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## **Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement**

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THE NATIONAL  
JUDICIAL COLLEGE

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# **Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement**

## **Introduction**

When a person is arrested or immediately after, significant issues must be addressed. For example:

- Should the person be detained?
- If detention is not required (e.g., mandatory because of the nature of the offense charged), what type or amount of bail or release conditions should be required?
- Should non-financial conditions of release (e.g., restricted residency, no contact provisions, limitations on activities, etc.) be imposed?
- If monitoring or supervision is necessary, how will it be provided?
- Should the court order screening, assessments or evaluations for possible drug abuse or mental health issues?
- Should the court order participation in specific programs?

These and other issues involve rapid decisions addressing two key types of risks potentially posed by the arrested person: (1) what is the risk of failure to appear, and (2) what is the risk to community safety or to the safety of specific individuals? From a systemic perspective, there are additional issues to consider:

- What are effective practices or protocols that allow decision makers to make evidence-based decisions that take these risks into account?
- To what extent is there room for improvement in the processes that judges and other justice system decision makers now follow about pretrial release and detention?
- What can be done to address problems or build upon strengths to improve the quality and effectiveness of pretrial decision-making?

These questions were at the core of a focus group discussion conducted with judges who participated in a program addressing “The Theory and Practice of Judicial Leadership and Project Management” held at The National Judicial College (the NJC) in the fall of 2012. The judges – a total of 36, from 22 states and the District of Columbia – constitute a cross-section of judges from both general and limited jurisdiction courts. They were identified as individuals appropriate to lead or represent the judiciary in justice system improvement projects.<sup>1</sup> This essay builds on the focus group discussions and includes five sections:

1. The core principles relevant to pretrial justice practices
2. A summary of the focus group discussion in which the participating judges identified ten challenges or obstacles to pretrial decision making
3. The judges’ focus group’s suggestions on ways to improve existing practices
4. The national picture and key trends in release or detention decision-making
5. The authors’ views on the need for improvements in pretrial justice and practical steps that can be taken in the near future, consistent with the core principles relevant to pretrial justice practices.

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<sup>1</sup> The NJC presented the grant funded program in two stages (one four-day stage in April 2012 and a second four-day stage in September 2012). The NJC designed the two stages to educate the judges in project management and leadership skills. Chief justices or state court administrators nominated the judges who attended; prior to the first program, the judges or their court systems identified local, circuit-wide, or state-wide justice system projects to address. The judges also agreed to act as a focus group on an issue of national importance that the NJC chose. Additionally, the judges participated in a brainstorming session in which they identified areas appropriate for future judicial focus groups which the NJC will explore in the future.

The NJC chose the focus group subject because of recent developments in pretrial justice. Most notably, a 2011 National Symposium on Pretrial Justice<sup>2</sup> highlighted and addressed potential improvements in criminal justice policies and practices in this area. Participants at the National Symposium developed a number of recommendations for improving pretrial practices, including recommending development of education and training programs that would engage judges at every level in addressing key issues.<sup>3</sup> The NJC focus group discussion hopefully will inform future judicial education programs, especially with regard to what judges perceive to be obstacles to improving pretrial practices and potential avenues for implementing positive changes in practices.

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<sup>2</sup> The U.S. Department of Justice, Office of Justice Programs, and the Pretrial Justice Institute convened the National Symposium on May 31-June 1, 2011 in Washington, D.C. For information about the symposium including the recommendations of participants, see *National Symposium on Pretrial Justice: Summary Report of Proceedings*, at <http://www.pretrial.org/NSPJ%20Report%20211.pdf>.

<sup>3</sup> *Id.* at p. 40.

## I. Pretrial Justice: Core Principles

Pretrial decision-making processes vary widely across jurisdictions in the United States. Despite the differences in practices, the authors believe that it should be possible to find broad basic agreement about a few core principles relevant to pretrial justice practices:

- The practices should be fair and evidence based. Optimally, decisions about custody or release should not be determined by factors such as an individual's gender, race, ethnicity, or financial resources.
- The practices should address two key goals: (1) protecting against the risk that the individual will fail to appear for scheduled court dates; and (2) protecting against risks to the safety of the community or to specific persons.
- Unnecessary pretrial detention should be minimized. Detention is detrimental to the individual who is detained, costly to the jurisdiction, and can be counter-productive in terms of its impact on future criminal behavior.
- To make sound decisions about release or detention, judicial officers need to have (1) reliable information about the potential risks posed by release of the individual; and (2) confidence that resources are available in the community to address or minimize the risks of non-appearance or danger to the community if the decision is made to release the individual.<sup>4</sup>

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<sup>4</sup> These principles were central to discussions at the National Symposium on Pretrial Justice and are at the core of the American Bar Association's *Standards for Pretrial Release*. See especially Standard 10-1.4.

## II. Ten Obstacles or Challenges to Effective Pretrial Decision Making

Asked to consider the obstacles to system improvement, judges participating in the NJC's focus group discussion identified ten main challenges:

1. **Lack of information.** Many of the judges noted that no pretrial services programs exist in their jurisdictions to provide information about defendants – especially about potential risks that might be posed by release and ways to address such risks. Often the judges have only the charge, basic facts set out in a police report or probable cause affidavit, and perhaps a summary of the individual's prior record. The problem is especially acute at first appearances in limited jurisdiction courts, where sometimes no defense counsel or prosecutors are present to provide relevant information.
2. **Lack of objective criteria for setting release conditions.** Although many state statutes list broad criteria to be used in making release or detention decisions, the judges noted that generally little in the way of objective criteria exists to guide their exercise of discretion in setting bail amount or other bond conditions. Often, the only guide is a bail schedule that sets presumptive bond amounts based solely on the charge, without any regard to the individual circumstances of the case and the defendant.<sup>5</sup>
3. **Lack of an evidence-based risk assessment tool.** A few of the judges who participated in the focus group are from jurisdictions that make use of evidence-based risk assessment instruments that can provide judges with indications of the level of risk posed by individual defendants. Most, however, do not have access to such tools. Additionally, a few judges who are familiar with such tools expressed concern about the existing tools' inability to focus explicitly on a primary concern of judges: the risk that an individual will, if released, commit a violent offense. These judges are more concerned about the risk of violent behavior than about risks of possible nonappearance or the risk of additional minor, nonviolent criminal offenses.<sup>6</sup>

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<sup>5</sup> The Conference of State Court Administrators (COSCA) drafted a recent policy paper that is highly critical of the use of bail schedules, noting that they “seem to contradict the notion that pretrial release conditions should reflect an assessment of an individual defendant's risk of failure to appear and threat to public safety.” See Conference of State Court Administrators, *2012-2013 Policy Paper: Evidence-Based Pretrial Release* 3.

<sup>6</sup> Current risk assessment instruments merge all of these risks into a single risk of “pretrial failure” or “pretrial misconduct.” See, e.g., Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia* 1, 5 (Richmond, VA: Virginia Department of Criminal Justice Services, 2003); Marie VanNostrand and Kenneth Rose, *Pretrial Risk Assessment in Virginia* 7 (Luminosity, Inc. for the Virginia Department of Criminal Justice Services and the Virginia Community Criminal Justice Association, May 2009); Edward LaTessa et al., *Validation of the Ohio Risk Assessment System: Final Report* (Cincinnati: University of Cincinnati Center for Criminal Justice Research, July 2009); Cynthia A. Mamalian, *State of the Science of Risk Assessment* 7-8 (Washington, D.C.: Pretrial Justice Institute, Mar. 2011).



4. **Lack of counsel at first appearance.** In some limited jurisdiction courts (as well as some general jurisdiction, single-tier court systems), it is common for first appearance proceedings to take place without a prosecutor or defense counsel being present. The judges participating in the focus group felt strongly that there is value in having counsel for both sides present, especially when there is no pretrial services program to provide basic information relevant to setting release conditions. A prosecutor can provide information not readily available from the documents before the judge about factors such as the circumstances of the offense, the victim's situation, the victim's views about release, and the prosecution's views about appropriate conditions of release. Similarly, defense counsel can provide information about the defendant's history, current employment, living situation, roots in the community, health issues, and ability to function under specific conditions of release.
5. **Lack of options for release under supervision in the community, especially for “frequent fliers.”** Some jurisdictions have an array of community-based supervision options that judges can employ to help mitigate potential risks of nonappearance or pretrial criminal offenses committed by released defendants. However, many of the judges at the focus group session thought that such resources were not readily available in their jurisdictions. A number of the judges expressed particular frustration about the lack of options for dealing with the population of frequent arrestees. Many of these individuals have significant mental health or substance abuse problems and are repeatedly charged with relatively minor offenses such as petty theft, urinating in public, other public order offenses, or failure to pay a previously imposed fine. They typically fail to change their behaviors regardless of the sanction imposed, and judges often lack other dispositional options that could address underlying behavioral health issues. Sometimes, a short jail sentence becomes the default sanction simply because nothing else has worked, and the judges feel that the offender's conduct warrants some expression of justice system disapproval.
6. **Push-back from bail bond agencies and insurance companies.** In some jurisdictions, bail bond agencies and the insurance companies who underwrite them promote themselves as providing a service and being part of the “system.” They are often active in local and statewide political issues and have a vested interest in maintaining a money bail system.
7. **Docket management pressures.** Many judges in high volume courts have scores of cases on their dockets each day. Reorganizing existing practices, to enable the judge and counsel to give more attention to information about the defendant and to consider specific risks of release and possible supervisory options, would likely slow down the process and lead to longer court days.

8. **A local legal culture that is comfortable with long-standing practices.** A number of the judges commented that existing courthouse cultures in their jurisdictions tend to reinforce perpetuation of the status quo – i.e., continuation of practices that rely on the use of money bail and the services of bail bond agencies. The judges often set bail amounts using a schedule that is based on the perceived seriousness of the charged offense(s). As the judges pointed out, a number of reasons explain why some practitioners are likely to resist changes in the existing system:
- Jurisdictions commonly use bail schedules – lists showing the “standard” amount of money bail to post for specific offenses. The schedules provide a quick and easy default positions for judges to take in setting bond.
  - If the defendant is unable to post money bail, a “quick” disposition may occur, especially in a case involving a relatively minor offense because the defendant is eager to get out of jail.
  - Setting bail high enough to make it difficult or impossible for defendants to post bond is often viewed as providing judges and communities with assurance that defendants will not be a risk to public safety.
  - Setting a relatively high bail amount avoids the risk of public criticism of the judge and prosecutor that can result if a released defendant commits a serious offense.
  - Everyone in the courthouse knows the existing system. Changing to a system that involves consideration of more information about risks and possible release options would require learning new procedures and practices and is likely to provoke resistance from some practitioners.
  - People are comfortable with what they know, and often don’t see clear advantages to changing to a different system. In particular, judges and other practitioners are not likely to be receptive to being told that what they have been doing for many years is wrong or inappropriate.
  - Philosophical and partisan differences among judges and others can impede adoption of a new system.
9. **Funding concerns.** Although a few of the jurisdictions represented at the focus group session have pretrial services programs that provide risk assessment information and some supervision services for defendants who are released conditionally, most do not. Given the economic recession that has been going on since 2008, judges expressed concerns that no funding is available to start such programs or sustain them over time.

10. **Lack of judicial or multi-disciplinary education on pretrial justice issues.** For most of the judges who participated in the NJC's course and the focus group session, this was the first experience they had had with any kind of education concerning the pretrial release and detention decision-making process in a long time. New judge programs or elective sessions at judicial conferences may address decision-making about pretrial release or detention, but this area has not been a high priority for education. The judges strongly agreed that they need to know more about feasible approaches to improving their existing systems. Law enforcement, prosecutors, defense counsel, pretrial professionals, among others, impact how this area of the criminal justice system works. As such, multidisciplinary educational programs that educate these professionals along with judges are critical for improving the pretrial justice system.

### III. Focus Group Ideas on Ways to Improve Existing Practices

Of the 36 judges who participated in the September 2012 focus group discussion at the NJC, only a few had experiences with systems that provide viable alternatives to money bail. However, those judges without alternatives had considerable interest in learning about the experience of judges who preside in courts where judicial officers have access to objective risk assessment information at the time they initially set bail conditions (typically at defendants' first court appearances) or at later bail review hearings. Similarly, the judges expressed strong interest in finding out how other judges, who have some types of resources available to provide for conditional or supervised release, make use of such resources.

Following a plenary session discussion about perceived obstacles to improved pretrial justice decision-making and practices in jurisdictions that have and use pretrial services programs, the judges returned to small groups to consider possible approaches to improving existing practices. The groups developed six main ideas about ways to improve these practices:

1. **Learn who is in the local jail.** Several of the judges at the NJC course were able to solicit data about the population of their local jails before the course. Not surprisingly, they learned that the jails had a high proportion of pretrial defendants. When persons arrested for alleged probation violations were included with the pretrial defendants identified by these judges, the aggregated percentage was well over 60 percent of the inmates and in one case over 90 percent. Once justice system practitioners have a sense of who is in their jails (and why and for how long), they can begin to think of ways to reduce unnecessary use of expensive jail resources.
2. **Define the problem(s) – be clear about what practices need to be changed.** While the existing money bail system is open to criticism, it will be important for judges and other local-level practitioners to be clear about what changes are most needed including why they should be sought. Is the primary problem:
  - Overcrowding in the local jail?
  - Unnecessary detention of persons who pose no real risk to the safety of the community?
  - A lack of information that a judge needs to make informed decisions about detention or release at the outset of the case?
  - Actual or perceived discrimination against a particular group of persons?
  - A lack of available supervisory options that would enable safe release of some defendants?
  - All of the above or a combination of some of them?

Defining the problem(s) will help to clarify what approaches are likely to be most promising in improving existing practices.

3. **Develop a collaborative approach to system improvement.** Consistent with one of the key themes of the NJC program, several of the discussion groups emphasized the importance of judges working collaboratively with other stakeholders to examine their existing systems and seek improvements. A primary concern of the judges in multi-judge trial courts is gaining support for change (or at least receptivity to considering change) from their judicial colleagues as a foundation for working with a broader stakeholder group.
4. **Learn from practitioners in other jurisdictions – especially about pretrial justice system improvements that have worked well.** All of the small groups expressed interest in learning more about the risk assessment tools and supervisory options used in jurisdictions that have made progress in improving previously existing practices.
5. **Seek improvements incrementally.** Many judges saw merit in starting slowly. Initial steps would be to identify existing practices and learn about effective practices used in other jurisdictions. Once the current situation is understood and the range of potential options is identified, it is possible to design and implement changes that can be tailored to the circumstances of the local jurisdiction.
6. **Educate judges and other justice system stakeholders about the need and opportunity for significant improvements in pretrial justice policies and practices.** The judges who participated in the focus group session recognized that, ultimately, it is the judiciary that has responsibility to establish fair and effective pretrial practices. They emphasized the importance of education as an essential prerequisite for significant change in existing practices – education first and foremost for judges, but also for other system stakeholders including prosecutors, defense counsel, law enforcement, jail staff, and local county government officials such as county commissioners.

## IV. The National Picture: Great Disparity in Practices but a Trend Toward Evidence-Based Decision-Making

Across the United States major differences exist in the ways that decisions about pretrial release or detention are made and in the outcomes of those decisions. The differences can be seen in the widely varying proportion of defendants who are released pending adjudication, in the range of different types of release mechanisms used, and in the varying effectiveness with which jurisdictions are able to achieve the key goals of pretrial decision-making. For example, the most recent available national data – drawn from records of cases involving defendants arrested on felony charges in 40 large urban counties in May 2006 and published by the federal Bureau of Justice Statistics (BJS) – shows that:

- The proportion of felony defendants released prior to trial varies from as low as 37 percent (Harris County, TX) to as high as 83 percent (Kings County, NY).
- The proportion released on non-financial conditions varies between zero (Harris County, TX) and 68 percent (Bronx County, NY)
- The proportion of released defendants who failed to return to court and remained fugitives after a year ranged from one percent (nine counties) to 14 percent (Middlesex County, NJ)
- The proportion of released defendants who were re-arrested on either misdemeanors or felony charges ranged between less than seven percent (five counties) to a high of 37 percent (Dallas, TX).<sup>7</sup>

The BJS data include only cases involving defendants charged with felonies, and no available national data exist on release rates, failure to appear (FTA) rates, or re-arrest rates for misdemeanor defendants. However, a few facts stand out from other available data

- Large numbers of people are affected by pretrial release or detention practices. As U.S. Attorney General Eric Holder noted in his remarks at the National Symposium on Pretrial Justice, during the course of a year approximately 10 million individuals will have been involved in nearly 13 million jail admissions.<sup>8</sup>

<sup>7</sup> See Thomas H. Cohen and Tracey Kyckelhahn, *Felony Defendants in Large Urban Courts, 2006* (Washington, D.C.: Bureau of Justice Statistics, May 2010, Revised July 2010) (tables 19 and 20 at pages 37-38 show release percentages, failure to appear (FTA) rates, and re-arrest rates for the 40 counties in the BJS study).

<sup>8</sup> See Remarks from the Honorable Eric H. Holder, Jr., in *National Symposium on Pretrial Justice: Summary Report of Proceedings*, supra note 1 at 30-31.

- On a single day in June 2011, there were about 735,000 persons in county and city jails in the U.S.<sup>9</sup> The number of jail inmates has more than doubled in a little over two decades, from about 343,000 in mid-1988 to more than 785,000 in mid-2008. Since 2008, there has been a slight decline to about 735,000 in June 2011.<sup>10</sup>
- About 60 percent of all of the inmates in American jails are defendants awaiting trial or other resolution of the charges against them.<sup>11</sup> A 2002 study of un-convicted inmates showed that a little less than 35 percent had been charged with violent offenses. The others were charged with property offenses (22%), drug offenses (23%) and public order offenses (20%).<sup>12</sup>
- A significant percentage of pretrial detainees has been in jail before, some of them many times.<sup>13</sup>
- Most of the pretrial defendants are poor. In many jurisdictions, they remain in custody because they cannot afford to post the financial bail set by a court.<sup>14</sup>

<sup>9</sup> Todd D. Minton, *Jail Inmates at Midyear 2011 – Statistical Tables 1* (Bureau of Justice Statistics, Apr. 2011).

<sup>10</sup> *Ibid.* Data on jail populations going back to at least 1983 can be found in other publications in the BJS *Prison and Jail Inmates at Midyear Series*. For BJS data on jail populations between 1983 and 1994, see Craig A. Perkins, James J. Stephen, and Allen J. Beck, Bureau of Justice Statistics, *Jails and Jail Inmates at Midyear 1993-94* (Table 1 at 2).

<sup>11</sup> See Minton, *Jail Inmates at Midyear 2011 – Statistical Tables*, *supra* note 5 (Table 12).

<sup>12</sup> Doris J. James, *Profile of Jail Inmates*, 2002 at 3 (Bureau of Justice Statistics Special Report, July 2004) (Table 3).

<sup>13</sup> See Cherise Fanno Burdeen, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* 4 (Washington, D.C.: National Association of Counties, Sept. 2009). This guide notes that a 2007 study of the jail in Athens-Clarke County, Georgia, showed that most of the male inmates were on at least their tenth stay in jail and that one was on his 112th jail stay. The guide emphasizes that a majority of counties are spending significant jail resources on a small number of individuals who are repeatedly arrested.

<sup>14</sup> The effect of requiring financial bail on producing unnecessary pretrial incarceration of poor people was a central theme of speakers at the 2011 National Symposium on Pretrial Justice and has been a continuing criticism of the money bail system for close to a century. See the *Summary Report of Proceedings*, *supra* note 1; also Roscoe Pound and Felix Frankfurter, eds., *Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio* 290-292 (Cleveland: The Cleveland Foundation, 1922; reprinted, Montclair, NJ: Patterson Smith, 1968); Arthur L. Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U.P.A. LAW REV. 693 (1954); Daniel J. Freed and Patricia Wald, *Bail in the United States: 1964* (Washington, D.C.: U.S. Department of Justice and The Vera Foundation, Inc., 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (New York: John Wiley and Sons, 1968); Paul Wice, *Freedom for Sale: A National Study of Pretrial Release* (Lexington, MA: D.C. Heath and Co., 1974); John S. Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger, 1979); Spike Bradford, *For Better or for Profit: How the Bail Bonding Industry Stands in the Way of Effective Pretrial Justice* (Washington, D.C.: Justice Policy Institute, 2012).

The legal framework for addressing pretrial justice issues varies from state to state. Some states have statutes that provide presumptions in favor of release on recognizance or on unsecured bond unless a judicial officer determines that the defendant presents a risk that that calls for more restrictive conditions of release or for detention.<sup>15</sup> In other states, court rule has established such a presumption.<sup>16</sup> In many states, however, the legal framework is murky, and judges get little guidance from statutes or court rules. There is, however, an important United States Supreme Court opinion that is directly relevant to policy development at the local level. In *United States v. Salerno*, 481 U.S. 739 (1987), the Court upheld a federal law permitting pretrial detention of an arrested person in certain limited categories of serious criminal offenses, after a hearing at which the prosecutor is required to show significant risk of flight or danger to the community by clear and convincing evidence. In his opinion for the seven-justice majority, then Chief Justice Rehnquist observed that “in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>17</sup>

Pretrial justice practices have been receiving increasing attention from influential national groups. Perhaps most notably, in January 2013, the U.S. Conference of Chief Justices (CCJ) addressed these issues in a resolution that formally endorsed a policy paper developed by the Conference of State Court Administrators (COSCA) on evidence-based pretrial release. The resolution explicitly calls on court leaders to:

promote, collaborate, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crime.<sup>18</sup>

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<sup>15</sup> See, e.g., ALASKA STAT. § 12.30.020; DELAWARE CODE ANN. TITLE 11 § 2105; IOWA CODE § 811.2; KENTUCKY REV. STAT. 431.520; MASSACHUSETTS GEN. LAWS ANN. CH. 276 § 58A; MAINE REV. STAT. TITLE 15 § 1026 (2-A); NORTH CAROLINA GEN. STAT. CH. 15A §§ 534 (A) AND (B); SOUTH CAROLINA CODE ANN. § 17-15-10; SOUTH DAKOTA LAWS § 23A-43-2; WISCONSIN STAT. 961.01.

<sup>16</sup> See, e.g., MINNESOTA R. CRIMINAL P. 6.10; N.D. R. CRIMINAL P. 46(A); WASHINGTON CRIMINAL R. 3.2; WYOMING R. CRIMINAL P. 8(c)(1).

<sup>17</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987). Notably, as highlighted in the COSCA policy paper, at least two state supreme courts have explicitly rejected the practice of using non-discretionary bail amounts based solely on the charge. See *COSCA Policy Paper on Evidence-Based Pretrial Release 3* (*supra*, note 5); *Pelekai v. White*, 861 P.2d 1205 (Hawaii 1993); *Clark v. Hall*, 53 P.3d 416 (Okla. 2002).

<sup>18</sup> Resolution # 3 approved by the Conference of Chief Justices (CCJ) at the CCJ 2013 Midyear Meeting, Jan. 30, 2013.



The COSCA policy paper endorsed by the Chief Justices includes a review of the history of bail and the issues related to the use of financial conditions of release, discussion of the consequences of the existing bail system in terms of financial costs and unequal justice, and the advantages of making release or detention decisions on the basis of empirically-based assessments of a defendant's risk of flight and threat to public safety and the safety of crime victims.<sup>19</sup> At least one CCJ member – Chief Judge Jonathan Lippman of New York – has already acted on the CCJ resolution, calling for major bail reform in his 2013 State of the Judiciary Address.<sup>20</sup>

Change is in the wind. The endorsement of evidence-based pretrial release practices by the Conference of Chief Justices is an important step toward improving pretrial release practices, and is consistent with policy positions taken by other major national organizations and associations of justice system practitioners. In addition to the Conference of Chief Justices and the Conference of State Court Administrators, a number national organizations and associations of key stakeholder groups have strongly endorsed moving from the traditional money bail system to a risk-based system for making decisions about detention or release and for setting pretrial release conditions. These include the American Bar Association, the National Association of Counties, the American Jail Association, the International Association of Chiefs of Police, the American Council of Chief Defenders, the Association of Prosecuting Attorneys, and the American Probation and Parole Association.<sup>21</sup>

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<sup>19</sup> Conference of State Court Administrators (COSCA), *2012-2013 Policy Paper: Evidence-Based Pretrial Release*, *supra*, note 5. The COSCA policy paper explicitly rejects the use of bail schedules, noting that the use of such schedules contradicts the policy goal of setting release conditions that reflect an assessment of the individual defendant's risk of failure to appear and threat to public safety. *Id.* at 3. Notably, as highlighted in the COSCA policy paper, at least two state supreme courts have explicitly rejected the practice of using non-discretionary bail amounts based solely on the charge. See *Pelekai v. White*, 861 P.2d 1205 (Hawaii 1993); *Clark v. Hall*, 53 P.3d 416 (Okla. 2002).

<sup>20</sup> Jonathan Lippman, *The State of the Judiciary 2013: "Let Justice be Done"* (Albany, NY: Feb. 5, 2013)

<sup>21</sup> See the COSCA policy paper on *Evidence-Based Pretrial Release* 10, *supra*, note 5 and accompanying end notes citing relevant resolutions and publications of these major associations.

## V. Authors' Observations and Conclusions

Despite a long history of informed criticism of the money bail system as unfair, discriminatory against the poor, a primary cause of unnecessary over-incarceration of individuals who do not pose significant risks of nonappearance or public safety, and costly to taxpayers, the system has endured for many decades in most places in the U.S. The obstacles identified by the judges who participated in the September 2012 NJC focus group discussion (see Part II above) pinpoint many of the reasons for the persistence of the system and can be viewed as targets for constructive change.

The ideas that emerged during the focus group discussion with judges who are pursuing justice improvement initiatives in their states should be encouraging for the prospects of achieving significant improvement in pretrial justice. During that discussion, judges from the 10th Judicial Circuit of Florida and the 19th Judicial District of Colorado spoke about stakeholder groups in their jurisdictions that had recently gotten together to review existing practices and consider possible changes. The stakeholder groups have developed systems that provide ways for judges in these jurisdictions to obtain essential information and utilize existing resources for supervision in the community, enabling release of more individuals than before. Generally, local government officials are receptive to ideas for system improvements that will result in lower costs for running the jail. They are also likely to very receptive to proposals that will avoid the need for construction of additional jail space.<sup>22</sup>

The judges' identification of obstacles to effective pretrial decision-making and their suggestions for ways to improve existing practices (Parts II and III above) provide the basis for developing a practical agenda for specific steps to implement needed change. We believe that once attention has been drawn to the issues, many judges at the trial court level are very interested in, and receptive to, improving pretrial decision-making practices. Of particular relevance, the judges at the focus group session were especially interested in learning about the practices in the District of Columbia, Kentucky, and the two local jurisdictions (in Florida and Colorado) where judges had taken leading roles in developing county-based pretrial services programs that make use of risk assessment instruments and resources for community supervision of released defendants.

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<sup>22</sup> See, e.g., National Association of Counties, *Jail Population Management: Elected Officials' Guide to Pretrial Services*, supra note 13.

For purposes of engaging judges in leading and supporting the use of evidence-based practices that focus release/detention decision-making on the risks posed by an arrested person, three key areas of attention seem especially important:

1. **The existence and effective operation of other practices for making pretrial release or detention decisions.** Judges want to learn about decision-making practices that have worked elsewhere – why they were adopted, how they work operationally, whether the outcomes (in terms of factors such as pretrial crime and failure to appear [FTA] rates) are better than under traditional approaches, and how practitioners like them. At the focus group discussions, the judges expressed strong interest in the examples of alternative approaches that were briefly outlined by judges from the District of Columbia and Kentucky, and (at the local level) Florida and Colorado.
2. **Strategies for initiating and achieving system change.** Recognizing that jurisdictions differ widely on many dimensions, judges are nonetheless interested in what approaches to system change have actually worked. Who supported the change, and why? What were the obstacles? How were the obstacles overcome and the change put in place? What problems can be anticipated as implementation moves forward? What roles did judges play in initiating and implementing the change?
3. **Relative advantage—why will a new approach be better for the jurisdiction?** Efforts aimed at improving judges’ practices in pretrial decision-making should focus on why the needed change will enable the judge to function more effectively as a judge, as well as on why the changes will better serve the jurisdiction’s justice system and the larger community. This approach suggests an emphasis on four key outcomes to be expected from changing to an evidence-based system that addresses identified risks:
  - ***Effective judicial decision-making.*** When a judge has accurate and relevant information about risk factors and supervisory options, the judge is able to make a better and more informed decision about detention or conditions of release.
  - ***Fairness.*** Equal justice under law is a core value in the American legal system. Perpetuation of the existing money bail system undermines that value and results in discrimination against the poor.
  - ***Public safety.*** By providing the judge with sound risk assessment information at the time of the release or detention decision plus resources for community supervision when needed, an improved system will increase the likelihood of a decision that will protect the safety of victims, witnesses, and the community.

- **Cost effectiveness.** With risk assessment information provided to the judge on a timely basis and with supervisory options available in the community, substantial taxpayer costs can be saved by reducing unnecessary pretrial detention. Operating a jail is expensive, and community supervision is appreciably less expensive. It will be important to demonstrate actual savings likely to be achieved through system change.

Reviewing the ideas generated at the judges' focus group discussion in light of what we know about the picture of pretrial justice nationally, it seems to the authors of this essay that the time is ripe for courts and court systems to begin transitioning from a traditional money bail system to a modern evidence-based system. A modern system would enable judges to use evidence-based risk assessment instruments as the foundation for release or detention decision-making, bring greater fairness to the process, reduce unnecessary confinement in jails, save taxpayer dollars, and enhance public safety. Good working models of such systems exist, and we anticipate that more will emerge in the near future.

Recognizing that different paths will be taken in different states and localities, below are 10 suggestions for approaches and next steps that courts and judges can take:

1. **Avoid a one-size-fits-all approach.** No easy generalizations about pretrial decision-making practices exist across the United States or about feasible reform strategies that will be broadly applicable. The diversity of the jurisdictions represented at the focus group discussions reinforces the sense that it will be important to tailor pretrial justice improvement efforts to the circumstances and needs of individual local jurisdictions. The focus group included a few judges from jurisdictions that have very progressive modern pretrial decision-making practices, and many from jurisdictions where bail practices continue to use the traditional money bail system. The capacity to obtain essential information about defendants and to utilize a range of supervisory options varies widely across jurisdictions, and practical approaches will necessarily take a variety of forms.<sup>23</sup> That said, however, it nevertheless seems feasible to move toward use of evidence-based practices that focus pretrial decision-making on identified risks that may be posed by arrested persons.

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<sup>23</sup> Because of sparse populations, long distances, and low case volume, developing effective pretrial programs in rural areas poses special challenges, but the challenges have been met successfully in some rural jurisdictions. For discussion of ways to develop or enhance an evidence-based approach to pretrial decision-making in rural areas, see Stephanie J. Vetter and John Clark, *The Delivery of Pretrial Justice in Rural Areas: A Guide for Rural County Officials* (Washington, D.C.: National Association of Counties, 2012).

2. **Support continued refinement of risk screening and assessment instruments that enable risk-focused decision-making.** Predicting the risk of future behavior is an enterprise fraught with problems, but much has been done to develop risk screening and assessment instruments that can help judicial officers make sound decisions.<sup>24</sup> These instruments provide a far better basis for making decisions about pretrial custody than simply using a bail schedule or setting a bond amount that makes release dependent upon an individual's financial resources and a bond agency's willingness to post the bail. However, there is surely room for further improvement in developing more effective tools for gauging risk and for identifying the nature and severity of the risks. As hypothesized by one leading researcher, judges considering release or detention issues may be less concerned with failure to appear and re-arrest for a minor offense than with a person's risk of dangerousness.<sup>25</sup> It seems desirable to support work on refining the risk screening and assessment instruments already in existence, to make them even more useful in providing judicial officers with reliable information about specific types of risks. Having such information will enable judges to tailor release or detention decisions (and orders regarding conditions of release) to the specific nature and severity of the risks posed by individuals who have been arrested.
  
3. **Support development of improved capability for risk management, including appropriate community-based resources for monitoring, supervision and treatment.** Having information derived from good risk screening and assessment instruments takes judges only part way toward effective pretrial decision-making. It is also important for judicial officers to have a range of viable options that can provide a basis for managing risks that are identified. In recent years, there has been considerable progress in the development of community-based resources that can be used to provide monitoring, supervision, and – when appropriate – attention to an individual's substance abuse and/or mental health problems that contribute to the risk of pretrial misbehavior. Judges need to know about the availability of such resources and ways in which they can be utilized. They can be effective leaders in identifying the need for specific types of community-based resources and catalyzing support for their development.

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<sup>24</sup> See, e.g., the publications discussing risk assessment techniques cited in note 6, *supra*.

<sup>25</sup> Mamalian, *State of the Science of Risk Assessment* 33 n. 88, *supra* note 6.

4. **Ensure that counsel for the prosecution and defense are present and prepared in court when the court adjudicates release or detention issues.** Judges who participated in the focus group discussion noted the value of having counsel present at the initial stages of any criminal case. Optimally, counsel for both the prosecution and the defense will have essential information – including information about current charge (at a minimum the police report) and the defendant’s prior criminal record, family and housing situation, employment status, physical and mental condition (including indications of abuse of drugs or alcohol), and prior record of compliance with conditions of release – before a first appearance proceeding. Defense counsel should have an opportunity to review the police report and any information about the arrested person prepared by a pretrial services program. Counsel should also have adequate opportunity to consult with the arrested person prior to the proceeding. The prosecutor should know the basic facts of the prosecution case – i.e., the facts that provided grounds for the arrest – and should also be familiar with information in a pretrial services report. Because of the generally short time period between an arrest and the arrested person’s first court appearance, it is sometime not feasible to have all of the relevant information gathered in time for the first appearance proceeding. If not, and if there is doubt as to whether the individual should be released, a *short* continuance of the proceeding – generally not more than a day – may be needed to enable the information to be gathered, the risks of release assessed, and a decision made with input from counsel.<sup>26</sup> In our opinion, the informational reports provided to judicial officers by established pretrial services programs, though generally characterized as “risk assessments” are generally more in the nature of “risk screening” reports. They provide very useful information relevant to gauging risk and can provide a basis for rapid and well-grounded custody or release decisions to be made in a high proportion of cases. However, there will almost certainly be some cases in which more in-depth assessment is desirable.

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<sup>26</sup> See, e.g., Mamalian, *State of the Science of Risk Assessment* 31, *supra* note 6. Mamalian suggests experimenting with a “differentiated case management” approach in which a court would first identify low risk defendants who could be released quickly without bail. Then, additional time could be spent on more in-depth assessment of the risks posed by higher risk defendants and determination of what supervision options would be most useful to address identified risks.

5. **Conduct judicial education programs that support judicial leaders in moving toward improved practices.** As noted above in the discussion of the focus group’s identification of obstacles to system improvement, effective pretrial decision-making has not been a priority area for judicial education. To implement real change, it will be important for judges to become well educated about pretrial justice principles and best practices. Some of the education can be done on a national basis at The National Judicial College using in-person programs, and some can be done through online programs. However, it will also be important to work at the state level with state judicial educators and others involved in planning judicial conferences and specialized training programs for judges. For example, curricula now being developed by the Pretrial Justice Institute and the National Judicial College can be used for in-state, regional, or national programs of varying length. The curriculum can be adapted for presentation – optimally by a mix of experts and sitting judges who have succeeded in achieving significant reforms – in one-hour to one-day segments at state judicial conferences. Such short programs could focus on key points about the current situation and viable approaches to implementing improved practices, with examples from peer jurisdictions.
6. **Develop and broadly disseminate a “how-to” guide.** To supplement and support judicial education programs, it will be helpful to have a range of written and visual resources that can help judges and other system leaders initiate and implement changes. For example, it would be useful to have a practitioner-oriented resource guide—similar to the “Ten Key Components” publication that was instrumental in fostering the development and implementation of many drug courts in the 1990s.<sup>27</sup> Such a guide could address key elements of an effective pretrial justice system; why change is needed; and how the changes can be accomplished in order to improve judicial decision-making, minimize unnecessary detention, save taxpayer dollars, and increase the fairness with which the system functions.<sup>28</sup>

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<sup>27</sup> National Association of Drug Court Professionals, Drug Court Standards Committee, *Defining Drug Courts: The Key Components* (Washington, D.C.: Office of Justice Programs Drug Courts Program Office, Jan. 1997).

<sup>28</sup> For a useful detailed guide to starting a pretrial services program, see Pretrial Justice Institute, *Pretrial Services Program Implementation: A Starter Kit* (Washington, D.C.: Pretrial Justice Institute, undated; probably 2010).

7. **Use learning sites and videos to demonstrate effective practices.** Four of the jurisdictions represented at the focus group – the District of Columbia, Kentucky, and the Florida and Colorado jurisdictions discussed in the preceding paragraph – are all potential “learning sites” for judges and other justice system stakeholders who are interested in improving current practices. It seems desirable to develop detailed descriptions of how these and other similar jurisdictions function, how well judges and other practitioners like the practices, and how the improved practices were developed and implemented. If possible, it would be desirable to find ways for judges and other practitioners to get a first-hand look at these systems in operation and opportunity to discuss the approaches with practitioners in these learning sites. Videos of practitioners and practices in these jurisdictions can also be valuable both as stand-alone educational tools and as supplements to in-person and online educational programs. A learning site could also (or additionally) conduct a series of webcasts as a way to foster peer-to-peer learning for judges and other practitioners interested in improving pretrial release or detention decision-making.
8. **Develop resources for information and technical assistance.** Judges and others at the focus group session were clearly interested in having a “go-to” place where they could get questions answered, obtain information, and perhaps get short-term assistance in assessing their local systems and developing improved practices. The Pretrial Justice Institute (PJI) has developed an extensive base of web-accessible publications and other resource materials that can be very useful in assessing current practices and implementing changes.
9. **Exercise judicial leadership.** To initiate and achieve meaningful change in existing practices will require judicial leadership – optimally at all levels of the judiciary. The Conference of Chief Justices’ resolution endorsing evidence-based pretrial release is an important exercise of state-level judicial leadership. Chief Judge Lippman’s call for change in New York laws and practices exemplifies one form of state-level judicial leadership in this area. Leadership at the trial court level, where decisions about release or detention are made every day, in a wide range of different environments, will be equally important. The judges who participated in the NJC’s focus group session are all local-level trial court judges. They recognized the leadership opportunities that judges can exercise in improving the justice systems in their localities and in their states. Of particular relevance, they acknowledged that trial court judges – especially chief judges or their designees – can, as knowledgeable and respected neutrals, convene stakeholders and can lead or help catalyze significant justice system improvements at the local level. As work goes forward in improving pretrial justice, judges should have key leadership and supporting roles.



10. **Anticipate resistance to change and develop a strong coalition in support of needed reforms.** The broader the coalition that can be assembled in support of modernizing pretrial justice decision-making, the better. There will almost surely be “incidents” involving persons released from custody – sometimes cases in which a released defendant is charged with serious criminal conduct – that will occur in some jurisdictions and will raise concern about the appropriateness of any program. Therefore, it is important to develop broad support for the program and to acknowledge its limitations. Judges, program leaders, and other stakeholders need to be aware of what the assessments performed actually tell a decision maker about the risks of release and about ways to address the risks. This is why the multidisciplinary approach to education discussed on page 8 is so important. Additionally, the political influence of bail bond agencies and insurance companies needs to be taken into account in undertaking improvement initiatives. These entities have been active in many states in opposing the implementation of pretrial services programs that can provide the information and supervisory options that many judges would like to have to make informed decisions. The entities can adversely impact the future careers of judges in systems where judges are subject to retention or contested elections. The prospect of opposition from these interest groups suggests the importance of developing strong broad-based coalitions to support the development of alternatives to the money bail system.

The NJC focus group was effective in identifying key obstacles to improving pretrial justice and in suggesting practical ways to undertake improvements at the local level. Having the support of state chief justices should be valuable for trial court judges who are prepared to initiate reform efforts at the local level. We are optimistic that trial court judges throughout the country will build on the foundation that has been developed, to work – optimally in collaboration with other stakeholders and with the support of their state chief justices – to implement changes in practices that will incorporate the core principles that are at the root of true pretrial justice.



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