *passim* (PJI, 2012).

bond defendants, and unsecured bond defendants have faster release times than do secured bond defendants.<sup>134</sup>

As noted previously, secured bonds tend to keep some defendants in jail for the entire pretrial period and keep others in for some shorter amount of time until they find the money to pay for release. Measuring this particular phenomenon, Dr. Jones found that it took four days longer for defendants with secured bonds to reach a given release threshold as defendants with unsecured bonds due to delays likely inherent in a money-based release process:

After judicial officers set defendants' bonds, unsecured bonds enable defendants to be released from jail more quickly than do secured bonds. This finding is expected because nearly all defendants who receive unsecured bonds can be released from custody immediately upon signing their bond, whereas defendants with secured bonds must wait in custody until they or a family member or friend negotiates a payment contract with a commercial bail bondsman or their family member or friend posts the full monetary amount of a cash bond at the jail. This finding indicates that the process of posting a secured bond takes much longer than the process of posting a unsecured bond for released defendants. Furthermore, this finding is consistent with previous research using data from across the United States that shows released defendants with secured bonds remained in jail longer than did released defendants with bonds that did not require a pre-release payment (Cohen & Reaves, 2007).<sup>135</sup>

Recent data from Kentucky similarly indicates that judicial decisions that rely less on secured bonds can, in fact, positively affect all three purposes underlying the bail process. In 2012, Kentucky Pretrial Services released a report on the impact of House Bill 463, a law substantially altering the bail statute to better incorporate risk while including presumptions for release on recognizance and unsecured bonds as well as an overall decrease in the use of money.<sup>136</sup> The report found that these changes in the administration of bail in Kentucky led not only to higher release rates, but also higher

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<sup>134</sup> Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, at 19 (PJI 2013).

<sup>135</sup> *Id.* at 15.

<sup>136</sup> See *Pretrial Reform in Kentucky* (Kentucky Pretrial Services, Jan. 2013) at 13, found at [http://www.apainc.org/html/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%20\(Final\).pdf](http://www.apainc.org/html/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%20(Final).pdf).

court appearance and public safety rates for those who were released.<sup>137</sup> These data, along with the virtually moneyless administration of bail performed each day in the District of Columbia,<sup>138</sup> strongly suggest that secured financial conditions are not necessary for public safety and court appearance, and should make judges seriously question altogether the continued use of money as the prime determinate of release.

Secured financial conditions have always been unfair, and so even without research judges should avoid ordering them due to their tendency to cause unnecessary pretrial detention. Nevertheless, the impact of research showing the effectiveness of unsecured compared to secured financial conditions, combined with research documenting the negative effects associated with even short-term detention, is potentially monumental. Specifically, it provides a solution for those judges who are not completely comfortable with eliminating the use of money, but who nonetheless want to make a release decision that: (1) is immediately effectuated; (2) avoids creating any additional risk to public safety, court appearance, or any other number of deleterious effects caused by even short amounts of unnecessary pretrial detention; (3) follows the law and the history by promoting the actual release of bailable defendants (indeed, through a centuries-old method of using unsecured financial conditions); (4) follows the ABA's Standards by using a fairer and less-restrictive form of financial condition; and (5) avoids money taking on a life of its own and becoming a stakeholder or decision maker in an otherwise rational pretrial bail process. The solution is for judges simply to use unsecured financial conditions instead of secured financial conditions whenever they deem that money is absolutely necessary.

The question of whether money motivates at bail is still largely unknown. The ABA Standards state that the premise is doubtful, and supply ample recommendations to steer judges from release decisions that require money to effectuate them. For those judges who still believe money to be some motivation, however, making the financial condition an unsecured one – one that requires nothing to gain release and that is due and payable only upon forfeiture of the condition – is one that will avoid virtually every problem associated with the traditional money bail system when it comes to the release of bailable defendants. In fact, a release decision using unsecured financial conditions

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<sup>137</sup> See *Report on Impact of House Bill 463: Outcomes, Challenges, and Recommendations* (KY Pretrial Servs. June 2012).

<sup>138</sup> See *The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth*, found at <http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf>. According to the D.C. Pretrial Services Agency website, 89% of released defendants were arrest-free during their pretrial phase in 2012 (with only 1% of those arrested for violent crimes) and 89% of defendants did not miss a single court date. See at <http://www.psa.gov/>.

coupled with pretrial services supervision is the closest thing we have today to the historic system of personal surety release that worked in both England and America for centuries.

## Chapter 6. The Practical Aspects of Making an Effective “Release/Detain” or In-or-Out Decision

Effective bail decisions maximize release while simultaneously maximizing public safety and court appearance. They apply the law to embrace pretrial risk so that liberty is the norm, but with the understanding that extreme pretrial risk can and should lead to pretrial detention in carefully limited situations. They take advantage of the law and the pretrial research to properly mitigate known risk for released defendants when risk mitigation is necessary. Effective “no bail” decisions are comparably simpler, but require judges to use transparent and due process-laden procedures to ensure that those rare cases of detention are done fairly. If judges are lucky, then their guiding bail laws will contain a framework that allows them to make effective release and detention decisions. If they are not so lucky, they can still attempt to make reasonable decisions while, as recommended by the Conference of Chief Justices, “analyz[ing] state law and work[ing] with law enforcement agencies and criminal justice partners to propose revisions that are necessary to support risk-based release decisions . . . and assure that non-financial release alternatives are utilized and that financial release options are available without the requirement for a surety.”<sup>139</sup>

The need for judges to help seek revisions to the law (or to practices, such as money bail schedules, that can be mandated by law or simply thrust upon judges through court tradition) that will support risk-based or risk-informed decisions cannot be overstated. Most, if not all, of American bail laws today are antiquated simply because they are based primarily on charge and not risk. For example, in Colorado the Constitution provides a right to bail for all except certain defendants who may be detained if they are charged with certain crimes along with various preconditions, such as being on probation or parole, along with a finding of “significant peril” to the community. It is a “bail/no bail” scheme, albeit based mostly on top charge, which means that an extremely high risk defendant charged with a serious crime not listed in the constitution or with a crime listed but without the preconditions, for example, cannot lawfully be detained without bail. Instead, judges are forced to order those high risk defendants released, set conditions of release, and hope that they cannot pay whatever secured financial condition might lead to de facto detention. Judges in Colorado routinely set extremely high cash-only bonds for high risk defendants, presumably in an attempt to detain them. Unfortunately, as mentioned previously, that practice is

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<sup>139</sup> Conference of Chief Justices, *Resolution Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release* (2013).

likely unlawful under more than one legal theory. Until states like Colorado create a more effective “release/detain” framework based on risk, however, judges will be forced to use money. Moreover, as long as money is necessary for at least one purpose, it will be used for others. Accordingly, much of the necessary future work of bail reform must include discussions on changing our bail statutes to better incorporate risk. Judges should lead these discussions.

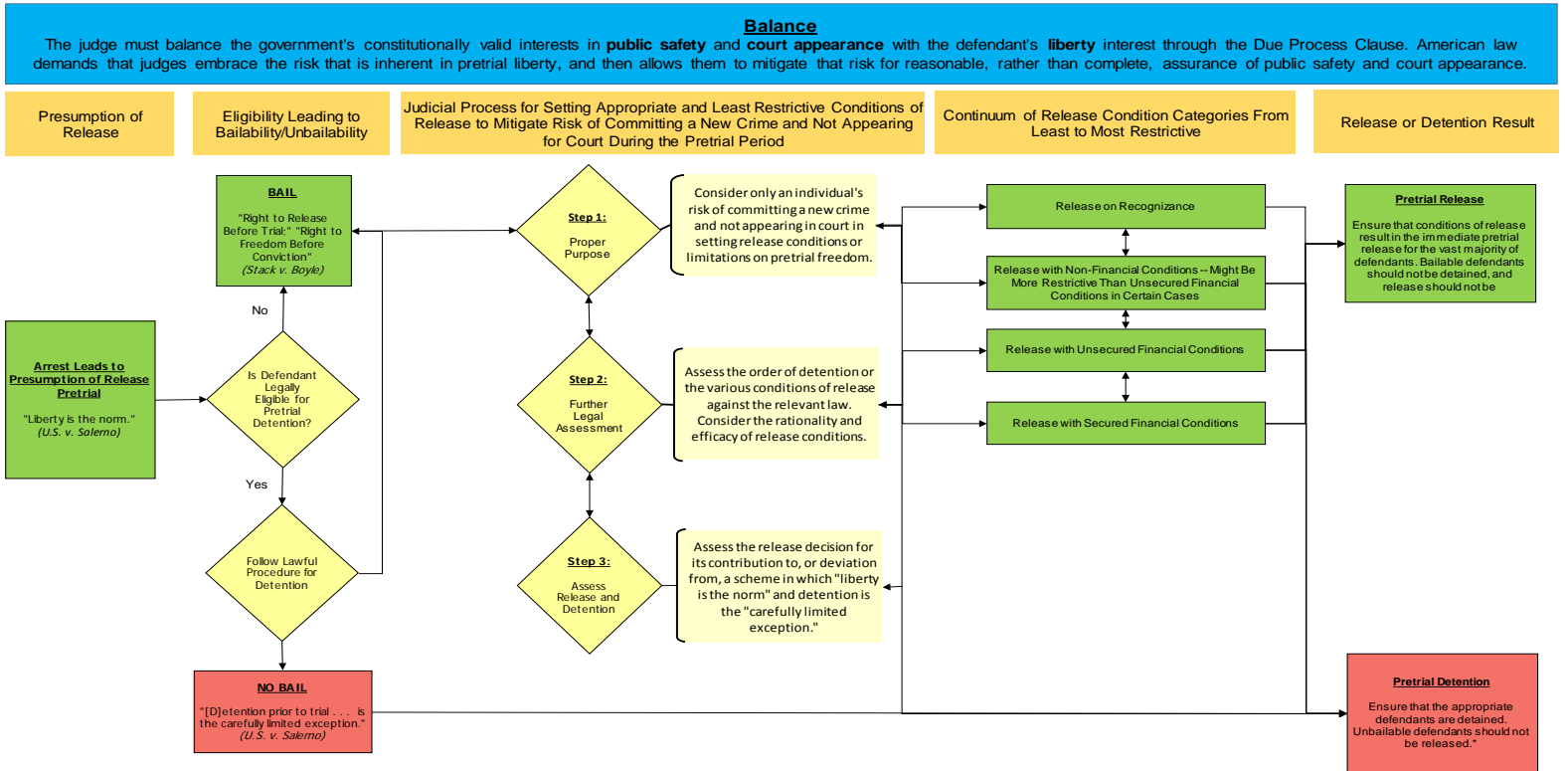
Assessing any particular bail statute for such a risk-based framework can be done by holding it up to what pretrial legal experts currently consider to be model bail laws. In 2014, the federal statute and the District of Columbia statute (which is substantially similar to the federal law), are considered to be the closest we have to “model” American bail laws, representing to a good degree the embodiment of the ABA’s National Pretrial Standards as well as much of what we know to date concerning the history of bail and the law flowing from that history.<sup>140</sup> Both are based on historic notions of a “bail/no-bail” or “release/detain” dichotomy. Both incorporate pretrial services program supervision, which can be viewed as a twentieth century re-creation of the personal surety system through its placement of responsible persons in charge of defendants for no profit, and which today provides assurance of both court appearance and public safety for all defendants despite their amount of wealth. Moreover, both statutes dramatically restrict the role of secured money at bail, which has proven to be a disappointing experiment in our attempt not only to maximize release, but also to provide reasonable assurance of court appearance for those who are released.

The following illustration represents how these statutes and the ABA Standards lead to a framework for an effective “release/detain” pretrial decision.

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<sup>140</sup> Historically, the 1966 federal statute served as a national model during the first generation of bail reform and the 1971 Court Reform and Criminal Procedure Act for the District of Columbia, along with the 1984 Federal Bail Reform Act, served as models during the second generation of bail reform. In 2011, the National Symposium on Pretrial Justice recommended using the federal law as a model law for current pretrial reform. *See* National Symposium Report, *supra* note 90, at 42. Nevertheless, recent pretrial research, such as research better illuminating defendant risk, has caused persons interested in pretrial justice to further assess those models, and has led to interest in creating a new national model based on the most recent pretrial studies.

## The "Bail" (Release)/"No Bail" (Detain) Decision



\*There may be instances in which the law does not allow for a defendant's detention (the defendant is technically bailable) but a judicial officer believes that no condition or combination of release conditions will provide reasonable assurance of court appearance or public safety. This is happening with increasing frequency in America as states are recognizing the benefits of using pretrial risk assessment instruments to gauge a defendant's risk of pretrial failure despite his or her top charge or other precondition for detention. Seeing these instances would suggest the need for any particular state to re-structure its "bail/no bail" dichotomy to designate the appropriate ratio of bailable to unbailable defendants based on risk or risk combined with charge. If this is not done, judges will continue to feel pressure to bypass their current, lawfully enacted processes for detention by using a condition of release (i.e., money) to obtain the same result.

### Bail or No Bail?

The initial determination flowing from this illustration involves evaluating which defendants are bailable and which are not bailable in any particular jurisdiction. Most states have constitutional language articulating some right to bail, and those that do not typically have statutory language either granting the right to all "except" some class of defendants, by presuming release, or by separating defendants based on whether they should be released or detained, all of which are indicative of a "bail/no bail" dichotomy. The "bail/no bail" or "release/detain" dichotomy, in turn, drives the judicial decision.

Bailability is often separated into two main inquiries: (1) eligibility; and (2) bailability, with defendants thus said to be eligible for either bail or no bail, but with some procedure in place to finalize the determination. For example, in my state of Colorado, the constitutional scheme articulates that "all persons shall be bailable except," and then lists various crimes, preconditions, and findings that must be present in order to detain defendants without bail. Under that scheme, there is a clear presumption for bailability or release (following the Supreme Court's admonition that pretrial liberty be the norm),

with relatively few persons even eligible for detention. Moreover, even if one is eligible for detention in Colorado, the process required by the constitution may nonetheless lead to a determination that the defendant is actually bailable – for example, if there is no finding of “significant peril” to the community. Likewise, the federal statute includes a relatively broad category of offenses that make one eligible for detention, but the detention hearing process itself may nonetheless lead to a determination of bailability or release.

There are variations on these themes in bail schemes across the United States (from schemes with bright-line bailability determinations to schemes that, like their earlier English counterparts, infuse significant judicial discretion into the determination), and often there may be considerable overlap of processes. For example, when a judge must determine whether a person is unbailable because “no condition or combination of conditions” may suffice to protect the public, that judge is necessarily analyzing conditions normally used for bailability, which involves assessing them for proper purpose, lawfulness, and effectiveness – an assessment that is discussed in more detail under the decision-making process for bailable defendants. In the end, however, after using whatever process is in place to determine bailability, one can typically look at any particular defendant and say that the defendant is either bailable or unbailable.

In an appropriately structured “bail/no bail” dichotomy, all bailable defendants would be released and all unbailable defendants would be detained, with exceptions only in extremely rare cases. The dichotomy is just that – a division of defendants into two mutually exclusive groups. One should not be treated as bailable and unbailable at the same time. If an accused is bailable, the process moves toward release. If he or she is presumptively unbailable, it moves toward detention but can result in release if ultimately determined to be bailable.

Following a particular state’s existing dichotomy is crucial to following the law, even when that law is considered in need of amendment. Thus, whenever judges (1) purposefully or carelessly treat a bailable defendant as unbailable by setting unattainable release conditions, or (2) treat an unbailable defendant as bailable in order to avoid the lawfully enacted detention provisions, they are not faithfully following the existing “bail/no bail” dichotomy, and should therefore be compelled to do so. Such digressions, however, also suggest that the balance of the dichotomy should be changed. Indeed, in the second American generation of bail reform, judges were treating technically bailable defendants as unbailable by setting unattainable financial conditions to protect public safety. They were not following the law, but they were not faulted and instead the laws were changed. Overall, the second generation of bail reform led to changes in “bail/no bail” dichotomies of many states by better defining



classes of defendants so that judges could ultimately detain the right persons (i.e., very high risk) through a transparent and moneyless process of detention.

Judges are expected to follow the law, but the lessons for state legislators are these: If the proper “bail/no bail” balance has not been crafted through a particular state’s constitutional or statutory preventive detention provisions, and if money is left as an option for conditional release, history has shown that judges will use that money option to purposefully detain defendants through the use of unattainable secured financial conditions.<sup>141</sup> On the other hand, if the proper balance is created so that high risk defendants can be detained through a fair and transparent detention scheme, money can be virtually eliminated from the bail process without negatively affecting public safety or court appearance rates.<sup>142</sup> Such a scheme can also prevent the unnecessary detention of lower and moderate risk defendants who can be effectively managed in the community, thus saving the government from wasting taxpayer funds and preventing the unwitting contribution to increased criminal activity and failures to appear for court.

## The Right to Bail

As indicated in the illustration, and as previously discussed, the “bail/no bail” dichotomy is largely based on the right to bail, and the right to bail should equate to the “right to freedom before conviction” and the “right to release before trial,” as articulated by the Supreme Court in *Stack v. Boyle*.<sup>143</sup> Any other interpretation of the right to bail would run counter to the history of bail (which has always considered someone who is bailable to be entitled to release), and the law (which desires, presumes, and very nearly demands release, but which has for too long tolerated bail’s opposite effect). Properly defining the right to bail will naturally lead jurisdictions to further question how they define the term “bail” itself. Accordingly, if the right to bail is

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<sup>141</sup> As mentioned earlier, using money to *intentionally* detain bailable defendants is likely unconstitutional. In addition, when money is tolerated for high risk defendants, it appears to grow more tolerable for lower risk defendants, which then leads to the *unintentional* detention of bailable defendants, which poses legal and social problems beyond the un-effectuated decision.

<sup>142</sup> The District of Columbia appears content with its balance between bailable and unbailable defendants (resulting in the release of approximately 85% of pretrial defendants), which has allowed it to virtually eliminate money from the bail process and thus allow the release of nearly every bailable defendant with high public safety and court appearance rates. See *Remarks of Susan Weld Shaffer*, National Symposium Report, *supra* note 90, at 25.

<sup>143</sup> 342 U.S. 1, 4. At the date of this writing, nine states do not have constitutional right-to-bail clauses, and thus, as in the federal system, any substantive right to bail or release would have to originate within those states’ statutory schemes.

properly defined as the right to release and freedom, jurisdictions that define the term “bail” as money will be seen as erroneous. As shown in the illustration, money at bail is a condition of bail – a limitation on pretrial release and not release itself – which, like all conditions of release or limitations on freedom, must be assessed for lawfulness and effectiveness in any individual defendant’s case. And although money has been used for centuries as the primary means for obtaining release, it should never be equated with the overall concept of bail, which is most appropriately defined as a process of conditional release.<sup>144</sup> Concomitantly, the purpose of any particular condition of bail, or limitation on pretrial freedom, can only be associated with court appearance and/or public safety, and therefore should not be confused with the purpose of bail, which is to provide a mechanism for that conditional release.<sup>145</sup>

When assessing the overall right to bail, the ABA Standards remind us that the law favors release, relying on *Stack* and *Salerno* as opinions “emphasizing the limited permissible scope of pretrial detention.”<sup>146</sup> Explicit guidance for that notion comes from a single sentence in the *Salerno* opinion: “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>147</sup> This statement provides at least some outer boundary to keep jurisdictions from slowly eroding the right to pretrial freedom by over-expanding the “no-bail” side of the dichotomy through either the use of money or even a more lawful, transparent detention process.

Using the rest of the *Salerno* opinion as a guide, however, one can look at any particular jurisdiction’s bail scheme to assess whether that scheme appears, at least on its face, to presume liberty and restrict detention by incorporating the numerous elements from the federal statute that were approved by the Court. For example, if a particular state has enacted a provision in either its constitution or statute opening up the possibility of detention for *all* defendants no matter what their charges, the scheme should be assessed for its potential to over-detain based on *Salerno’s* articulated approval of a

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<sup>144</sup> Bail defined as a process of conditional release is in accord with Supreme Court language, modern dictionary definitions, and various state laws that have redefined the term to take into account changes in the administration of bail in the twentieth century such as release without financial conditions, the use of non-financial conditions of release, public safety as a constitutionally valid purpose for limiting pretrial freedom, and preventive detention.

<sup>145</sup> A review of historical documents reveals that the original purpose of bail in Medieval England was to avoid a blood feud or private war. Later, as jails were erected, the purpose of bail evolved as a means to effectuate the defendant’s release from jail while maintaining some control over him. *See Duker, supra* note 17, at 41-42; *Meyer, supra* note 18, at 1175-76.

<sup>146</sup> ABA Standards, *supra* note 6, Std. 10-1.1 (commentary) at 38.

<sup>147</sup> 481 U.S. 739 at 755.

statute that instead limited detention to defendants “arrested for a specific category of extremely serious offenses.”<sup>148</sup> Likewise, any jurisdiction that does not “carefully” limit detention – that is, it detains carelessly, arbitrarily, or irrationally through the casual use of money in any amount or form affecting traditional bond types – is likely to be seen as running afoul of this foundational principle.

By favoring release, the law necessarily commands judges to embrace the risk that is inherent in our American system of bail, and to recognize that mitigation of that risk can never provide complete insurance of public safety or court appearance due to the unpredictability of human behavior. The late Supreme Court Justice Robert H. Jackson summed it up as follows:

Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them.<sup>149</sup>

It must be remembered that this statement was made when America had only one constitutionally valid purpose for limiting pretrial freedom – court appearance – but the same concept holds true today. There is also always some risk that defendants may commit new offenses while on pretrial release. Nevertheless, lawmakers in America have specifically anticipated this by providing provisions dealing with those situations as well. To be an American means to live in a country that favors, if not demands liberty before trial, and reasonable assurance, rather than complete assurance of public safety and court appearance when limiting pretrial freedom. We follow the legal and evidence-based pretrial practices so as to hold on to those fundamental precepts.

Following legal and evidence-based pretrial practices is not necessarily complicated, either. To move from a largely arbitrary, charge and money-based bail system to an individualized, risk-informed bail system, judges setting bail must only answer the following question: “Is this defendant someone who should remain in jail or be released pending trial?” To answer this question, the judge must determine whether that defendant’s risk to public safety and for failure to appear for court is manageable within the community and outside of a secure facility. All defendants pose risk – the question

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<sup>148</sup> *Id.* at 750. A similar overall limitation would be a constitutional or statutory provision that allowed detention only for certain high risk individuals. Given that risk is a better indicator of pretrial misbehavior than charge, it is unlikely that the Supreme Court would oppose a scheme using risk instead of charge as the gateway toward detention.

<sup>149</sup> *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

is whether that risk is manageable. Some defendants pose such a great risk that they are unmanageable in the community – i.e., no condition or combination of conditions of a bail bond can provide reasonable assurance of public safety or court appearance. However, the great majority of defendants only pose risks that are manageable to reasonable levels outside of the jail.

## Conditions

As seen in the illustration, release through the bail process is always conditional. Every bond is an appearance bond, and thus has at least one condition: the defendant must show up for court at a time and date certain. Even the broadest definition of bail, which would include release by law enforcement on a summons, includes this basic condition. Virtually every state also incorporates as a standard condition the requirement that the defendant not commit any more offenses, and these two conditions are illustrative of the only constitutionally valid purposes thus far for limiting pretrial freedom, which are court appearance and public safety.<sup>150</sup> Technically, detention also has conditions, which is likely why the Supreme Court spoke of “conditions of release or detention” in

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<sup>150</sup> There are some who have said that “integrity of the judicial process” is a third constitutionally valid purpose for limiting pretrial freedom, but that particular phrase is a term of art in the field of bail that is typically articulated without definition or that has been further defined as, or sums up, a number of variables related to risk affecting court appearance and public safety. For example, the American Bar Association states that the purpose of the pretrial release decision includes “maintaining the integrity of the judicial process by securing defendants for trial.” ABA Standards, *supra* note 6, Std. 10-1.1. Other jurisdictions use the phrase when describing the threat of intimidating or harassing witnesses, arguably clear risks to public safety. The phrase “ensure the integrity of the judicial process” was used in *United States v. Salerno*, 481 U.S. 739, 753 (1987), but only in a passing reference to the argument on appeal. Reviewing the court of appeals ruling, however, sheds some light on that argument. The principle contention at the court of appeals level was that the Bail Reform Act of 1984 violated due process because it permitted pretrial detention of defendants when their release would pose a danger to the community or any person. *See United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986), *rev’d*, 481 U.S. 739, 753 (1987). As the appeals court noted, this contention was different from what it considered to be the clearly established law that detention was proper to prevent flight or threats to the safety of those solely within the judicial process, such as to witnesses or jurors. The appeals court found the idea of potential risk to the broader community “repugnant” to due process and, had the Supreme Court not reversed, the distinction between those within the judicial process, such as witnesses and jurors, and those outside of it might have remained. However, by upholding the Bail Reform Act’s preventive detention provisions, the Supreme Court forever expanded the notion of public safety to encompass consideration of all potential victims, whether in or out of the judicial process. Today, use of the phrase “protecting the integrity of the judicial process” typically requires further definition so as to clarify whether judicial integrity means specifically court appearance or public safety, more general compliance with all court-ordered conditions of one’s bail bond, or some other relevant factor.

articulating a new test for excessiveness in *United States v. Salerno*.<sup>151</sup> Nevertheless, conditions of detention are typically only the two primary conditions – appear for court and abide by the law – which, along with a myriad of other behaviors, are adequately monitored and effectuated by secure detention. Indeed, when a defendant is detained, often these two primary conditions are assumed and thus unarticulated. Accordingly, when we speak of conditions, we speak almost exclusively of conditions of release.

As also shown by the illustration, conditions can be either “financial” or “non-financial,” and the financial conditions can also be broken down into secured and unsecured conditions. As discussed previously, secured financial conditions typically require some up-front payment as a condition precedent to release. Unsecured financial conditions, like virtually all non-financial conditions, are conditions subsequent – that is, release is obtained, but if the condition occurs (or fails to occur, depending on its wording), it will trigger some consequence, and sometimes bring pretrial freedom to an end. Moreover, as noted previously, when conditions of release are set, it should be assumed that the judge is operating under the “bail” side of the dichotomy, thus indicating a decision to release. Finally, in a bail scheme that aspires to follow *Salerno’s* directive that pretrial freedom be the norm, financial conditions should be recognized as the most restrictive conditions and used only when other, non-financial conditions cannot provide adequate assurance of court appearance. Finally, financial conditions should never be set to provide reasonable assurance of public safety.

This last concept is crucial to understand. There is no empirical evidence for using money to provide assurance of public safety. Indeed, some jurisdictions make it unlawful to set financial conditions for public safety, and the laws in virtually every state make money forfeitable only for failure to appear for court, meaning that there is no legal basis in those states for using money for public safety purposes. In those cases, using money for public safety would be irrational and thus potentially unlawful.

It is critical that judges understand what “tools” they have in the way of non-financial bail conditions to provide reasonable assurance of public safety and court appearance. Judges with few tools, such as the supervision methods and techniques discussed in the ABA’s national standards, are at a disadvantage and will often resort to money when it appears that their jurisdiction lacks the sort of infrastructure designed to implement those methods and techniques. But judges should also understand two fundamental points. First, just as we are beginning to see that money at bail may be ineffective at achieving its lawful purpose of deterring flight, non-financial conditions also may or may not be effective to achieve their proper purposes based on the current research

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<sup>151</sup> See 481 U.S. 730, 754 (1987).

literature. Unless they are effective, there is no advantage to having them as tools, and thus they may also be deemed excessive or at least irrational, thereby triggering due process analysis. Second, across America, we tend to over-supervise defendants, and the research is becoming clear that unnecessary supervision of lower risk defendants can actually harm both those defendants and society at large (also implicating excessiveness and due process).<sup>152</sup> It is thus important for judges and other pretrial practitioners to stay abreast of the pretrial research so that they can determine which tools actually work best to achieve the purposes underlying the bail process.

## Balance

Overall, the decision to release or detain a defendant pretrial involves a judicial officer balancing the government's constitutionally valid interests in court appearance and public safety with the defendant's liberty interest through the Due Process Clause. It is this balance that makes bail a quintessentially judicial function, for no other criminal justice actor is required in such a degree to fully incorporate the law and constitutional rights of defendants into his or her bail decisions.<sup>153</sup> Indeed, this balance is often lacking in systemwide attempts to improve the administration of bail, where there is an overabundance of concern for public safety but little attention paid to the rights of defendants.

### **Step One – Proper Purpose**

According to the illustration, the first step toward lawful and effective bail decision making involves judges articulating a proper purpose for detention or the release conditions, and this is likely true whether analyzed under the Eighth Amendment, the Due Process Clause, or even the Equal Protection Clause. In bail, motive matters, and so it makes a difference what Congress or a state legislature intended when it passed any

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<sup>152</sup> See, e.g., Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, at 6 (U.S. DOJ 2009). Many jurisdictions are learning that an effective (and evidence-based) supervision method for all defendants is simple court date reminders, through phone calls, text messages, or emails. Other jurisdictions are experimenting with motivating defendants by conditioning appearance through the defendant exchanging his or her driver's license for a letter from the court allowing conditional driving privileges during the pretrial phase. There is much research on the former method, see, e.g., *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court Date Reminders*, 48 Court Rev. 86 (AJA 2013), but very little, if any, research on the latter.

<sup>153</sup> While prosecutors are duty bound to seek justice, which may hint at the same sort of balance, there are significantly different checks on prosecutorial discretion than those applied to judicial decision making to assure adequate consideration of the defendant's liberty interest.

particular bail law,<sup>154</sup> or what a judge intended when he ordered detention or any particular condition of release.<sup>155</sup> Certain state interests are clearly invalid, such as setting bail to punish a defendant.<sup>156</sup> Others are inferentially so, such as setting a financial condition with a purpose to detain the defendant.<sup>157</sup> This makes the existence of a written record of bail hearings indispensable, which is why the federal law requires (and the ABA national standards recommend) judges to provide explicit reasons on the record for detaining any particular defendant.<sup>158</sup>

## **Step Two – Legal Assessment**

The second step toward lawful and effective bail decision making involves further assessing (beyond its lawful purpose) the order of detention or the various conditions of release against the relevant law. This step involves holding them up against both federal and state law, or occasionally against court rules, and it is typically the step in which jurisdictions not faithfully following the “bail/no bail” dichotomy get into trouble. If a person is bailable, and thus presumed to have a right to release, his or her conditions of release will be less likely to foster objection, appeal, remand, or reversal under the law when they actually lead to release. But when judges set unattainable release conditions that cause a bailable defendant to more resemble someone who is legally unbailable under the law, those conditions of release are more likely to run afoul of the law. This happens particularly frequently when judges set secured financial conditions of release, which can trigger due process, excessiveness, and even equal protection analysis when they lead to the detention of bailable defendants.

Steps one and two are somewhat interrelated. For example, if a judge was to set a secured financial condition with a purpose to detain a bailable defendant outside of a lawful process of detention, the improper purpose itself would likely drive analysis for excessiveness or fundamental unfairness. On the other hand, if a judge was to set a secured financial condition to protect public safety (technically a proper purpose even though it might, in fact, lead to detention) in a state that does not allow the forfeiture of money for breaches in public safety (virtually all states), the condition would make no sense and thus might offend legal principles that require rationality as their basis, such

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<sup>154</sup> See *Salerno*, 481 U.S. 739, 746-752 (assessing Congress’ intent in determining a facial due process challenge); 752-55 (assessing Congress’ intent on in determining facial 8<sup>th</sup> Amendment challenge).

<sup>155</sup> See *Galen v. County of Los Angeles*, 477 F. 3d 652, 660 (2007).

<sup>156</sup> See *Salerno*, 481 U.S. at 746; *Bell v. Wolfish*, 441 U.S. 520, 535 – 537 and n. 16 (1979).

<sup>157</sup> See notes 57-60, *supra*, and accompanying text.

<sup>158</sup> See 18 U.S.C. § 3142 (i) (1); ABA Standards, *supra* note 6, Std. 10-5.10 (g).

as excessiveness or due process. Moreover, in either case (proper purpose or not), detention caused by money set in a perfunctory bail hearing will invite procedural due process analysis to determine whether that decision sidestepped the sort of due process safeguards attendant to a proper detention scheme, such as the one approved by the Supreme Court in *Salerno*.<sup>159</sup>

Even when detention is unintentional, a relatively low secured money bond can have the effect of detaining a bailable defendant, again implicating excessiveness and due process deprivations. Moreover, when a judge is apprised of the continued detention based on a relatively low monetary amount, that judge's decision not to alter the amount could be seen as *intentional* detention of a bailable defendant. In a well-crafted "bail/no bail" legal scheme, not only does the law reflect the principle that liberty is the norm, it also reflects the courts' and the general public's satisfaction with the ratio of defendants (bailable to unbailable) as reflected in the dichotomy. In the end, most defendants will be bailable and thus released, and some unusually high risk defendants will be deemed unbailable and thus detained.

It is also during this second step that judges should keep in mind the rationality required under traditional analyses for due process, equal protection, and excessive bail. Additionally, judges should be especially mindful of the principle of using "least restrictive" bond conditions, a principle often articulated by the appellate courts as using the "least onerous" means or imposing the "least amount of hardship" on a particular defendant during his or her pretrial release. The phrase "least restrictive conditions" is a term of art, which has a particular meaning in bail.

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

This Standard's presumption that defendants should be released under the least restrictive conditions necessary to provide reasonable assurance they will not flee or present a danger is tied closely to the presumption favoring release generally. It has been codified in the Federal Bail Reform Act and the District of Columbia release and pretrial detention statute, as well as in the laws and court rules of a number of states. The presumption

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<sup>159</sup> See 481 U.S. at 752 ("Given the legitimate and compelling regulatory purpose of the [Bail Reform] Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment."). As indicated by the quote, *Salerno* involved a facial challenge; an "as applied" challenge to any particular bail decision could theoretically present a stronger case for arguing that the detention or conditions of release were unlawful.



constitutes a policy judgment that restrictions on a defendant's freedom before trial should be limited to situations where restrictions are clearly needed, and should be tailored to the circumstances of the individual case. Additionally, the presumption reflects a practical recognition that unnecessary detention imposes financial burdens on the community as well as on the defendant.<sup>160</sup>

This principle is foundational, and is expressly reiterated throughout the Standards when, for example, those Standards recommend citation release versus arrest,<sup>161</sup> and the use of nonfinancial over financial conditions.<sup>162</sup> Moreover, the Standards' overall scheme creating a presumption of release on recognizance,<sup>163</sup> followed by release on non-financial conditions,<sup>164</sup> and finally, release on financial conditions,<sup>165</sup> is directly tied to the premise of release on least restrictive conditions. Indeed, the least restrictive principle transcends the Standards and flows from even more basic understandings of criminal justice, which begins with presumptions of innocence and freedom, and which correctly imposes increasing burdens on the government to incrementally restrict one's liberty.

More specifically, however, the ABA Standard's commentary on financial conditions makes it clear that the Standards consider secured money bonds to be a more restrictive alternative to both unsecured bonds and non-financial conditions: "When financial conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first."<sup>166</sup> Moreover, the Standards state, "Under Standard 10-5.3(a), financial conditions may be employed, but only when no less restrictive non-financial release condition will suffice to ensure the defendant's appearance in court. An exception is an unsecured bond because such a bond requires no 'up front' costs to the defendant and no costs if the defendant meets appearance requirements."<sup>167</sup> These principles are well founded in logic: setting aside, for now, the argument that money at bail might not be of any use at all, it at least seems reasonable that secured financial conditions (requiring up-front payment) are always more restrictive than unsecured ones, even to the wealthiest defendant. Moreover, in the

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<sup>160</sup> ABA Standards, *supra* note 6, Std. 10-1.2 (commentary) at 39-40 (internal footnotes omitted).

<sup>161</sup> *See id.*, Std. 10-1.3, at 41.

<sup>162</sup> *See id.*, Stds. 10-1.4 (commentary) at 43, 44; 10-5.3 (commentary) at 111-14.

<sup>163</sup> *Id.*, Std. 10-5.1 at 101.

<sup>164</sup> *Id.*, Std. 10-5.2 at 106-107.

<sup>165</sup> *Id.*, Std. 10-5.3 at 110-111.

<sup>166</sup> *Id.*, Std. 10-1.4 (c) (commentary) at 43-44.

<sup>167</sup> *Id.*, Std. 10-5.3 (a) (commentary) at 112.

aggregate, we know that secured financial conditions, as typically the only condition precedent to release, are highly restrictive compared to virtually all non-financial conditions and unsecured financial conditions in that they tend to cause pretrial detention. Like detention itself, any condition causing detention should be considered highly restrictive.<sup>168</sup>

This second step would necessarily require judges to also question the continued use of traditional monetary bail bond schedules, which list amounts of money as presumptive secured financial conditions of release for all persons arrested on any particular charge. Despite whatever good intentions existed for creating them, traditional money bail schedules are the antithesis of an individualized bail setting,<sup>169</sup> unfairly and irrationally separate defendants based on wealth,<sup>170</sup> are typically arbitrary,<sup>171</sup> and displace judicial discretion at bail<sup>172</sup> if not unlawfully delegate judicial authority altogether. Whether judges have helped to create these schedules or have simply had the schedules thrust

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<sup>168</sup> See Cohen & Reaves, *supra* note 121, at 3 (“There was a direct relationship between the bail amount and the probability of release . . . The higher the bail amount the lower the probability of pretrial release.”).

<sup>169</sup> According to LaFave, et al., the ruling and language of *Stack v. Boyle* “would indicate that use of a bail schedule, wherein amounts are set solely on the basis of the offense charged, violates the Eighth Amendment except when resorted to as a temporary measure pending prompt judicial appearance for a particularized bail setting.” Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, *Criminal Procedure* (5th ed., West Pub. Co. 2009) § 12.2 (a), at 681. Indeed, some high courts have invalidated money bail schedules because they conflict with individualized bail schemes. See, e.g., *Clark v. Hall*, 53 P.3d 416 (Okla. Crim. App. 2002) (“[The provision] sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances. We find the statute is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination to bail.”).

<sup>170</sup> The relevant ABA Standard “flatly rejects the practice of setting bail amounts according to a fixed schedule based on charge. . . . 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 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.” ABA Standards, *supra* note 6, Std. 10-5.3(f) (commentary) at 113.

<sup>171</sup> The use of round numbers alone prompted bail researcher Arthur Beeley to call using standard amounts for specific offenses arbitrary as early as 1927. See Arthur L. Beeley, *The Bail System in Chicago*, at 31-32 (Univ. of Chicago Press, 1927). Further illustrating the arbitrary nature of the numbers themselves, jurisdictions have made both blanket increases and decreases to their schedules. See *Fewer to Get Out of Jail Cheap*, Colorado Springs Gazette (May 27, 2007) (reporting that the 4<sup>th</sup> Judicial District was raising the bond amounts for all crimes so that they would be more aligned with those in other judicial districts throughout the state); see also *Supreme Court Lowers Amount Iowans Need to Get Out of Jail*, Des Moines Register (August 16, 2007) (reporting blanket bond reductions for non-violent felonies and misdemeanors with no explanation for the reductions); see also *Lowered Bail Bonds Make System More Equitable*, Quad City Times (Aug. 31, 2007).

<sup>172</sup> See Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?* 26 Crim. Just. (ABA 2011).

upon them, all judges should find ways around them while working toward their ultimate revision or elimination.

Finally, this second step includes analysis to assure the efficacy of any particular condition, financial or non-financial, because conditioning release upon something that does not work to achieve its own purpose would be irrational and thus likely unlawful. Setting a seemingly rational condition of GPS monitoring, for example, would be no different than requiring a defendant to wear a particular color of shoes if it is ultimately shown that GPS monitoring does not further the purposes underlying the bail process.<sup>173</sup> Likewise, but perhaps less intuitively, if a secured financial condition does not work to achieve its lawful purpose, or if it works no better than less restrictive alternatives, then the condition should be assessed under any variety of legal principles that guide judges toward non-arbitrary and rational decision making. Finally, and most importantly, if a condition actually works to further an outcome that is the *opposite* of its intended outcome, it should be avoided altogether. This can be the case with secured financial conditions, which, in causing even short-term detention, can actually increase the risk to public safety and failure to appear for court.

### **Step Three – The Release and Detention Result**

The third and final step toward lawful and effective bail decision making involves assessing the decision for its contribution to, or deviation from, a legal scheme in which “liberty is the norm” and detention is the “carefully limited exception” pursuant to *Salerno*. If judges, looking at the jail data, see that high numbers of defendants are detained pretrial for even short periods of time, then those judges must purposefully question what is hindering pretrial liberty. The requirement that detention be “carefully limited” is especially important as it guards against judicial decision making that is arbitrary, irrational, or random. It is at this point that money at bail becomes especially acute, for there is little that is “careful” about a decision that is unintended or that may or may not be effectuated by others depending on their access to money or perhaps their desire to yield an acceptable profit.

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<sup>173</sup> As noted by researchers Marie VanNostrand, Kenneth J. Rose, and Kimberly Weibrecht, while studies have not shown electronic monitoring, including GPS monitoring, to increase court appearance or public safety rates, the studies so far indicate that electronic monitoring might nonetheless increase release rates while maintaining the same court appearance and public safety rates. See *State of the Science*, *supra* note 129, at 27.

# Conclusion

The judicial decision to release or detain a defendant pretrial is the core of the bail process, often the focal point of the defendant's first appearance, and the moment at which the law and research come together for practical implementation with critically important short- and long-term ramifications to both defendants and the public. The decision is inherently a judicial function because judges are in the best position (and with the proper appellate checks) to simultaneously balance the defendant's liberty interest with the broader societal interests of public safety and court appearance.

The history of bail, the law intertwined with that history, the pretrial research, the national pretrial best-practice standards, and the model federal and District of Columbia statutes all point to a judicial decision that is an in-or-out decision, based on any particular jurisdiction's "bail/no bail" or "release/detain" dichotomy. Moreover, they point to judicial decision making that is immediately effectuated, with nothing unnecessarily hindering or delaying either the release or detention of any particular defendant. Finally, they point to a decision that is not left to outside persons to effectuate, despite its potential for immediacy. The history of bail illustrates that when a decision to release is left to others, typically because of the existence of a secured financial condition, that decision is either delayed or thwarted altogether in a significant number of cases for reasons not necessarily shared by the criminal justice system or society at large.

While many of the historical, legal, and research-related concepts underlying the decision might seem complicated, the decision-making process itself involves simply trying to determine which defendants can be safely managed outside of a secure facility and which cannot. Nevertheless, it involves judges fully understanding the history and law so that they are comfortable embracing the risk inherent in the decision. Moreover, it involves judges fully understanding the research so that they are comfortable with how and when to mitigate that risk through lawful and effective conditions of release by following a few relatively simple steps designed to faithfully pursue the correct release or detention path based on defendant bailability. Finally, the decision-making process involves radically re-thinking about how to use money at bail – possibly to the extent of using only unsecured bonds whenever money is deemed to be absolutely necessary. Unsecured financial conditions were used for centuries in England and in America up until the 1800s, and so they should never be considered as "alternatives" to secured financial conditions. Historically, unsecured financial conditions came first; similarly, they should come to mind first whenever a judge is considering the need to use money at bail.

Secured financial conditions, on the other hand, have shown in their relatively short history to undermine the entire bail decision-making process. Put simply, secured financial conditions at bail skew judges' understanding of risk, delay and sometimes prohibit the release of bailable defendants, do not always prohibit the release of defendants who should rightfully be detained pretrial, and often are ineffective at achieving the very purposes for which they are ordered. Finally, if allowed the status of criminal justice stakeholder by allowing it to have influence over the case, secured money fails because it cares nothing for the system's vision or goals and is quick to hand over its stakeholder status to anyone willing to pay the price.

The best pretrial infrastructure, the best overall understanding of pretrial risk, and even the best bail laws can be rendered meaningless without effective judicial decision making at the criminal justice system's pretrial release and detention decision point. Our society has given judges the extraordinary role as arbiters of liberty and justice, but those judges have only recently been given the tools they need to adequately fulfill that role at bail. To take full advantage of our current knowledge of legal and evidence-based pretrial practices, we must now work together to help judges fully understand risk, mitigation of risk through lawful and effective conditions of release, and the appropriateness of money at bail, and to help judges to reclaim their roles as sole decision makers responsible for the pretrial release or detention of any particular defendant. Bail belongs to judges, and we must all do our part to help judges take back their responsibility for it. American pretrial justice hangs in the balance.